F. Grove City

TALKING POINTS

Re: Grove City Legislation

Grove City case

- The Administration won a significant case in the Supreme Court this Term, Grove City College v. Bell, involving Title IX of the Education Amendment Act. (Title IX prohibits sex discrimination in federally funded educational programs.) The Court held that:
  - Pell Grant student aid program was expressly intended by Congress to be considered federal assistance to institutions attended by student grantees;
  - Title IX is programmatic in its coverage (i.e., its language limits civil rights coverage to the specific program or activity receiving federal assistance -- in Grove City, the financial aid program of the school).

Proposed Legislation

- Following the Grove City decision, bills were introduced in Congress for the stated purpose of overturning Grove City by applying Title IX institutionwide if any educational program at the institution received federal funding (Schneider/Packwood bills H.R. 5011/S. 2363).
- The Leadership Conference and other Civil Rights Groups saw the opportunity to use Grove City as a vehicle for a substantial rewrite of existing civil rights laws.
- They therefore drafted a substitute bill which has been introduced in the House as H.R. 5490 (128 cosponsors) and in the Senate as S. 2568 (61 cosponsors).

H.R. 5490/S. 2568

- These bills are being described as nothing more than a modest amendment "that is intended to break no new ground" (S. Dole) but simply to "return" the law to where it was before Grove City.
- In point of fact the bills represent a radical departure from existing civil rights enforcement under the Federal funding statutes.
- Coverage is neither programmatic nor institutionwide, but applies to:
  - All programs or activities of all entities (public and private) and their divisions, subdivisions, units, subunits, assignees or transferees, if the entity

or any component thereof is extended federal financial assistance ("directly or through another entity or a person") or "receives support from" federal aid so extended.

- The reach of the proposed legislation is dramatic, and represents the most expansive intrusion of the Federal Government into State and local government activities at every level, and into the private sector, that has ever been suggested in civil rights legislation.

- If enacted, the bills would necessarily impose substantial new regulatory and paperwork requirements throughout the government and thus effectively undo the significant strides that have been made in the last three-and-a-half years in reducing the senseless bureaucratic entanglements that those receiving federal grants and assistance have been forced to endure.

- Moreover, the added costs required to enforce this sort of open-ended legislation could be staggering, since it removes all existing boundaries of agency jurisdiction to conduct compliance reviews and complaint investigations (i.e., all funding agencies would have a statutory responsibility to regulate all of the programs, activities, units and subunits of entities to which they provide any assistance)

- Also troublesome is the new "defunding" provision in the proposed legislation which appears designed to allow for funds to be terminated, for example, to a program not engaged in any discriminatory conduct (i.e., a municipal school system) if another of the City's nonfunded programs (i.e., police department) is involved in discriminatory practices. So long as it can be maintained that the funding to the City (wherever it goes) in some manner "supports noncompliance," the federal financial assistance can appropriately be terminated under the bills.

Comment

- The Department of Justice believes that such legislation runs counter to the most basic principles of Federalism, undercutting everything that this Administration represents and has fought for in terms of reducing Federal intrusiveness and returning to State and local governments the authority and responsibility to deal on their own with matters having no legitimate federal interest (or, in this case, not even a remote nexus to a legitimate federal interest.)

° If such legislation is ever to be enacted, Congress should responsibly consider all the ramifications inherent in such a marked departure from existing law enforcement -- and should do so with a full understanding of, and appreciation for, the complexities involved, rather than suffering under the misapprehension that the proposed legislation "breaks no new ground" and simply involves a modest amendment to existing law serving only an isolated and discrete purpose.

CONSTITUTIONAL IMPACT STATEMENT

Constitutional Analyses of Legislation Pending Before the House and Senate Judiciary Committees.

The Civil Rights Act of 1984

S. 2568/H.R. 5490

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June 1, 1984

THE CIVIL RIGHTS ACT OF 1984

S. 2568/H.R. 5490

The Civil Rights Act of 1984, aptly described by Senator Robert Packwood (R.-Ore.) as "a simple bill with global ramifications,"[1] has been proposed as a corrective for one aspect of the Supreme Court decision in Grove City College v. Bell.[2] This statement will analyze briefly some implications of the proposed act with respect to federalism and other aspects of the constitutional system.

The Grove City Decision

Title IX of the Education Amendments of 1972[3] bars sex discrimination in "any education program or activity receiving Federal financial assistance." Grove City College, a private institution, has always refused federal and state financial assistance. Its students receive federal Basic

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1. Cong. Rec., April 12, 1984, S4589.

2. 104 S. Ct. 1211 (1984).

3. 20 U.S.C. Sec. 1681(a).

Educational Opportunity Grants (BEOGs), which go directly to the students to pay tuition and other educational expenses. The Department of Education ruled that Grove City College itself was a "recipient" of "Federal financial assistance" and demanded that the College execute an Assurance of Compliance with Title IX's nondiscrimination provisions. The College denied that it was made a "recipient" by the fact that some of its students received BEOGs, and refused to sign the Assurance of Compliance.

The Supreme Court ruled, first, that the College was a "recipient" of "Federal financial assistance," despite the fact that "federal funds are granted to Grove City's students rather than directly to one of the College's educational programs."[4] The Court went on to decide, however, that the "education program or activity" of the College that was "receiving" federal assistance and that therefore was subject to Title IX, was not the College as a whole but only its financial-aid program.[5]

In holding that Title IX has only program-specific application, the Supreme Court rejected the contention that receipt of federal aid by any component of the college would bind every aspect of the college's activity by the Title IX prohibitions against sex discrimination. Instead, the re-

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4. 104 S. Ct. at 1220.

5. 104 S. Ct. at 1222.

ceipt of BEOGs by its students requires the college to comply with Title IX only in the operation of its financial aid office; the rest of the college's activities are not bound by Title IX. The correctness of this interpretation is a matter of dispute.[6]

Impact of Grove City on Age, Handicap and Race Discrimination

The key phrase, "program or activity," used in Title IX, is used also in the three main statutes banning discrimination on account of age, handicap, or race in federally aided programs.[7] Title IX, Section 504 and the Age Discrimination Act were all modeled in this respect on Title VI of the Civil Rights Act of 1964. The Grove City decision therefore raises the likelihood that the same kind of "program-specific" interpretation will be given to those other statutes as well as to Title IX. The judicial precedents

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6. Compare the testimony of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, before the House Committee on Education and Labor, May 22, 1984, with the Statement of Senator Edward M. Kennedy (D.-Mass.), Cong. Rec. April 12, 1984, S4585.

7. Those statutes are the Age Discrimination Act of 1975 (42 U.S.C. Sec. 6101, et seq.); Section 504 of the Rehabilitation Act of 1973, as amended in 1978 (29 U.S.C., Sec. 794 et seq.); and Title VI of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000 d et seq.).

appear to confirm this prospect[8]. It is important to remember, moreover, "that Title IX's coverage, even in broad form, applies only to educational entities or settings. Title VI, Section 504 and the Age Discrimination Act cover all federally-assisted entities and programs."[9] A program-specific interpretation of those statutes, therefore, would have an impact far beyond the area of education. Senator Kennedy expressed his concern that, after the Grove City decision, "the protection from discrimination provided by the government to the elderly, minorities and the disabled in all kinds of federally assisted activities is likely to be as spotty and inadequate as that offered to women and girls in education."[10]

The Intent of the Sponsors of the Civil Rights Act of 1984

S. 2568 and its companion, H.R. 5490, were introduced, in Senator Kennedy's words, "to restore Title IX, Title VI, Section 504, and the ADA to their intended force and cover-

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8. See, for example, Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1980); see also Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984).

9. Testimony of Clarence M. Pendleton, Jr., Chairman of U.S. Commission on Civil Rights before House Committees on Judiciary and Education and Labor, May 16, 1984, p. 4.

10. Cong. Rec., April 12, 1984, S4586.

age."[11] "What difference does it make to a disabled student," asked Senator Robert Dole (R.-Kans.) in co-sponsoring S. 2685, "if the student financial aid office is in compliance with Section 504, if none of the school's academic programs are accessible?"[12] The bill makes three changes in all four laws:

> 1. The "general prohibition language in each statute is modified to delete 'program or activity' and generally to substitute the term 'recipient.' Thus, each of the four laws would prohibit discrimination 'by a recipient of' - rather than 'under a program or activity receiving' - 'Federal financial assistance.' In Title IX, the limitation to education is retained; that is, the prohibition would run against an 'education recipient' in place of an 'education program or activity.'"[13]
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> 2. A definition of the term "recipient" is added to each of the four statutes, as will be discussed below.
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> 3. The enforcement section of each of the laws is modified so as to enlarge the power of the agencies to terminate funding, as will be discussed below.

Senator Packwood summarized the changes as follows: "That any receipt of Federal financial assistance will trigger institutionwide coverage. Lest any critic question our remedial approach, however, the bill will also clarify that

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11. Cong. Rec. April 12, 1984, S4586.

12. Cong. Rec. April 12, 1984, S4590.

13. Statement by Senator Alan Cranston, Cong. Rec., April 12, 1984, S4594.

only the particular assistance supporting noncompliance will be subject to termination."[14] Senator Robert Dole (R.-Kans.), in co-sponsoring S. 2568, stressed that the bill was intended as a limited remedial measure: "I believe it should be emphasized that the sole purpose of this legislation is to restore Title IX to the broad coverage which marked its enforcement prior to Grove City, and to keep the other three civil rights laws intact. It is not the intent of the sponsors to break new ground."[15]

There is reason to believe, however, that the limited expectations of the sponsors of S. 2568 are unrealistic. This analysis will examine the likely effects of the bill in two general respects: its use of the expansive term "recipient" and its increase of the enforcement power of the agencies.

The Meaning and Effect of "Recipient"

The four statutes amended by S. 2568 now cover "any program or activity receiving federal financial assistance." [References herein will be to S. 2568 rather than to its companion, H.R. 5490] S. 2568 would amend those statutes to cover any "recipient" ("education recipient" in Title IX) of

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14. Cong. Rec., April 12, 1984, S4589.

15. Cong. Rec., April 12, 1984, S4590.

such assistance. In all four statutes, incidentally, "tax exemptions and deductions would continue to be excluded from the definition of Federal financial assistance."[16] The term "recipient" is defined in S. 2568 as follows:

> "(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and
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> "(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,
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> 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."[17]

Assistant Attorney General Reynolds maintains, contrary to the claim of the sponsors of S. 2568, that the definition of "recipient" in S. 2568 exceeds the definition of that term in the existing regulations under Title VI, Title IX and Section 504, in that "a recipient, as used in the existing regulatory scheme, is subject to coverage only as to its funded programs or activities; by contrast, under

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16. Statement of Senator Robert Dole (R.-Kans.), Cong. Rec., April 12, 1984, S4590.

17. Sec. 2(b)(2).

[S. 2568], a recipient is to be covered in its entirety."[18] In any event, it is clear that, under S. 2568, "when an entity receives federal aid for one of its parts or subdivisions, the entity - and not the specific subunit of the entity - is the recipient."[19] Senator Cranston made this plain in his explanation of S. 2568:

> Where the Federal financial assistance is provided to an entity itself, either directly from a Federal agency or through a third party, the whole entity and all of its component parts would be covered by the anti-discrimination ban and suit could be brought against the entity to enjoin discrimination in any of its components and to recover damages for injuries suffered by reason of discrimination in any component.[20]

If federal aid is extended, not to the entity as a whole but directly to one of its subunits, the entity as a whole (and consequently all other subunits) will be covered if the entity itself "receives support" from the aided subunit. As Senator Cranston explained, "Where Federal financial assistance is extended to a subunit of an entity, the question whether the entity itself and all of the other subunits of the entity would be covered would turn on the question of whether the entity "receives support" from the pro-

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18. Reynolds testimony, supra.

19. Statement of Senator Edward M. Kennedy, Cong. Rec., April 12, 1984, S4586.

20. Cong. Rec., April 12, 1984, S4594.

vision of the assistance to the subunit - for example, by receiving a portion of the assistance to help defray overhead costs. If the entity receives such support, it and all of its subunits are subject to the anti-discrimination ban, just as they would be if the entity itself received assistance directly from a Federal agency or through a third party."[21]

S. 2568 contains no definition of the terms, "receives support," "entity" and "subunit," among other undefined terms. As Senator Alan Cranston (D.-Cal.) explained, "the concept of 'support' is intended to refer to a not immaterial support having monetary value which could include, for example, services."[22]

On the one hand, aid to a State government would bring all the counties, cities, villages, school districts, etc., in that state automatically within the coverage of the age, sex, handicap and race discrimination statutes and regulations. For example, if the state receives a categorical grant for its highway department, then, if the state itself is the "recipient," all activities of the state government, including the prison system and state professional licensing boards, would become subject to the civil rights laws, which incidentally, are administered under regulations

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21. Cong. Rec., April 12, 1984, S4595.

