CIVIL RIGHTS BILL: CONGRESS MUST SAY WHAT IT MEANS

Congress unquestionably has the right to pass legislation clarifying its intent in civil rights enforcement, if members of Congress feel the Supreme Court's Grove City decision earlier this year flies in the face of that intent. Recent history is replete with examples of badly or ambiguously written legislation which the courts have interpreted in a manner in conflict with congressional intent.

The proposed Civil Rights Act of 1984, regrettably, in attempting to clarify certain aspects of civil rights law, is certain, as currently worded, to create more confusion than it resolves. Congress has a responsibility to write laws that express its intent unambiguously.

Numerous witnesses at congressional hearings, including Justice Department and Civil Rights Commission spokesmen, have raised a number of questions regarding the proposed law which Congress has thus far failed to resolve. If Congress doesn't, the courts will. It would be far less burdensome to society if Congress amended the bills (H.R.5490, S.2568) before them now. The question naturally arises whether the haste in pushing through the bills as currently worded is motivated primarily by a concern for civil rights or election-year grandstanding.

The Civil Rights Act of 1984 amends four existing civil rights statutes: Title IX of the Education Amendments of 1972 (sex discrimination), 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). The Supreme Court has interpreted current law to mean that federal civil rights enforcement jurisdiction only extends to the program or activity actually receiving federal aid. In the proposed law, sponsoring congressmen apparently want to express their intent to extend such coverage to the entire institution or entity of which the program or activity is a part.

The problem is that the bills seem not only to do this, but to extend the scope of coverage far more widely than was presumed to exist--even before the Grove City decision. In effect, the bill would authorize federal agencies and courts to exercise unprecedented power over recipients of federal aid. If this is intentional, it should be made explicit. If not, the wording should be changed.

The bill contains a number of ambiguities. The definition of "recipient" of federal aid, for example, although based on present regulatory definitions, goes beyond them. Federal jurisdiction would be extended not only to the institution or entity conducting a federally assisted program or activity--the bill's alleged intent--but also to all

activities of any entity of which that institution can be considered a subunit. A grant to a town fire department would thus put all other town departments and activities under federal purview even if that town received no other federal aid. (Neither "subunit" nor "entity" is defined in the legislation).

Moreover, a "recipient" according to the bill would not only be a direct recipient of aid but also "any successor, assignee or transferee" of any entity receiving federal aid, either "directly or through another entity or a person." A grocery store accepting food stamps could be said to be receiving federal benefits "through another person" much as a university benefits from tuition paid by a student receiving federal assistance, which the Grove City decision has already determined constitutes aid to the university. Would the proposed law mean "mom-and-pop" groceries would have to install wheelchair ramps and file affirmative action reports? If the grocery's food stamp earnings are used to pay the owner's children's school tuition, is the school a "successor, assignee or transferree" of federal aid? What does this do to the basic legal and economic principle of the fungibility of money?

It is not enough for supporters of H.R.4590/S.2568 to argue that these ambiguities would not be pursued to such ridiculous extremes. Certainly no responsible government agency would do so of its own initiative (nor would it have the funding or staffing to do so). But private parties' ability to pursue such interpretations through the court system almost guarantees a plethora of lawsuits. It is not reassuring that the explicit exclusion from coverage in existing regulations to "ultimate beneficiaries" of federal aid is not part of this legislation's definition of "recipient."

Enforcement is another area where the bill seems to broaden federal powers. Current fund termination provisions are so-called "pinpoint" provisions--they limit fund termination to the particular activity or program evidencing discrimination. The proposed bill provides for termination of all assistance "which supports" the discrimination. "Supports" is not defined, and arguably, federal aid to a non-discriminatory program within an entity can be construed as "supporting" another, discriminatory program because it freed up the entity's resources for the latter activity. Is this broadening of present enforcement powers intentional? These are just a few of the unresolved questions.

Congress, moreover, should consider the philosophical implications of the Civil Rights Act of 1984. The regulatory burden of policing even institutions which do not receive federal funds, do not discriminate and where no discrimination has been alleged entails social and economic costs. It is also a punitive administrative headache for the institutions, for no reason other than that they are presumed guilty until proven innocent. For these and other reasons, Congress should go slowly in acting on this bill to ensure that the law clearly says what Congress intends.

S. Anna Kondratas
Policy Analyst

For further information:

"A Pyrrhic