22. Cong. Rec., April 12, 1984, S4595.

using an "effects" test, as will be discussed below. The same conclusion would follow under block grants as well. These results are automatic. On the other hand, if federal aid is given to one of the "subunits" of the State, e.g., a water district or school district, then the State as a whole is covered in all its activities and subdivisions so long as it "receives support from the extension of Federal financial assistance" to that subunit. Similarly, federal aid given to one department or campus of a university could subject every activity of the university to federal regulations regarding age, handicap, sex and race discrimination. If a university engages in non-educational, commercial activities, those activities could be covered by all four acts if aid were given to any part of the university.

As a practical matter, all states already receive federal aid given directly to themselves or through their subdivisions. The likely result of the enactment of S. 2568 therefore would seem to be an immediate extension of federal regulatory power with regard to age, sex, handicap and race discrimination, to virtually all the activities of every state and political subdivision in the land. Similar conclusions would follow in the private sector with respect to aid extended to subsidiaries and affiliates of corporations as well as to the corporations themselves.

Title IX now applies to "any education program or activity receiving Federal assistance." Under S. 2568, Title IX and the regulations adopted to enforce it would apply to

any educational program incidentally conducted by a non-educational institution if that non-educational institution received federal assistance for any purpose even if it received no assistance directed toward its educational program. Senator Kennedy illustrated this by the following example: "A state prison receives federal funding to develop a better inmate classification system, and no other federal assistance. Its education activities and related benefits, such as classes and training programs, are covered by Title IX. The entire prison - including its educational programs - would be covered by Title VI, Section 504, and the ADA, because it is a recipient of federal funding and these statutes are not limited to education."23

This result would apply as well to training and other educational programs conducted by a corporation which receives any federal assistance, including, perhaps, as will be discussed below, its receipt of food stamps from "a person." Furthermore, since S. 2568 defines a "recipient" as a "transferee of any . . . entity . . . to which Federal financial assistance is extended (directly or through another entity or a person)," and since "transferee" is nowhere defined in the bill, one can only speculate as to the ultimate potential reach of S. 2568 coverage.

These conclusions become even more striking in light of the Grove City definition of aid to the person as aid to the

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23. Cong. Rec., April 12, 1984, S4586.

institution. If one student at a single campus of a state university system used a BEOG, the entire university could be covered by all four acts. The apartment building owned elsewhere by that university and rented to the general public could be required to install ramps for the handicapped, etc. The Grove City decision attempted to forestall the further extension of this principle by stating, "Grove City's attempt to analogize BEOGs to food stamps, Social Security benefits, welfare payments, and other forms of general-purpose governmental assistance to low-income families is unavailing. First, there is no evidence that Congress intended the receipt of federal money in this manner to trigger coverage under Title IX . . . ."[24] But S. 2568, if enacted, would manifest precisely that intent. A "recipient" includes any of the listed types of entities "to which Federal financial assistance is extended (directly or through another entity or a person)." Although S. 2568 does not include a "person" as a "recipient," an entity from among the listed types would become a "recipient" if it received federal assistance "through . . . a person." So why would S. 2568 not apply all four acts to the grocer who took food stamps?

Senator Cranston did emphasize that nothing in S. 2568 is intended "to change the consistent interpretation" of the four statutes "excluding from coverage as 'recipients' in-

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24. 104 S. Ct. at 1217-18, n. 13.

dividuals and businesses which may ultimately receive federally provided dollars - such as a clothing store from whom a retiree purchases a suit with a social security check or a landlord whose tenant pays the rent with funds from supplemental security income payments, and others similarly situated - as well as the individual beneficiaries - the social security and SSI recipients themselves - of such programs."[25] While it is true that the individual retiree is not a "recipient" under S. 2568, the plain language of the bill includes the grocery or clothing store to which he negotiates his Social Security check. "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."[26]

S. 2568 is given a further reach by the Supreme Court's 1983 interpretation of Title VI in Guardians Assn. v. Civil

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25. Cong. Rec., April 12, 1984, S4595.

26. Testimony of William Bradford Reynolds, supra; see also Prof. Chester E. Finn, Jr., Civil Rights in Newspeak, Wall St. Journal, May 23, 1984.

Service Commission of the City of New York.[27] The Court held that although discriminatory intent is necessary to show a violation of Title VI itself, nevertheless, proof of "discriminatory effect" will suffice to create liability for a violation of the regulations issued under Title VI rather than of Title VI itself.[28] Under Grove City, regulations outlawing conduct which has an unintended racially discriminatory effect are limited in their impact to the programs or activities that receive federal assistance. Under S. 2568, however, a requirement of affirmative action on racial discrimination could apply to all recipients as expansively defined in that bill.

The Expanded Agency Enforcement Power Under S. 2568

Serious implications are raised by S. 2568's expansion of the enforcement power of administrative agencies. Under S. 2568, in the words of Senator Cranston, "all of the existing procedural safeguards that the four laws provide for before Federal funds may be terminated are retained without change - the government's initial duty to attempt resolution of the violation through conciliation, notice to the recipient of any adverse finding, opportunity for hearing, 30

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27. 103 S. Ct. 3221 (1983).

28. See 103 S. Ct. at 3235, n. 1 (separate opinion of Powell, J., Burger, C. J. and Rehnquist, J.).

days' advance notice to the congressional committees with responsibility for the laws under which the funds were provided, and the right to judicial review of any decision to terminate funding."[29]

According to the existing law, however, the power of the agencies to terminate funding is program-specific, i.e., the termination is limited to funding for the particular program or activity which is found to be in noncompliance.[30] S. 2568, by contrast, would permit the enforcing agency to terminate any "assistance which supports"[31] the noncompliance. In this respect, S. 2568 would open the door to termination of funding to an innocent program if that program "supports" another program that is in noncompliance. And it would seem clear that if a program is in noncompliance, assistance to the parent entity may be cut off on the theory that assistance to the whole provides support to the discrimination by the part.

At this point it will be useful to compare the parameters of S. 2568 with respect to basic coverage, on the one

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29. Cong. Rec., April 12, 1984, S4595.

30. See North Haven Board of Education v. Bell, 456 U.S. 512 (1982); Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir., 1969); Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984); see also testimony of Clarence M. Pendleton, Jr. Chairman, U.S. Commission on Civil Rights, before House Committees on Judiciary and Education and Labor, May 16, 1984.

31. See Sec. 2(c)(2)(C).

hand, and fund termination on the other. Senator Cranston explained his view of this as follows:

> Thus, in place of the "program-specific" coverage improperly imposed by the Supreme Court, coverage of all components of the recipient would be restored.
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> "This broad construction of the entity covered by the nondiscrimination laws would apply to such areas as executing assurances of compliance, investigation of charges, and private rights of action and judicial actions by the United States to obtain injunctive or declaratory relief to bring about compliance.
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> "With respect to the power to terminate funds or refuse to grant funds, the statutory scheme would be different. It would retain the basic concept of "pinpointing"; that is, limiting the termination of funds to those funds which have a specific nexus to the discrimination that is found."[32]

Senator Cranston's distinction is precarious, however, in light of the language of S. 2568 which would appear to make the power of fund termination practically as broad as the extremely broad definition of "recipient." As Senator Cranston himself stated:

> I would note that in our proposal, both the definition of recipient and the pinpointing provision use similar terms with respect to receiving "support" and assistance which "supports". In the former case, an entire organization, institution, or other entity meets the definition of "recipient" if Federal assistance directly to a subunit results in the parent entity also receiving some appreciable "support." In the case of pinpointing, only assistance that "supports" noncompliance may be cutoff. In both situa-

32. Cong. Rec., April 12, 1984, S4595.

> tions, the concept of "support" is intended to refer to a not immaterial support having monetary value which could include, for example, services.[33]

In light of the indefiniteness of "supports," which is not defined in S. 2568, it would seem clear that the "specific nexus to the discrimination" which Senator Cranston says is required for termination of funding, is a less than exacting restraint on the discretion of the agencies with respect to fund termination. This expanded potential for termination of funding is significant despite the fact that termination "has been actually used in only a handful of cases through the history of these laws."[34] The mere prospect of termination is a powerful inducement to compliance with federal agency directives. That inducement will be significantly increased by the grant of authority to the agency to cut off not only the funds of the program or activity that actually discriminates but also the funds of any entity or part thereof that directly or indirectly "supports" the discrimination.

Other aspects of S. 2568 would merit discussion here were it not for the limitations of space. For example, it is not at all unrealistic to describe S. 2568 as a "back door Equal Rights Amendment," in that the virtually univer-

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33. Cong. Rec., April 12, 1984, S4595.

34. Statement of Senator Robert Dole (R.-Kans.), Cong. Rec. April 12, 1984, S4590.

sal character of various types of federal aid to education, combined with the "effects" test which could outlaw even unintentional discrimination, could endow federal agencies with the power to impose upon education recipients, by administrative action, many, if not most, of the requirements that would have been imposed upon them by the Equal Rights Amendment itself.

Another issue is presented by the fact that S. 2568 retains the private right of action which exists under the four statutes and it continues the provision for attorneys' fees in such actions.[35] In view of the expansion of coverage under S. 2568 and the "effects" test which can forbid even unintentional discrimination, the inducement to litigiousness here is apparent. A further problem with S. 2568 arises from the fact that each agency administering the four statutes would have the responsibility to regulate all the activities of entities receiving federal assistance. This raises the prospect of added paper work, interagency conflicts, multiplicity of complaints, duplication of effort and involvement by agencies in areas in which they have neither expertise nor experience. Nor does S. 2568 provide for interagency referrals to alleviate this problem. Another potential problem is created by the exposure of federal administrators to an increased risk of personal liability through their failure to enforce the four statutes affected

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35. See Consolidated Rail Corporation v. Darrone, 104 S. Ct. 1248 (1984).

by S. 2568, especially in light of the expanded definition of recipients and the employment of the "effects" test for discrimination at least in the race area.[36]

The overall effect of S. 2568 on the present enforcement mechanism under the four statutes was generally summarized by Dr. Michael Horowitz, General Counsel of the Office of Management and Budget:

> 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.[37]

Some Constitutional Implications of S. 2568

The foregoing analysis should make it apparent that S. 2568 may be criticized as vague and uncertain, for example,

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36. See National Black Police Assn. v. Velde, 712 F.2d 569 (D.C. Cir., 1983), cert. den., 52 U.S.L.W. 3791 (April 16, 1984).

37. Michael Horowitz, Memorandum, Analysis of S. 2568: The Civil Rights Act of 1984.

in its failure to define important terms such as "receives support," "entity," "submit," "assistance which supports" and others. While it is important that Congress avoid what the Supreme Court has called "the shoals of unconstitutional vagueness,"[38] and while "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds,"[39] it is likely that the lack of precision in S. 2568 could be remedied by the regulations issued to enforce it, which regulations can impose obligations beyond those specifically imposed by the statute itself.[40] The imprecision of S. 2568, therefore, would argue strongly in favor of clarifying amendments before its enactment but it would not justify a prediction that, without such amendments, S. 2568 as implemented would be held unconstitutional for vagueness.

Another constitutional question is raised by the expansion of federal regulatory power that would be effected by S. 2568. Private entities as well as state and local governments would be subject to pervasive regulation with respect to age, handicap, race and sex discrimination, on

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38. Buckley v. Valeo, 424 U.S. 1, 78 (1976).

39. Pennhurst State School v. Halderman, 451 U.S. 1, 24 (1981).

40. See Guardians Assn. v. Civil Service Commission of the City of New York, 103 S. Ct. 3221 (1983).

account of the expansive definition of "recipient" in S. 2568, its expansion of agency enforcement power and the virtual universality of federal aid. These regulatory exposures could be burdensome. However, "Congress may fix the terms on which it shall disburse federal money to the States"[41] and, with respect to private recipients, "[i]t is hardly lack of due process for the Government to regulate that which it subsidizes."[42] While the regulations sanctioned by S. 2568 would be more extensive and more intrusive than those already in place, they would appear to differ more in degree than in kind from those heretofore approved by the courts.[43]

The point of these observations is not to endorse the increase that S. 2568 would effect in federal regulation of the private lives of Americans, but to suggest merely that it is unlikely that the Supreme Court will find S. 2568 unconstitutional on that account. The decision would seem to be for the Congress rather than for the courts.

A more difficult question is posed by the impact of

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41. Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981).

42. Wickard v. Filburn, 317 U.S. 11, 131 (1942).

43. See, for example, Detroit Police Assn. v. Young, 608 F.2d 671 (6th Cir., 1979); United Air Lines, Inc., v. McMann, 434 U.S. 192 (1977); EEOC v. Wyoming, 103 S. Ct. 1054 (1983); Assn. for Retarded Citizens v. Olson, 561 F. Supp. 473 (D, N.D., 1982); La Strange v. Consolidated Rail Corp., 687 F.2d 767 (3rd Cir., 1982).

S. 2568 on state governments themselves. If S. 2568 were enacted in its present form, it would instantly subject virtually every operation of every state and local government in the land to the potential supervision of federal agencies with respect to age, handicap, race and sex discrimination, including unintentionally discriminatory conduct that has discriminatory effects, with the attendant potential for affirmative action requirements. Such a massive preemption of state authority would seem to be contrary to the spirit, if not the letter, of the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Tenth Amendment was long regarded as a mere "truism," reciting the obvious fact that all powers not delegated are reserved.[44] In 1976, surprisingly, the Supreme Court declared an Act of Congress unconstitutional on the basis of Tenth Amendment principles.[45] Usery held unconstitutional the 1974 amendments to the Fair Labor Standards Act, which extended the wage and hour provisions of the Act to virtually all public employees. The Supreme Court declared that to the extent that the act overrode "the State's freedom to structure integral operations in areas of traditional governmental

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44. See U.S. v. Darby, 312 U.S. 100, 124 (1941).

45. National League of Cities v. Usery, 426 U.S. 833 (1976).

functions," such as fire, police, sanitation, public health and parks and recreation, the Act was "not within the authority granted Congress by the commerce clause."[46] The Usery decision, however, has been severely limited by later Supreme Court rulings.[47] In any event, the Court in Usery specifically noted that it was not deciding whether the Tenth Amendment was a limit on Congress' spending power, its power to enforce the Fourteenth Amendment or its war power.[48] And in Bell v. New Jersey,[49] the Court held that the states are bound by regulations attached to a federal grant voluntarily accepted by the states. The Court rejected the claim that the restrictions violated the Tenth Amendment:

> Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty. The

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46. 426 U.S. at 852.

47. See Hodel v. Virginia Surface Mining and Reclamation Assn., 452 U.S. 264 (1981); United Transportation Union v. Long Island Railroad Co., 455 U.S. 678 (1982); Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982).

48. 426 U.S. at 852, n. 17; 426 U.S. at 854, n. 18; see North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532, 536, n. 10 (E.D., N.C., 1977), aff'd mem., 435 U.S. 962 (1978); see generally, Rotunda, Usery in the Wake of Federal Energy Regulatory Commission v. Mississippi, 1 Constitutional Commentary 43 (1984).

49. 103 S. Ct. 2187 (1983).

> State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I.[50]

The potential displacement of State authority and private autonomy by S. 2568 is so extensive as to justify Dr. Michael Horowitz's conclusion that, "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."[51] Nevertheless, there is no sufficient basis to expect that S. 2568, if enacted and implemented by appropriate regulations, would fail to survive a constitutional challenge in court. The decision of the Congress on S. 2568, therefore, is likely to be conclusive.

It should be mentioned here that alternatives are available which would achieve the limited objective of overturning the challenged aspect of the Grove City case without inviting the difficulties involved in S. 2568.[52]

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50. 103 S. Ct. at 2197.

51. Horowitz, Memorandum, supra.

52. See, for example, Senator Packwood's simple proposal (S. 2363) to amend Title IX "by striking out 'education program or activity,' and inserting in lieu thereof "education program, activity or institution.'" More extensive coverage would be provided by Dr. Horowitz' proposal "to amend Title IX to prohibit discrimination based on race, color, national origin, age or handicap as well as sex and to provide that any assistance to an educational institution would result in coverage of all of its education programs." (Horowitz, Memorandum, supra).

If a limited alternative is not substituted for S. 2568, and if that measure is enacted in its present form, it will effect a radical and massive expansion of federal power in the subject areas.

Charles E. Rice
Visiting Scholar
Center for Judicial Studies
June 1, 1984

CONSTITUTIONAL IMPACT STATEMENT

Constitutional Analyses of Legislation Pending Before the House and Senate Judiciary Committees.

The Civil Rights Act of 1984

S. 2568/H.R. 5490

The Center for Judicial Studies
632 Constitution Ave. N.E.
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June 1, 1984

THE CIVIL RIGHTS ACT OF 1984

S. 2568/H.R. 5490

The Civil Rights Act of 1984, aptly described by Senator Robert Packwood (R.-Ore.) as "a simple bill with global ramifications,"[1] has been proposed as a corrective for one aspect of the Supreme Court decision in Grove City College v. Bell.[2] This statement will analyze briefly some implications of the proposed act with respect to federalism and other aspects of the constitutional system.

The Grove City Decision

Title IX of the Education Amendments of 1972[3] bars sex discrimination in "any education program or activity receiving Federal financial assistance." Grove City College, a private institution, has always refused federal and state financial assistance. Its students receive federal Basic

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1. Cong. Rec., April 12, 1984, S4589.

2. 104 S. Ct. 1211 (1984).

3. 20 U.S.C. Sec. 1681(a).

Educational Opportunity Grants (BEOGs), which go directly to the students to pay tuition and other educational expenses. The Department of Education ruled that Grove City College itself was a "recipient" of "Federal financial assistance" and demanded that the College execute an Assurance of Compliance with Title IX's nondiscrimination provisions. The College denied that it was made a "recipient" by the fact that some of its students received BEOGs, and refused to sign the Assurance of Compliance.

The Supreme Court ruled, first, that the College was a "recipient" of "Federal financial assistance," despite the fact that "federal funds are granted to Grove City's students rather than directly to one of the College's educational programs."[4] The Court went on to decide, however, that the "education program or activity" of the College that was "receiving" federal assistance and that therefore was subject to Title IX, was not the College as a whole but only its financial-aid program.[5]

In holding that Title IX has only program-specific application, the Supreme Court rejected the contention that receipt of federal aid by any component of the college would bind every aspect of the college's activity by the Title IX prohibitions against sex discrimination. Instead, the re-

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4. 104 S. Ct. at 1220.

5. 104 S. Ct. at 1222.

ceipt of BEOGs by its students requires the college to comply with Title IX only in the operation of its financial aid office; the rest of the college's activities are not bound by Title IX. The correctness of this interpretation is a matter of dispute.[6]

Impact of Grove City on Age, Handicap and Race Discrimination

The key phrase, "program or activity," used in Title IX, is used also in the three main statutes banning discrimination on account of age, handicap, or race in federally aided programs.[7] Title IX, Section 504 and the Age Discrimination Act were all modeled in this respect on Title VI of the Civil Rights Act of 1964. The Grove City decision therefore raises the likelihood that the same kind of "program-specific" interpretation will be given to those other statutes as well as to Title IX. The judicial precedents

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6. Compare the testimony of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, before the House Committee on Education and Labor, May 22, 1984, with the Statement of Senator Edward M. Kennedy (D.-Mass.), Cong. Rec. April 12, 1984, S4585.

7. Those statutes are the Age Discrimination Act of 1975 (42 U.S.C. Sec. 6101, et seq.); Section 504 of the Rehabilitation Act of 1973, as amended in 1978 (29 U.S.C., Sec. 794 et seq.); and Title VI of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000 d et seq.).

appear to confirm this prospect[8]. It is important to remember, moreover, "that Title IX's coverage, even in broad form, applies only to educational entities or settings. Title VI, Section 504 and the Age Discrimination Act cover all federally-assisted entities and programs."[9] A program-specific interpretation of those statutes, therefore, would have an impact far beyond the area of education. Senator Kennedy expressed his concern that, after the Grove City decision, "the protection from discrimination provided by the government to the elderly, minorities and the disabled in all kinds of federally assisted activities is likely to be as spotty and inadequate as that offered to women and girls in education."[10]

The Intent of the Sponsors of the Civil Rights Act of 1984

S. 2568 and its companion, H.R. 5490, were introduced, in Senator Kennedy's words, "to restore Title IX, Title VI, Section 504, and the ADA to their intended force and cover-

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8. See, for example, Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1980); see also Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984).

9. Testimony of Clarence M. Pendleton, Jr., Chairman of U.S. Commission on Civil Rights before House Committees on Judiciary and Education and Labor, May 16, 1984, p. 4.

10. Cong. Rec., April 12, 1984, S4586.

age."[11] "What difference does it make to a disabled student," asked Senator Robert Dole (R.-Kans.) in co-sponsoring S. 2685, "if the student financial aid office is in compliance with Section 504, if none of the school's academic programs are accessible?"[12] The bill makes three changes in all four laws:

> 1. The "general prohibition language in each statute is modified to delete 'program or activity' and generally to substitute the term 'recipient.' Thus, each of the four laws would prohibit discrimination 'by a recipient of' - rather than 'under a program or activity receiving' - 'Federal financial assistance.' In Title IX, the limitation to education is retained; that is, the prohibition would run against an 'education recipient' in place of an 'education program or activity.'"[13]
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> 2. A definition of the term "recipient" is added to each of the four statutes, as will be discussed below.
>
> 3. The enforcement section of each of the laws is modified so as to enlarge the power of the agencies to terminate funding, as will be discussed below.

Senator Packwood summarized the changes as follows: "That any receipt of Federal financial assistance will trigger institutionwide coverage. Lest any critic question our remedial approach, however, the bill will also clarify that

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11. Cong. Rec. April 12, 1984, S4586.

12. Cong. Rec. April 12, 1984, S4590.

13. Statement by Senator Alan Cranston, Cong. Rec., April 12, 1984, S4594.

only the particular assistance supporting noncompliance will be subject to termination."[14] Senator Robert Dole (R.-Kans.), in co-sponsoring S. 2568, stressed that the bill was intended as a limited remedial measure: "I believe it should be emphasized that the sole purpose of this legislation is to restore Title IX to the broad coverage which marked its enforcement prior to Grove City, and to keep the other three civil rights laws intact. It is not the intent of the sponsors to break new ground."[15]

There is reason to believe, however, that the limited expectations of the sponsors of S. 2568 are unrealistic. This analysis will examine the likely effects of the bill in two general respects: its use of the expansive term "recipient" and its increase of the enforcement power of the agencies.

The Meaning and Effect of "Recipient"

The four statutes amended by S. 2568 now cover "any program or activity receiving federal financial assistance." [References herein will be to S. 2568 rather than to its companion, H.R. 5490] S. 2568 would amend those statutes to cover any "recipient" ("education recipient" in Title IX) of

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14. Cong. Rec., April 12, 1984, S4589.

15. Cong. Rec., April 12, 1984, S4590.

such assistance. In all four statutes, incidentally, "tax exemptions and deductions would continue to be excluded from the definition of Federal financial assistance."[16] The term "recipient" is defined in S. 2568 as follows:

> "(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and
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> "(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,
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> 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."[17]

Assistant Attorney General Reynolds maintains, contrary to the claim of the sponsors of S. 2568, that the definition of "recipient" in S. 2568 exceeds the definition of that term in the existing regulations under Title VI, Title IX and Section 504, in that "a recipient, as used in the existing regulatory scheme, is subject to coverage only as to its funded programs or activities; by contrast, under

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16. Statement of Senator Robert Dole (R.-Kans.), Cong. Rec., April 12, 1984, S4590.

17. Sec. 2(b)(2).

[S. 2568], a recipient is to be covered in its entirety."[18] In any event, it is clear that, under S. 2568, "when an entity receives federal aid for one of its parts or subdivisions, the entity - and not the specific subunit of the entity - is the recipient."[19] Senator Cranston made this plain in his explanation of S. 2568:

> Where the Federal financial assistance is provided to an entity itself, either directly from a Federal agency or through a third party, the whole entity and all of its component parts would be covered by the anti-discrimination ban and suit could be brought against the entity to enjoin discrimination in any of its components and to recover damages for injuries suffered by reason of discrimination in any component.[20]

If federal aid is extended, not to the entity as a whole but directly to one of its subunits, the entity as a whole (and consequently all other subunits) will be covered if the entity itself "receives support" from the aided subunit. As Senator Cranston explained, "Where Federal financial assistance is extended to a subunit of an entity, the question whether the entity itself and all of the other subunits of the entity would be covered would turn on the question of whether the entity "receives support" from the pro-

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18. Reynolds testimony, supra.

19. Statement of Senator Edward M. Kennedy, Cong. Rec., April 12, 1984, S4586.

20. Cong. Rec., April 12, 1984, S4594.

vision of the assistance to the subunit - for example, by receiving a portion of the assistance to help defray overhead costs. If the entity receives such support, it and all of its subunits are subject to the anti-discrimination ban, just as they would be if the entity itself received assistance directly from a Federal agency or through a third party."[21]

S. 2568 contains no definition of the terms, "receives support," "entity" and "subunit," among other undefined terms. As Senator Alan Cranston (D.-Cal.) explained, "the concept of 'support' is intended to refer to a not immaterial support having monetary value which could include, for example, services."[22]

On the one hand, aid to a State government would bring all the counties, cities, villages, school districts, etc., in that state automatically within the coverage of the age, sex, handicap and race discrimination statutes and regulations. For example, if the state receives a categorical grant for its highway department, then, if the state itself is the "recipient," all activities of the state government, including the prison system and state professional licensing boards, would become subject to the civil rights laws, which incidentally, are administered under regulations

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21. Cong. Rec., April 12, 1984, S4595.

22. Cong. Rec., April 12, 1984, S4595.

using an "effects" test, as will be discussed below. The same conclusion would follow under block grants as well. These results are automatic. On the other hand, if federal aid is given to one of the "subunits" of the State, e.g., a water district or school district, then the State as a whole is covered in all its activities and subdivisions so long as it "receives support from the extension of Federal financial assistance" to that subunit. Similarly, federal aid given to one department or campus of a university could subject every activity of the university to federal regulations regarding age, handicap, sex and race discrimination. If a university engages in non-educational, commercial activities, those activities could be covered by all four acts if aid were given to any part of the university.

As a practical matter, all states already receive federal aid given directly to themselves or through their subdivisions. The likely result of the enactment of S. 2568 therefore would seem to be an immediate extension of federal regulatory power with regard to age, sex, handicap and race discrimination, to virtually all the activities of every state and political subdivision in the land. Similar conclusions would follow in the private sector with respect to aid extended to subsidiaries and affiliates of corporations as well as to the corporations themselves.

Title IX now applies to "any education program or activity receiving Federal assistance." Under S. 2568, Title IX and the regulations adopted to enforce it would apply to

any educational program incidentally conducted by a non-educational institution if that non-educational institution received federal assistance for any purpose even if it received no assistance directed toward its educational program. Senator Kennedy illustrated this by the following example: "A state prison receives federal funding to develop a better inmate classification system, and no other federal assistance. Its education activities and related benefits, such as classes and training programs, are covered by Title IX. The entire prison - including its educational programs - would be covered by Title VI, Section 504, and the ADA, because it is a recipient of federal funding and these statutes are not limited to education."[23]

This result would apply as well to training and other educational programs conducted by a corporation which receives any federal assistance, including, perhaps, as will be discussed below, its receipt of food stamps from "a person." Furthermore, since S. 2568 defines a "recipient" as a "transferee of any . . . entity . . . to which Federal financial assistance is extended (directly or through another entity or a person)," and since "transferee" is nowhere defined in the bill, one can only speculate as to the ultimate potential reach of S. 2568 coverage.

These conclusions become even more striking in light of the Grove City definition of aid to the person as aid to the

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23. Cong. Rec., April 12, 1984, S4586.

institution. If one student at a single campus of a state university system used a BEOG, the entire university could be covered by all four acts. The apartment building owned elsewhere by that university and rented to the general public could be required to install ramps for the handicapped, etc. The Grove City decision attempted to forestall the further extension of this principle by stating, "Grove City's attempt to analogize BEOGs to food stamps, Social Security benefits, welfare payments, and other forms of general-purpose governmental assistance to low-income families is unavailing. First, there is no evidence that Congress intended the receipt of federal money in this manner to trigger coverage under Title IX . . . ."[24] But S. 2568, if enacted, would manifest precisely that intent. A "recipient" includes any of the listed types of entities "to which Federal financial assistance is extended (directly or through another entity or a person)." Although S. 2568 does not include a "person" as a "recipient," an entity from among the listed types would become a "recipient" if it received federal assistance "through . . . a person." So why would S. 2568 not apply all four acts to the grocer who took food stamps?

Senator Cranston did emphasize that nothing in S. 2568 is intended "to change the consistent interpretation" of the four statutes "excluding from coverage as 'recipients' in-

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24. 104 S. Ct. at 1217-18, n. 13.

dividuals and businesses which may ultimately receive federally provided dollars - such as a clothing store from whom a retiree purchases a suit with a social security check or a landlord whose tenant pays the rent with funds from supplemental security income payments, and others similarly situated - as well as the individual beneficiaries - the social security and SSI recipients themselves - of such programs."[25] While it is true that the individual retiree is not a "recipient" under S. 2568, the plain language of the bill includes the grocery or clothing store to which he negotiates his Social Security check. "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."[26]

S. 2568 is given a further reach by the Supreme Court's 1983 interpretation of Title VI in Guardians Assn. v. Civil

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25. Cong. Rec., April 12, 1984, S4595.

26. Testimony of William Bradford Reynolds, supra; see also Prof. Chester E. Finn, Jr., Civil Rights in Newspeak, Wall St. Journal, May 23, 1984.

Service Commission of the City of New York.[27] The Court held that although discriminatory intent is necessary to show a violation of Title VI itself, nevertheless, proof of "discriminatory effect" will suffice to create liability for a violation of the regulations issued under Title VI rather than of Title VI itself.[28] Under Grove City, regulations outlawing conduct which has an unintended racially discriminatory effect are limited in their impact to the programs or activities that receive federal assistance. Under S. 2568, however, a requirement of affirmative action on racial discrimination could apply to all recipients as expansively defined in that bill.

The Expanded Agency Enforcement Power Under S. 2568

Serious implications are raised by S. 2568's expansion of the enforcement power of administrative agencies. Under S. 2568, in the words of Senator Cranston, "all of the existing procedural safeguards that the four laws provide for before Federal funds may be terminated are retained without change - the government's initial duty to attempt resolution of the violation through conciliation, notice to the recipient of any adverse finding, opportunity for hearing, 30

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27. 103 S. Ct. 3221 (1983).

28. See 103 S. Ct. at 3235, n. 1 (separate opinion of Powell, J., Burger, C. J. and Rehnquist, J.).

days' advance notice to the congressional committees with responsibility for the laws under which the funds were provided, and the right to judicial review of any decision to terminate funding."[29]

According to the existing law, however, the power of the agencies to terminate funding is program-specific, i.e., the termination is limited to funding for the particular program or activity which is found to be in noncompliance.[30] S. 2568, by contrast, would permit the enforcing agency to terminate any "assistance which supports"[31] the noncompliance. In this respect, S. 2568 would open the door to termination of funding to an innocent program if that program "supports" another program that is in noncompliance. And it would seem clear that if a program is in noncompliance, assistance to the parent entity may be cut off on the theory that assistance to the whole provides support to the discrimination by the part.

At this point it will be useful to compare the parameters of S. 2568 with respect to basic coverage, on the one

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29. Cong. Rec., April 12, 1984, S4595.

30. See North Haven Board of Education v. Bell, 456 U.S. 512 (1982); Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir., 1969); Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984); see also testimony of Clarence M. Pendleton, Jr. Chairman, U.S. Commission on Civil Rights, before House Committees on Judiciary and Education and Labor, May 16, 1984.

31. See Sec. 2(c)(2)(C).

hand, and fund termination on the other. Senator Cranston explained his view of this as follows:

> Thus, in place of the "program-specific" coverage improperly imposed by the Supreme Court, coverage of all components of the recipient would be restored.
>
> "This broad construction of the entity covered by the nondiscrimination laws would apply to such areas as executing assurances of compliance, investigation of charges, and private rights of action and judicial actions by the United States to obtain injunctive or declaratory relief to bring about compliance.
>
> "With respect to the power to terminate funds or refuse to grant funds, the statutory scheme would be different. It would retain the basic concept of "pinpointing"; that is, limiting the termination of funds to those funds which have a specific nexus to the discrimination that is found."[32]

Senator Cranston's distinction is precarious, however, in light of the language of S. 2568 which would appear to make the power of fund termination practically as broad as the extremely broad definition of "recipient." As Senator Cranston himself stated:

> I would note that in our proposal, both the definition of recipient and the pinpointing provision use similar terms with respect to receiving "support" and assistance which "supports". In the former case, an entire organization, institution, or other entity meets the definition of "recipient" if Federal assistance directly to a subunit results in the parent entity also receiving some appreciable "support." In the case of pinpointing, only assistance that "supports" noncompliance may be cutoff. In both situa-

32. Cong. Rec., April 12, 1984, S4595.

> tions, the concept of "support" is intended to refer to a not immaterial support having monetary value which could include, for example, services.[33]

In light of the indefiniteness of "supports," which is not defined in S. 2568, it would seem clear that the "specific nexus to the discrimination" which Senator Cranston says is required for termination of funding, is a less than exacting restraint on the discretion of the agencies with respect to fund termination. This expanded potential for termination of funding is significant despite the fact that termination "has been actually used in only a handful of cases through the history of these laws."[34] The mere prospect of termination is a powerful inducement to compliance with federal agency directives. That inducement will be significantly increased by the grant of authority to the agency to cut off not only the funds of the program or activity that actually discriminates but also the funds of any entity or part thereof that directly or indirectly "supports" the discrimination.

Other aspects of S. 2568 would merit discussion here were it not for the limitations of space. For example, it is not at all unrealistic to describe S. 2568 as a "back door Equal Rights Amendment," in that the virtually univer-

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33. Cong. Rec., April 12, 1984, S4595.

34. Statement of Senator Robert Dole (R.-Kans.), Cong. Rec. April 12, 1984, S4590.

sal character of various types of federal aid to education, combined with the "effects" test which could outlaw even unintentional discrimination, could endow federal agencies with the power to impose upon education recipients, by administrative action, many, if not most, of the requirements that would have been imposed upon them by the Equal Rights Amendment itself.

Another issue is presented by the fact that S. 2568 retains the private right of action which exists under the four statutes and it continues the provision for attorneys' fees in such actions.[35] In view of the expansion of coverage under S. 2568 and the "effects" test which can forbid even unintentional discrimination, the inducement to litigiousness here is apparent. A further problem with S. 2568 arises from the fact that each agency administering the four statutes would have the responsibility to regulate all the activities of entities receiving federal assistance. This raises the prospect of added paper work, interagency conflicts, multiplicity of complaints, duplication of effort and involvement by agencies in areas in which they have neither expertise nor experience. Nor does S. 2568 provide for interagency referrals to alleviate this problem. Another potential problem is created by the exposure of federal administrators to an increased risk of personal liability through their failure to enforce the four statutes affected

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35. See Consolidated Rail Corporation v. Darrone, 104 S. Ct. 1248 (1984).

by S. 2568, especially in light of the expanded definition of recipients and the employment of the "effects" test for discrimination at least in the race area.[36]

The overall effect of S. 2568 on the present enforcement mechanism under the four statutes was generally summarized by Dr. Michael Horowitz, General Counsel of the Office of Management and Budget:

> 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.[37]

Some Constitutional Implications of S. 2568

The foregoing analysis should make it apparent that S. 2568 may be criticized as vague and uncertain, for example,

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36. See National Black Police Assn. v. Velde, 712 F.2d 569 (D.C. Cir., 1983), cert. den., 52 U.S.L.W. 3791 (April 16, 1984).

37. Michael Horowitz, Memorandum, Analysis of S. 2568: The Civil Rights Act of 1984.

in its failure to define important terms such as "receives support," "entity," "submit," "assistance which supports" and others. While it is important that Congress avoid what the Supreme Court has called "the shoals of unconstitutional vagueness,"[38] and while "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds,"[39] it is likely that the lack of precision in S. 2568 could be remedied by the regulations issued to enforce it, which regulations can impose obligations beyond those specifically imposed by the statute itself.[40] The imprecision of S. 2568, therefore, would argue strongly in favor of clarifying amendments before its enactment but it would not justify a prediction that, without such amendments, S. 2568 as implemented would be held unconstitutional for vagueness.

Another constitutional question is raised by the expansion of federal regulatory power that would be effected by S. 2568. Private entities as well as state and local governments would be subject to pervasive regulation with respect to age, handicap, race and sex discrimination, on

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38. Buckley v. Valeo, 424 U.S. 1, 78 (1976).

39. Pennhurst State School v. Halderman, 451 U.S. 1, 24 (1981).

40. See Guardians Assn. v. Civil Service Commission of the City of New York, 103 S. Ct. 3221 (1983).

account of the expansive definition of "recipient" in S. 2568, its expansion of agency enforcement power and the virtual universality of federal aid. These regulatory exposures could be burdensome. However, "Congress may fix the terms on which it shall disburse federal money to the States"[41] and, with respect to private recipients, "[i]t is hardly lack of due process for the Government to regulate that which it subsidizes."[42] While the regulations sanctioned by S. 2568 would be more extensive and more intrusive than those already in place, they would appear to differ more in degree than in kind from those heretofore approved by the courts.[43]

The point of these observations is not to endorse the increase that S. 2568 would effect in federal regulation of the private lives of Americans, but to suggest merely that it is unlikely that the Supreme Court will find S. 2568 unconstitutional on that account. The decision would seem to be for the Congress rather than for the courts.

A more difficult question is posed by the impact of

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41. Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981).

42. Wickard v. Filburn, 317 U.S. 11, 131 (1942).

43. See, for example, Detroit Police Assn. v. Young, 608 F.2d 671 (6th Cir., 1979); United Air Lines, Inc., v. McMann, 434 U.S. 192 (1977); EEOC v. Wyoming, 103 S. Ct. 1054 (1983); Assn. for Retarded Citizens v. Olson, 561 F. Supp. 473 (D, N.D., 1982); La Strange v. Consolidated Rail Corp., 687 F.2d 767 (3rd Cir., 1982).

S. 2568 on state governments themselves. If S. 2568 were enacted in its present form, it would instantly subject virtually every operation of every state and local government in the land to the potential supervision of federal agencies with respect to age, handicap, race and sex discrimination, including unintentionally discriminatory conduct that has discriminatory effects, with the attendant potential for affirmative action requirements. Such a massive preemption of state authority would seem to be contrary to the spirit, if not the letter, of the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Tenth Amendment was long regarded as a mere "truism," reciting the obvious fact that all powers not delegated are reserved.[44] In 1976, surprisingly, the Supreme Court declared an Act of Congress unconstitutional on the basis of Tenth Amendment principles.[45] Usery held unconstitutional the 1974 amendments to the Fair Labor Standards Act, which extended the wage and hour provisions of the Act to virtually all public employees. The Supreme Court declared that to the extent that the act overrode "the State's freedom to structure integral operations in areas of traditional governmental

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44. See U.S. v. Darby, 312 U.S. 100, 124 (1941).

45. National League of Cities v. Usery, 426 U.S. 833 (1976).

functions," such as fire, police, sanitation, public health and parks and recreation, the Act was "not within the authority granted Congress by the commerce clause."[46] The Usery decision, however, has been severely limited by later Supreme Court rulings.[47] In any event, the Court in Usery specifically noted that it was not deciding whether the Tenth Amendment was a limit on Congress' spending power, its power to enforce the Fourteenth Amendment or its war power.[48] And in Bell v. New Jersey,[49] the Court held that the states are bound by regulations attached to a federal grant voluntarily accepted by the states. The Court rejected the claim that the restrictions violated the Tenth Amendment:

> Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty. The

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46. 426 U.S. at 852.

47. See Hodel v. Virginia Surface Mining and Reclamation Assn., 452 U.S. 264 (1981); United Transportation Union v. Long Island Railroad Co., 455 U.S. 678 (1982); Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982).

48. 426 U.S. at 852, n. 17; 426 U.S. at 854, n. 18; see North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532, 536, n. 10 (E.D., N.C., 1977), aff'd mem., 435 U.S. 962 (1978); see generally, Rotunda, Usery in the Wake of Federal Energy Regulatory Commission v. Mississippi, 1 Constitutional Commentary 43 (1984).

49. 103 S. Ct. 2187 (1983).

> State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I.[50]

The potential displacement of State authority and private autonomy by S. 2568 is so extensive as to justify Dr. Michael Horowitz's conclusion that, "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."[51] Nevertheless, there is no sufficient basis to expect that S. 2568, if enacted and implemented by appropriate regulations, would fail to survive a constitutional challenge in court. The decision of the Congress on S. 2568, therefore, is likely to be conclusive.

It should be mentioned here that alternatives are available which would achieve the limited objective of overturning the challenged aspect of the Grove City case without inviting the difficulties involved in S. 2568.[52]

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50. 103 S. Ct. at 2197.

51. Horowitz, Memorandum, supra.

52. See, for example, Senator Packwood's simple proposal (S. 2363) to amend Title IX "by striking out 'education program or activity,' and inserting in lieu thereof "education program, activity or institution.'" More extensive coverage would be provided by Dr. Horowitz' proposal "to amend Title IX to prohibit discrimination based on race, color, national origin, age or handicap as well as sex and to provide that any assistance to an educational institution would result in coverage of all of its education programs." (Horowitz, Memorandum, supra).

If a limited alternative is not substituted for S. 2568, and if that measure is enacted in its present form, it will effect a radical and massive expansion of federal power in the subject areas.

Charles E. Rice
Visiting Scholar
Center for Judicial Studies
June 1, 1984

The Washington Times

Q&A

Wide perils perceived in new rights bill

Dr. Bruce Hafen on proposed legislation to expand federal civil rights laws.

Major legislation is speeding quietly through both houses of Congress to expand federal regulatory and investigative powers under existing civil rights laws that prohibit discrimination on the basis of sex, race, age, or handicap. Proponents claim the measure, now on the House floor, would merely restore the government's enforcement authority that existed prior to the Supreme Court's decision in Grove City vs. Bell, which held that Title IX of the Education Amendments of 1972 applies only to particular programs which directly or indirectly receive federal money.

Dr. Bruce Hafen, president of the American Association of Presidents of Independent Colleges and Universities, which comprises 165 educational institutions in 40 states, disagrees. He told the Senate in recent testimony that the legislation would radically increase the power of the federal bureaucracy and the courts over all aspects of public and private life. Dr. Hafen, who is president of Ricks College in Idaho and a law professor at Brigham Young University, explained his position in this interview with George Archibald of The Washington Times.

Photo by Walter Cissel-The Washington Times

Q: Why are college and university presidents who belong to your association so strongly opposed to this legislation?

A: It is amending four of the major civil rights statutes in a way that broadens federal jurisdiction in a breathtaking way. Let me explain the background. The Supreme Court ruled earlier this year in the Grove City case that when a college or university receives federal aid, only the department of the university that receives the aid is subject to Title IX, dealing with sex discrimination. Shortly after that decision was handed down, a number of groups began talking about proposing an amendment to Title IX that would overturn the effect of that decision and provide that if a campus receives federal funds of any kind for any purpose, the entire campus would be subject to federal regulation under Title IX. For instance, if the biology department received a grant, then the athletic department would be subject to Title IX. That was the original proposal.

However the much broader bill now being considered applies not only to Title IX, but to three other major civil rights statutes dealing with race discrimination, age discrimination, and discrimination against the handicapped. All these laws triggered federal jurisdiction whenever there was federal aid. Also, the bill's definition of "recipient" provides that if a sub-entity of a larger organization receives federal aid, then the other portions of that organization are subject to federal law. It would broaden coverage across any institution that has parent-subsidiary corporate relationships.

For instance, if a Catholic diocese owns hospitals and schools, and if federal aid goes to one of the schools or a hospital, not only are all the hospitals and schools brought within the realm of federal jurisdiction, the church itself would be subject to federal jurisdiction.

Q: Wouldn't that be unconstitutional?

A: At some point it would be. It would require litigation to determine exactly when First Amendment liberties are affected. For that reason, any new legislation must contain an exemption for religious activities, and church related schools. Religious liberty is, after all, also a civil right.

State governments could also have big problems under this proposal. If the state highway department receives some federal money for highway construction, then under the new proposed definition of "recipient" all other state agencies would be subject to federal jurisdiction in all four areas — race, sex, age and handicap discrimination. That's significant, because when those earlier civil rights laws were debated and passed, the idea of extending jurisdiction that broadly was openly discussed and consciously rejected.

Q: If we're opposed to discrimination and it's national policy to prohibit discrimination, why is it wrong to apply it over the whole organization if any part is getting federal aid?

A: If an entire organization is subject to termination of federal funds when one part of the organization discriminates, you take the risk that funds would be cut off to the entire organization rather than just the part that discriminated, which ends up hurting the beneficiaries in areas where there was no discrimination.

Q: But how about ensuring there's not discrimination at the part of the institution not receiving federal aid?

A: There are many other laws that prohibit discrimination. The laws affected by this measure are only those that are triggered by federal money. Title VII of the Civil Rights Act forbids discrimination in employment, and that affects all employers, all private institutions. There is another law forbidding age discrimination. There are state laws dealing with discrimination.

Q: There seems to be a presumption that discrimination per se is wrong, but all of us make choices and discriminate in one way or another. The choice of a private school over a public school, for example. Will this legislation affect those choices?

A: People have a choice about entering private institutions. If, in their judgment, they would be harmed or there's discrimination there, they're in no way forced to enter. That's a major distinction between a private entity and a public one. Because we're all citizens and taxpayers of our states and our nation, there is a much heavier responsibility in public agencies to avoid making distinctions. But in the private sector, we want distinctions, we want free competition about ideas on many, many subjects, and then we let individual consumers make choices as to the institutions that satisfy their interests. No one is required to make any particular choice. In that sense, part of the genius of our federal system and free enterprise system is that we encourage diversity.

Part of the problem with a bill of this kind, as the economist Schumpeter once said, is that it represents "the conquest of the private sector by the public sector" — so that instead of having many choices and distinctions about approaches to education and so forth, we have only one choice. It's all very monolithic. There's a single approach-to-educational-philosophy that is embodied in the ideas that led to this legislation.

People say, "Well, we don't want any discriminating." But in fact one of the characteristics of an educated person is to be able to discriminate between good ideas and bad ones, and being discriminating about political choices and economic choices and a lot other things. In the area of race discrimination, which we oppose, we're in agreement. There is a long history that has been addressed by legislation and, in that area, the word "discrimination" has a meaning we now understand.

Q: This bill touted as a measure to reverse or overturn the Grove City decision affirms the court's ruling that a college enrolling students who receive federal grants and loans is an indirect recipient of federal aid, and therefore subject to federal regulation and control.

A: It does. In my opinion, it should overturn it. The idea that one student receiving one dollar of federal money could, by enrolling in an institution, subject that entire campus to as much federal regulation as if that campus had had every one of its buildings built by federal grants goes beyond the point of reason. The bill goes further. A major element of the proposed legislation is a new and significant definition of recipients of federal aid to include those who are "transferees" of federal aid. It uses the example of the student attending the college and now applies that everywhere else.

Q: Are the hands of your 165 member colleges and universities clean on the subject of discrimination? Have any of them ever been charged with discrimination of any kind?

A: In both the two main cases that led to all of this — the Hillsdale College case and the Grove City case — there was an express finding of no discrimination. It wasn't even an issue. No one had complained about it. It was simply an argument about jurisdiction in the abstract. And there isn't evidence of new, rampant discrimination in all agencies of state government and in all large organizations leading to this new legislation. That seems peculiar to me — that we're getting the most breathtaking extension of federal jurisdiction in the discrimination aren without any evidence that there is a need for that legislation.

Q: What would legislation of this kind mean to colleges in your association?

A: Some of the schools have already announced that, if this law is passed, they will not admit students on federal grants to avoid subjecting the entire campus to complex federal regulations and a kind of single-minded view of educational philosophy. So students who need federal assistance to attend school will not be able to go to these schools. That's a tragedy, because it will deny a great number of students who need financial help to go to college the opportunity of choosing this kind of education.

The schools that choose to go on admitting students receiving federal assistance will be subject to a wide range of laws to which they were not formerly subject to across their entire campuses, and the compliance burden is enormous. They would need to hire new people, establish policies and offices of compliance. Where is all the money going to come from to finance that whole new administrative bureaucracy at each of these private schools? Maybe they'll have to turn to the government for that money — not to satisfy educational purposes of their own, but to satisfy the government's purposes which it has imposed on them.

Another problem is that this legislation seems to give many federal regulatory agencies overlapping jurisdiction

Distributed 6-12-84

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO	J. Svahn M. Horowitz	L. Verstandig N. Sweeney	Take necessary action ☐ Approval or signature ☐ Comment ☐ Prepare reply ☐ Discuss with me ☐ For your information ☐ See remarks below ☐
	N. Risque J. Cicconi		
	A. Meyer F. Fielding		
	K. Wilson K. Cribb		
	M. Uhlmann B. White		
FROM	Branden Blum		DATE 6/8/84

REMARKS

Subject: Draft Education Report on S. 2568, the Civil Rights Act of 1984

Attached is a draft Education report on S. 2568, which we have been asked to clear as soon as possible.

Education advises that committee markup is scheduled for 6/13/84.

Please provide me with any comments. (A copy of this report has been sent to Justice.)

OMB FORM 4
Rev Aug 70

UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

DRAFT
JUN - 8 1984

The Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

This responds to your letter of May 29, 1984, requesting the views of the Department of Education on S. 2568, the Civil Rights Act of 1984. I appreciated the opportunity to present my views on this bill before the Subcommittee on the Constitution on Tuesday, June 5. As requested, I am enclosing the Department's responses to two questions raised at the hearing concerning indirect Federal aid and the Pell Grant Alternate Disbursement System.

I want to reiterate my strong support for legislation to return civil rights coverage to its status prior to the Grove City decision. This Administration and this Department are firmly committed to the cause of civil rights. We commend your efforts to provide thorough and balanced hearings on the legislation before the Congress.

My only reservations about S. 2568, however, are that some of its provisions are ambiguous and may lead to judicial interpretations unintended by its sponsors. These concerns are discussed in some detail in my June 5 testimony before your subcommittee (copy enclosed). Clarification of the language of legislation is far preferable to risking uncertainty in this important area of law, especially as it may affect enforcement authority. I am sure that these problems can be corrected in an expeditious manner.

The Administration ~~Department of Education~~ will be happy to provide you and your colleagues any assistance you request to ensure that the legislation would achieve the goal that we all share of removing the limitations imposed by the Grove City decision on civil rights coverage.

Sincerely,

T. H. Bell

Question: As a legal matter, should indirect aid, such as ADS Pell grants received by students at an institution of higher education, be viewed as aid to the institution?

Response: Although I personally do not view ADS Pell grants as aid to institutions of higher education, the Supreme Court in Grove City v. Bell held that there is no difference between direct and indirect federal aid for the purpose of coverage under Title IX. In the case of the Pell Grant Program, the Court found that both the purpose and the effect of this program is to supplement the financial aid programs of institutions of higher education.

Question: How many schools participate in the Pell Grant Alternate Disbursement System (ADS)? How many ADS schools declined the Pell Grant administrative allowance?

Response: As of June 7, 1984, 1,239 schools have agreements with the Department of Education to participate in the Pell Grant Alternate Disbursement System (ADS). Of the 1, 239 schools, approximately 765 schools accepted the administrative allowance from the Department while 19 schools declined it. The remaining schools were not active participants in the Pell Grant Alternate Disbursement System during the 1983-84 academic year.

For your information, a list of the schools receiving the 1983-84 administrative allowance, along with a list of the 19 schools which declined the administrative allowance, are attached.

Declined 1983-84 Administrative Allowance

1. RICKS COLLEGE, ID
2. PRINCIPIA COLLEGE, IL
3. HILLSDALE COLLEGE, MI
4. GROVE CITY COLLEGE, PA
5. COLUMBIA BIBLE COLLEGE, SC
6. ST FRANCIS REG MED CRT SCH RAD TECH, KS
7. MINN VA HOSP SCH RAD TECH, MN
8. WASHINGTON HOSP SCH OF RAD TECH, PA
9. BAPTIST MEM HOSP SCH OF XRAY TECH, TX
10. ST MICHAEL HOSP SCH OF RAD TECH, WI
11. VETERANS ADMIN CENTER SCH RAD TECH, WI
12. VETERANS ADMIN MED CTR SCH RAD TECH, CA
13. VETERANS ADMIN MED CTR SCH OF RAD TECH, NY
14. CENTRAL SCHOOL OF PRACTICAL NURSING, OH
15. ALASKA BIBLE COLLEGE, AK
16. LAKE PROVIDENCE VOC TECH SCH, LA
17. BAPTIST MEM HOSP SYSTEM SCH NURSING, TX
18. ASCENSION VOCATIONAL TECHNICAL SCH, LA
19. EDW HINES VET ADMIN HOSP RAD THRPY, IL

BGP ADM

REPORT DATE - 04/17/84

1984 - 85 BASIC GRANT PROGRAM

INITIAL ADMINISTRATIVE ALLOWANCE DISTRIBUTION

VENDOR	INSTITUTION NAME	ST	ELG	PAR	ADS	SPC	STA	CURRENT AUTH	TOT RECIP	TOT QUAL	PREV AMT	FINAL AMT	-REMARKS-
001182	COLLEGE OF DESERT COACHELLA VALLEY	CA	1	4	1	0	1	$196,384	249	249	$0	$1,245	
001210	HEALD INSTITUTE OF TECHNOLOGY	CA	1	4	1	0	1	$427,378	260	259	$0	$1,295	
001211	HEALD BUSINESS COLLEGE-SAN JOSE	CA	1	4	1	0	1	$114,301	67	67	$0	$335	
001230	SOUTHERN CALIF CLG OF OPTOMETRY	CA	1	4	1	0	1	$5,126	4	4	$0	$20	
001277	SAN FRANCISCO CLG MORTUARY SCIENCE	CA	1	4	1	0	1	$23,612	17	17	$0	$85	
001299	ST JOHN'S COLLEGE	CA	1	4	1	0	1	$39,950	24	24	$0	$120	
001377	BRIDGEPORT ENGINEERING INST	CT	1	4	1	0	1	10	0	0	$0	$0	NO SARS
001389	HOLY APOSTLES SEMINARY COLLEGE	CT	1	4	1	0	1	$26,935	15	15	$0	$75	
001606	BRIGHAM YOUNG UNIV-HAWAII CAMPUS	HI	1		1	0	1	$[illegible]	[illegible]	[illegible]	$0	$1,355	
001625	RICKS COLLEGE	ID	1	4	1	0	1	$1,469,304	1,084	1,083	$0	$5,415	DECLINED
001659	UNIV HLTH SERVICES CHICAGO	IL	1	4	1	0	1	$10,850	5	5	$0	$25	
001663	SPERTUS COLLEGE OF JUDAICA	IL	1	4	1	0	1	$5,127	4	4	$0	$20	
001688	ILLINOIS COLLEGE OF OPTOMETRY	IL	1	4	1	0	1	$[illegible]	[illegible]	[illegible]	$0	$110	
001706	LAKE FOREST COLLEGE	IL	1	4	1	0	1	$217,288	171	171	$0	$855	
001744	PRINCIPIA COLLEGE	IL	1	4	1	0	1	$122,586	89	89	$0	$445	DECLINED
001755	SHERWOOD MUSIC SCHOOL	IL	1	4	1	0	1	$16,615	12	11	$0	$55	
002213	ST HYACINTH COLLEGE & SEMINARY	MA	1	4	1	0	1	$1,000	1	1	$0	$5	
002272	HILLSDALE COLLEGE	MI	1	4	1	0	1	$170,133	128	128	$0	$640	DECLINED
002740	JEWISH THEOLOGICAL SEMINARY OF AMER	NY	1	4	1	0	1	$7,613	4	4	$0	$20	
002741	UNIVERSITY OF JUDAISM	CA	1	4	1	0	1	$4,313	2	2	$0	$10	
002956	PIEDMONT BIBLE COLLEGE	NC	1		1	0	1	$215,231	191	164	$0	$820	
003203	MOUNT ANGEL SEMINARY	OR	1		1	0	1	$16,401	9	9	$0	$45	
003269	GROVE CITY COLLEGE	PA	1	4	1	0	1	$274,498	261	258	$0	$1,290	DECLINED
003311	PENNSYLVANIA CLG OF OPTOMETRY	PA	1	4	1	0	1	$12,200	6	6	$0	$30	
003386	VALLEY FORGE MILITARY JUNIOR CLG	PA	1	4	1	0	1	$17,125	8	8	$0	$40	

Orders 2-35 will be sent

CA-comments?

Distributed 6-12-84

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO	J. Svahn	L. Verstandig	Take necessary action ☐
	M. Horowitz		Approval or signature ☐
	N. Risque	R. Landis	Comment ☐
	J. Ciccconi	N. Sweeney	Prepare reply ☐
	A. Meyer		Discuss with me ☐
	F. Fielding		For your information ☐
	K. Wilson		See remarks below ☐
	K. Cribb		
	M. Uhlmann		
	B. White		
FROM	Branden Blum BB		DATE 6/11/84

REMARKS

Draft Agriculture testimony on S. 2568, the Civil Rights Act of 1984

Attached is Agriculture's draft testimony for a hearing before the Senate Agriculture Committee scheduled for 10:00 A.M. tomorrow (6/12/84). A copy of the testimony has been forwarded to Justice.

Please review and provide me with any comments as soon as possible.

Attachment

SPECIAL

OMB FORM 4
Rev Aug 70

Agriculture - Dan Oliver - GC

Mr. Chairman, it's a pleasure to appear before your Committee again, and I welcome this opportunity to present my views on S. 2568 entitled the "Civil Rights Act of 1984."

This Administration, as you do know and all should know, is committed to the principles of non-discrimination and equal opportunity. Those principles and this Administration's commitment to them and efforts on behalf of them have been eloquently described by others, especially by the Honorable Wm. Bradford Reynolds, the distinguished Assistant Attorney General for the Civil Rights Division. That commitment is not in dispute here -- is not in dispute anywhere where serious people are gathered together -- and I will say no more about it, except that I am heartily in concurrence with it.

Mr. Chairman, S. 2568 was introduced following the Supreme Court's decision in the Grove City case (Grove City College v. Bell, 104 S. Ct. 1211 (1984)). The stated purpose of the bill is, as I understand it, to reverse only a single holding of that decision, specifically, the Court's holding that the law prohibiting discrimination on the basis of gender (Title IX of the Education Amendments of 1972) prohibits such discrimination only in programs or activities receiving Federal financial assistance.

Some have said that that reading of the law (which I will call the "program specific" reading) -- and I should add here that the laws prohibiting discrimination on the grounds of race, handicap, and age have the same provision -- some have said that that program specific reading represents a "new interpretation" of the anti-discrimination laws.

I believe that is not so. Every Federal court of appeals that has considered the issue has adopted the program specific reading -- every court, that is, except the Third Circuit, in the Grove City case. And, of course, the Third Circuit was overruled by the Supreme Court.

But more important for our purposes here this morning, Mr. Chairman, the statutes' focus on activities receiving Federal financial assistance rather than on recipients of that assistance is the basis of the Department's current and long-standing view that these anti-discrimination laws are concerned, not with the activities of the ultimate beneficiaries of Federal financial assistance, but with the activities of the groups and individuals through which the government works to provide assistance to those ultimate beneficaries.

This understanding of many years is reflected in the regulations of the Department of Agriculture and of other

agencies implementing the Federal anti-discrimination laws. Specifically, the regulation defining "recipient" excludes from that definition the ultimate beneficiaries of a program or activity (7 C.F.R. 15.2(e)).

It is important to note that this specific exclusion of ultimate beneficiaries is not grounded in any statutory definition of a recipient of Federal financial assistance or in any other specific statutory exclusion. It is grounded in the fact that the anti-discrimination statutes are directed at programs or activities receiving Federal financial assistance and therefore appear not to be directed at the ultimate beneficiaries of the assistance under those programs.

S. 2568 would amend Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 ("Section 504"), and the Age Discrimination Act of 1975 to prohibit discrimination by "recipients of Federal financial assistance" rather than discrimination in programs and activities receiving Federal financial assistance. If this legislation is enacted, it appears doubtful that the current exclusion of ultimate beneficiaries from the definition of recipients of Federal financial assistance could be continued. Indeed, from the proposed bill's tracking of all the language of the present regulation defining a recipient,

except that portion relating to the ultimate beneficiary, it seems entirely fair to infer a legislative intent to preclude continuation of the exemption of the ultimate beneficiary, and I certainly would not be surprised if a court made that inference.

The definition in the proposed bill of a recipient is as follows:

> "(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and
>
> "(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity 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."

I realize, Mr. Chairman, that some people may say that that definition of a recipient of Federal financial assistance does not, could not, and was not intended to, include a farmer. I suggest, nevertheless, that that language could indeed include a farmer.

In the first place, it is not clear what is meant by the word "entity" contained in section (A) of S. 2568's definition of a recipient.

Let us take the case of a Farmer Program loan, extended directly to a farmer by the Farmers Home Administration. Currently, the anti-discrimination laws do not apply to Farmer Program loans, because the farmer is considered to be the ultimate beneficiary. Under the proposed bill, however, there is no exclusion for ultimate beneficiaries, and it is at least plausible to say that the farmer is included within the bill's definition of a recipient of Federal financial assistance.

Cannot a farmer be an "entity?" And even if a farmer in his individual capacity is not an "entity," -- and I am not sure he is not -- what about his farming operation? What if that operation is a huge corporation, employing hundreds of people -- is that not an "entity" within the meaning of the statute? S. 2568 is sufficiently ambiguous to leave unresolved whether or not the farmer or his operation would be a recipient under the proposed definition.

Mr. Chairman, in addition to there being a real possibility of a farmer's being included within section (A) of the definition of recipient contained in the proposed

bill, there is also a real possibility that some farmers will be included within section (B) of that definition.

Let us consider, for example, a tobacco farmer. All tobacco price support loans are provided to farmers through producer associations. These associations are, even now, considered by the Department of Agriculture to be covered by the anti-discrimination laws. They are the recipients of the Federal financial assistance being provided, but they are not the ultimate beneficiaries of that assistance. Therefore, their price support activities are subject to the prohibitions of the Federal anti-discrimination laws. The individual tobacco farmer, himself, however, is not currently considered to be covered by those laws, because it is he who is considered to be the ultimate beneficiary of the Federal financial assistance.

Under the proposed bill, however, I believe such a tobacco farmer might be subject to the anti-discrimination laws. Under section (A) of the proposed bill's definition of a recipient, the producer association would almost certainly be a recipient. It is certainly a "private" ... "organization" ... "to which Federal financial assistance is extended." And under section (B), because the farmer would seem to be a transferee of the cooperative or association, he might also be a recipient. It certainly would not be an unreasonable interpretation to say he was a recipient.

Now, Mr. Chairman, let us consider some of the people and business organizations -- dare we call them "entities"? -- the farmer does business with.

Let us return to our farmer who received a Farmers Home Administration loan, and let us suppose he puts half of the money in a bank, and spends the other half on fertilizer and a tractor. It is not at all clear that the bank, the seller of the fertilizer, and the seller of the tractor are not covered by the definition of recipient contained in the proposed bill. I believe the bank and the farmer's input suppliers could be covered by this bill if Grove City College is meant to be covered by the bill's definition. The only Federal funds -- and I prefer to call them taxpayers' dollars, Mr. Chairman -- the only Federal taxpayers' dollars Grove City College received, it received from students who had obtained grants from the Federal Government. If those funds retain the characteristic of being Federal assistance even after they leave the students' hands, why won't the funds lent to a farmer retain that same Federal assistance characteristic when the farmer pays them to the tractor salesman, or when he stores them in the bank? If those funds remain assistance, then those funds are "Federal financial assistance" that is being "extended" to a "private organization" (the banker or tractor seller) "through" "a person" (the farmer), and the banker and tractor seller become recipients.

Mr. Chairman, let me hasten to add that I assume the sponsors of this bill intend that the colleges to which the students pay over their grants will be covered by the laws that this bill would amend. But we have a paradox here. What I don't understand is how these laws, if they are amended by S. 2568, will cover colleges but not a farmer's bank or the stores where he buys his fertilizer or tractor.

Finally, Mr. Chairman, let me say that if the American farmer and the people he does business with -- his banker, his input suppliers, his implement dealers -- are meant to be covered by the Federal anti-discrimination laws by reason of this amendment to them, I believe the enforcement effort the Department of Agriculture would have to mount would be staggering. I have no idea how it would be performed, and I am not prepared to discuss it here this morning. I would say only that if the Department is to take on an obligation of that magnitude, policing every farmer and every person he does business with, Congress should ask it to do so in a more explicit manner than is contained in this proposed bill.

In concluding, Mr. Chairman, I should like to note that despite extensive debate on the floors of the House and Senate over the meaning of certain portions of Title IX, including specifically the program and activity language, there remains today -- even after the Supreme Court's

decision in Grove City -- disagreement on what it was that Congress intended by that language. Clearly some of the language in S. 2568 is also ambiguous. Under the circumstances, it would seem wise to take enough time fully to consider the language and implications of such a sweeping proposal, and to take the care to craft such a proposal with sufficient precision that another generation of lawyers and their clients will not have to guess at its meaning. If the Grove City decision had revealed the existence of widespread and hitherto undetected discrimination, there might be some urgency to pass S. 2568. The facts are, however, that there was not the slightest hint of any failure on the part of Grove City College to comply with any anti-discrimination law. The Grove City case had nothing whatever to do with discrimination past or present. I believe, therefore, that in respect to this legislation, this deliberative body has, and should take, the time to deliberate carefully.

Mr. Chairman, I would be happy to try to answer any questions you may have.

Department of Justice

STATEMENT

OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CONSTITUTION
UNITED STATES SENATE

CONCERNING

S. 2568 - "CIVIL RIGHTS ACT OF 1984"

ON

JUNE 5, 1984

Mr. Chairman and Members of the Subcommittee, I welcome this opportunity to appear before you today to present the views of the Department of Justice on S.2568, 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 -- of discriminatory conduct, in whatever form and however manifested, against any person on account of race, color, sex, national origin, handicap, religion or age. The nondiscrimination principle -- embodied in the ideal of a Nation blind to color and gender differences -- is at the center of America's historic struggle for civil rights. In that tradition, ours has been a profound and unwavering commitment to insure 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 that legal and moral command has been compromised by discrimination -- whether for reasons regarded as benign or pernicious -- the Administration has been quick to bring the full force of the law against the discriminator.

There is another principle that this Administration has been every bit as vigilant in protecting, the principle of Federalism that is at the foundation of our Nation's dedication to the ideals of self-government and individual freedom. We have, therefore, resisted unnecessary and overly intrusive expansion of federal power, particularly when the federal intrusion unduly impedes state and local governments' efforts to deal effectively with regional and local problems that most directly affect citizenry at the state and local levels.

As Senator Hatch noted in his statement regarding S.2568, the bill being considered by the Committee, 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 Amendments 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 need (based on congressional findings) for strong Federal protections against discrimination (i.e., the Voting Rights Act of 1965), but not so overly intrusive as to usurp unnecessarily legitimate State and local prerogatives (i.e., the Revenue Sharing Act of 1972).

We join with Senator Hatch and others in urging Congress to put "The Civil Rights Act of 1984" (S.2568) 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

S.2568 has been offered as a modest amendment of existing statutes, intended not to break 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 Amendments 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 so-called "new interpretation" of Title IX, and considerable impetus for the current congressional interest in amending that statute comes from an assumption that the Court's pronouncement of Title IX as program-specific legislation 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. While some Federal agencies had previously pursued a more expansive reading of the statute -- one contemplating institution-wide coverage of Title IX -- the fact is that, before Grove City, every court of appeals except the Third Circuit in the Grove City case itself had construed Title IX to be program-specific in coverage. 1/ Indeed, as to the parallel Federal

1/ E.g., Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982), vacated and remanded,

(cont'd)

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 Federal appellate courts as program-specific. Thus, testimony provided to this Committee regarding, for example, 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 federal appellate courts had construed Title IX to have institution-wide coverage -- to get in line with existing judicial authority in this area, including earlier Supreme Court precedent. 4/

1/ (cont'd)
52 U.S.L.W. 3700 (U.S. March 26, 1984) in light of Grove City College v. Bell, 104 S. Ct. 1211 (1984); Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Othen v. Ann Arbor School Board, 507 F. Supp. 1376 (E.D. Mich. 1982), aff'd 699 F.2d 309 (6th Cir. 1983).

2/ E.g., Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969).

3/ E.g., Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1980). See also Consolidated Rail Corp. v. Darrone, 52 U.S.L.W. 4301 (U.S. Feb. 28, 1984).

4/ North Haven Board of Education v. Bell, 456 U.S. 512 (1982).

Nonetheless, we agree with many Members of Congress that there are sound policy reasons for Congress to consider an amendment to Title IX that will change its programmatic coverage to institution-wide coverage. In fact, I was accurately reported as stating as much immediately following the Court's announcement of the Grove City decision. Nor would it be inappropriate, in my view -- if Congress should find the need for it in these or other hearings -- to broaden in similar fashion coverage of the parallel antidiscrimination funding statutes that deal with race, handicap and age. That is, as I understand it, precisely what Congress has in mind. Based on that assumption, let me make it unmistakably clear: the Administration's concern with S.2568 lies not with the stated purpose of its sponsors, but only with the overly expansive language selected to reach the desired end. In the name of doing no more than "restoring" Title IX to institution-wide coverage, and providing a similar interpretation to three parallel statutes, the Senate has introduced a bill in S.2568 (like its counterpart in the House, H.R. 5490) that, by its terms, goes far beyond the limit set for it by its sponsors. Let me explain.

The Approach of S.2568

S.2568 would amend not only Title IX, but also three

other civil rights statutes prohibiting discrimination in federally-funded programs: 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). We are told that the bill's aim is only to remove the programmatic limitation on coverage found in the current statutory phrase "program or activity" so as to make clear that coverage has an institution-wide application. The difficulty is that the vehicle used to accomplish this purpose is an overly expansive definition of "recipient" that takes civil rights enforcement not only well beyond the institutional horizons some have set for Title IX and the other statutes, but indeed into entirely new areas of responsibility, and without any guidance.

1. Definition of "Recipient." By deleting the phrase "program or activity" from the existing statutes and substituting in its place the word "recipient," S.2568 prohibits discrimination under the four statutes "by any recipient of" Federal financial assistance, rather than barring only discrimination within a recipient's federally funded programs or activities.

The bill includes a definition of "recipient" that is said to be "drawn from" existing federal regulatory definitions of that term under Title VI, Title IX and Section

504. There are, however, notable differences. A "recipient," as used in the existing regulatory scheme, is subject to coverage only as to its funded "programs or activities;" by contrast, under S.2568, a "recipient" is to be covered in its entirety. Beyond that, the bill's definition of "recipient" does not track any of the present regulatory definitions, but makes additions and deletions that expand the scope of coverage. Thus there is added at the end the new clause: "or which receives support from the extension of federal financial assistance to any of its subunits;" while the regulatory exemption for "ultimate beneficiaries" has been deleted. As presently proposed, 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 support" is included in the bill and, thus far, statements by the sponsors and by witnesses at these hearings have left unclear the true legislative intent.

At a minimum, it seems 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. It appears, moreover, that 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 S.2568, seemingly include all graduate programs within Title IX coverage, even though there was no federal financial assistance at the graduate level.

To suggest a narrower reading of the language on the ground suggested by David Tatel (Tatel Test. at p.7) -- i.e., that the bill is designed only to "restore" Title IX coverage to pre-Grove City interpretations and those interpretations

never went so far -- is to ignore that S.2568 is a different statute using different language under different circumstances. Small comfort can therefore be derived from past agency interpretations of a markedly different piece of legislation. The scope of the present bill will unquestionably be determined by its language and legislative history, not pre-Grove City activities. And that is why it behooves Congress to insist that the language of the bill accurately reflects the bill's purpose. Otherwise the Supreme Court will once again -- as it did in Grove City -- be forced to tell Congress that the law it passed fails to do what Congress intended for it.

What, for example, is the intended scope of coverage under S.2568 with respect to a college or university's commercial property? Rental property occupied by students or faculty 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, for example, the regulatory requirement to make facilities accessible to handicapped individuals would, under S.2568, apparently apply 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. As S.2568 is written, 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. While Senator Dole and others have testified that this language is intended only as a "limited exception," other witnesses seem to regard it sufficient to meet the "receives support" standard if the Federal financial assistance to a subunit "frees up" non-federal funds to be used elsewhere (Tatel Test., at p.15). Courts thus could conclude on such a theory that 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 -- would be brought within the coverage of the four statutes since the State "receives support" from the

Federal assistance to the university system. The clear contemplation appears to be that 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 department receives a grant from the Environmental Protection Agency (EPA) to study the county's sewer needs, S.2568 would appear to provide that all of the county's operations are subject to all four civil rights statutes 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).

In addition, under the proposed definition 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 would likely bring 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 S.2568 seems to be virtually complete. And, the bill would apply in similar fashion and with equal force to private commercial ventures and enterprises.

Moreover, all successors and assignees or transferees of a "recipient" become, under S.2568, recipients in their own right; as does any entity to which federal funds are extended ". . . through another entity or a person" (emphasis added). 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 Senator Dole and others have testified that this is not the intent, the bill's language simply fails to preclude so broad a reading. It may well be that individuals receiving federal funds escape coverage, but, as I have already indicated, the express protection against coverage afforded by the existing regulations to "ultimate beneficiaries" of federal aid (28 C.F.R. §§ 41.3(d), 42.102(f)) -- such as farms, for example, under certain Department of Agriculture grants -- was not carried over in the statutory definition of "recipient." Thus, the bill is in fact susceptible to the broadest possible interpretation.

2. Enforcement Provisions. In addition to expanding the substantive coverage of the nondiscrimination funding statutes, S.2568 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 is measurably expanded, however.

As to the fund termination provisions, S.2568 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 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 provide "support" for another nonfunded program involved in unlawful discrimination. The new termination provision also admits of the argument that any federal assistance which goes to the entity as a whole necessarily "supports" the discrimination of the component parts and is thus invariably vulnerable to fund cutoff.

This broad potential for eliminating federal assistance programs would severely undermine the original intent of the program-specific limitation in Title VI, which "was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices." Board of Public Instruction v. Finch, 414 F.2d 1068, 1075 (5th Cir. 1969) (emphasis by the court). Nor does this broad interpretation

appear to be consistent with the overall context of the "supports" phrase in the bill itself, the focus of which is ostensibly on limiting, rather than expanding, the scope of funding termination as a sanction for noncompliance. Nevertheless, the bill does not specify in what respect a federal grant to one entity could be deemed to "support" discrimination committed by related entities and consequently implicate the vicarious termination requirement.

It has been stated that such a broad construction of the bill's new language was never anticipated. If, however, Congress truly 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 this formulation.

The alternate enforcement capability through litigation, which is available both to the Government and to private litigants, is also expanded by S.2568. Unlike the existing statutes -- where 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 (North Haven Board of Education v. Bell, supra, note 4) -- S.2568 disregards this limitation, providing broader judicial enforcement capabilities than are available administratively. If a federal agency seeks to enforce through fund

termination, it can, at most, under S.2568, reach only those 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 activities of a recipient, its subunits, subdivisions, instrumentalities and transferees, are reachable by the court -- even when there is no conceivable link between the violation and the federally funded activity. Thus, the Department of Justice (and private litigants) can seek to enjoin activity that plainly would not be subject to fund cutoff by the funding agency. The proliferation of lawsuits that will undoubtedly come from passage of such legislation cannot be overstated, and should prompt some consideration by Congress whether so open-ended an invitation to private attorneys to add measurably to our already overcrowded Federal court dockets will ultimately enhance or impede civil rights enforcement, as so expanded by S.2568.

3. Administrative Concerns. Nor can one overlook the serious administrative complexities that S.2568 presents to the Federal agencies. Agency regulations and paperwork requirements imposed under the four existing civil rights statutes are currently onerous in many respects. S.2568,

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 and impose regulatory requirements.

The result, particularly for universities and state and local governments that typically receive funding from many agencies, would likely be multiple compliance reviews as well as multiple reporting and other regulatory 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 systems, how the fund termination provision would operate if the discriminatory activity existed in a nonfunded component, as

investigated by a referral agency, and there developed a disagreement as to whether the federal funds "supported noncompliance." No attention appears to have been given to this set of complexities by the drafters of S.2568.

Nor has attention been paid to twenty-six Federal statutes that make specific reference to Title VI, Title IX, Section 504, or the Age Discrimination Act. Several of these statutes, including the Revenue Sharing Act and the block grants contained in the Omnibus Budget Reconciliation Act, have broad impact. The drafters of S.2568 have not indicated what effect passage of S.2568 will have on the implementation of these program-specific statutes.

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 S.2568. Nor

can it honestly be maintained that legislation designed to overturn Grove City by making Title IX coverage -- even if expanded to include race, age and handicap -- institution-wide warrants such intrusive Federal activity.

While Congress may well conclude that such legislation is in the Nation's best interest, it should do so fully cognizant (1) that the additional costs of Federal enforcement under a bill as comprehensive as S.2568 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); (4) that with new legislation so dramatically different from the existing statutes invariably comes considerable litigation, leaving the law unsettled for some years; and (5) that whatever shape the Federal funding statutes might ultimately take, this body must, for constitutional purposes, define with precision what conditions it is imposing on the grant of federal funds to states so that, as "recipients," states "can knowingly decide whether or not to accept those funds" as so conditioned. Pennhurst State School v. Halderman, 451 U.S. 1, 24 (1981).

The Department of Justice's review of the foreseeable effects of S.2568 convinces us that the sweeping scope of the language proposed in the bill provides a much broader application than simple reversal of the Grove City decision -- broader, indeed, than extending institution-wide coverage under Title IX to race, age and handicap discrimination as well. The perhaps unintended ramifications of the bill are certain, at best, to create confusion in recipients, agencies and courts. At worst they may include unwarranted interference with important state prerogatives and even lead to adverse judicial decisions as to their enforceability.

It is therefore important to tailor S. 2568 to its stated purpose and to carefully craft the proposed bill with full attention to the complexities of the undertaking. This can be achieved, in the Justice Department's view, with some modification of the proposed definition of "recipient" and a return of the "pinpoint" provision (i.e., the fund cutoff provision) to its pre-Grove City status.

In addition, the Committee might want to consider using the approach to coverage for state and local governments that was adopted by Congress in the civil rights provisions of the Revenue Sharing Act. The federal funds under that statute go to municipalities without being earmarked for particular use. A presumption attaches that the federal financial assistance is provided to all municipal programs and activities unless the city can show, by clear and convincing evidence, that a particular department or service received no federal funds. If a similar rebuttable presumption existed under S.2568 for State and local funding, the bill's coverage, while still generally applicable to states and localities, would be far more manageable as an enforcement matter.

The Department of Justice stands ready to work with the Committee on these and other modifications of S.2568 so as to align the bill more closely with the stated objectives of its sponsors. It is critically important that legislation of this sort be drafted in precise, clear terms that leave no room for speculation as to its reach and application.

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

WASH. TIMES F-Grove City

ALICE IN POTOMAC LAND

Last February, in what is called the Grove City case, the Supreme Court ruled that federal education laws which prohibit discrimination apply only to those programs receiving federal funds. Grove City College had not been accused of discriminatory practices. It simply refused to sign a federal certificate of compliance on the grounds that the institution receives no government assistance although some students do get tuition grants.

Liberals, as expected, went through the roof, and it wasn't long before Sen. Edward Kennedy, D-Mass., introduced what he calls the Civil Rights Act of 1984. Proponents said it would break no new ground, merely overturn the court's ruling. Nevertheless, you would think by now we'd have learned to be suspicious of a Kennedy bill with an apple pie name and carefully selected Republican co-sponsors.

One person who was not caught off guard is presidential counsel Mike Horowitz. His memo, pointing out that the Kennedy bill does more than overturn the Grove City decision, is circulating the White House. Mr. Horowitz says the bill expands the government's enforcement powers as far as discrimination (race, sex, age, and physical disability) is concerned. It would:

- Bring under federal scrutiny most state and city activities such as bar exams, medical boards, and teacher competency exams. In New York City, the medallion system for licensing taxicabs would be covered, and the federal government could reassign members of the city's police and fire departments to achieve racial balance.
- Cover supermarkets that redeem food stamps. Federal architectural requirements for the handicapped would add a costly burden to the grocer, a burden that would, of course, be passed on to the consumer. Some chains have already threatened to quit accepting stamps if the bill passes.
- Bring all of the state's departments and agencies under federal authority by virtue of the fact that the U.S. government sends assistance to a state university system. Sen. Kennedy himself has admitted the bill's applicability to prisons, museums, and hospitals.

Obviously, the measure is mistitled. The Attorneys Relief Act or the Anti-consumer Act of 1984 might be more appropriate.

On Capitol Hill, election year caution about any bill with "civil rights" in the title means that the measure will pass handily through the House next week and the Senate shortly thereafter. Private meetings between the administration and congressional Republicans produce little more than hand-wringing even as new potential horror stories begin to emerge.

It is generally conceded that farmers will be covered. Unions, worried that the federal government will override provisions in labor contracts, are now meeting on it. Most disquieting for lawmakers is the discovery that rabbinical schools, which take only male applications, would have to meet sex discrimination tests. Even those who say, "Fine, women should be rabbis, too," might wonder what business it is of Congress to change religious doctrine.

Some senators, trying to appease farm constituents, want the Agriculture Committee to hold hearings on the Kennedy bill. But they know the measure will sail through the Senate just the same. Sen. Dole is a co-sponsor, although his concern for the handicapped is understandable. The name of Majority Leader Howard Baker is also on the bill, but he is only handicapped by a staff that failed to point out the bill's ramifications.

In the end, it will be left up to the president to decide whether to stop the bill by vetoing it, and that would take an act of political courage unlikely in an election year. Besides, Mike Deaver sits at President Reagan's elbow, not Mr. Horowitz. Alice would be willing to bet that Mr. Deaver will point out how policing the new law could lower the unemployment rate.

What Sen. Kennedy has done is bring us one step closer to the day when anyone suspected of harboring a personal prejudice can be hauled into court. It really is 1984 after all.

'84 civil rights bill hit as 'ambiguous, broad'

By Dave Doubrava
THE WASHINGTON TIMES 6/16/84

Civil rights legislation designed to overturn a controversial Supreme Court decision could extend the federal government's reach deep into state and local education matters, two top administration officials told a Senate subcommittee yesterday.

Terrell H. Bell, the secretary of education, and the Justice Department's top civil rights lawyer, William Bradford Reynolds, said that "ambiguous language" and a broad-brush approach to the legislation could cause a hornets' nest of court suits and problems in the administration and enforcement of Title IX programs and other civil rights laws.

They stressed, however, that the administration is "fully in accord" with proposals to apply civil rights laws equally and supports efforts to overturn the high court ruling which narrowed that civil rights coverage.

After a sometimes stormy subcommittee session, however, the two officials and the senate panel struck a truce of sorts, agreeing that the best way to proceed would be to work together to rewrite the bill to everyone's satisfaction so it has a chance to pass Congress this session.

And despite frequent disagreements between the administration and Congress over the matter, Republicans and Democrats, conservatives and liberals, seem to agree that Congress must act to overturn the Supreme Court's February decision in the Grove City College case.

In that case,the high court ruled that Title IX of the Education Amendments of 1972 could be enforced only upon education programs that specifically receive federal funding, and not upon the college as a whole.

Title IX prohibits sex discrimination in any education "program or activity" receiving federal funds. In response to the ruling, Congress is working on the "Civil Right Act of 1984." The bill, passed by the House and cosponsored by 64 senators, would restore the principle that if an educational institution accepts federal funds for any of its programs, all programs and activities of the institution must conform to anti-discrimination laws.

Mr. Bell and Mr. Reynolds, however, sharply criticized the current Senate version, saying its language was so ambiguous that future court rulings could extend its provisions to give the federal government virtually complete control over most public and private institutions which accepted even small amounts of federal funding.

As an example, they said that if discrimination was found in a single program or on a single campus of a multi-campus university system, the bill could result in the cutoff of federal funds for the entire system.

Or, Mr. Reynolds said, the courts might decide that if federal funds were accepted by a state educational agency, all other state agencies — whether involved in education or not — could also lose their funding.

Mr. Reynolds admitted the examples were "worst case scenarios" but said the vague wording of the bill could allow any of the approximately 500 federal court judges to make just such a ruling.

The Senate bill, Mr. Reynolds said, would create "an unnecessary tension" between the principles of equal opportunity and non-discrimination and "limited federal involvement in state and local affairs."

The bill would apply not only to sex discrimination, the basis of the Supreme Court ruling, but also extend protection to the aged, minorities and the handicapped.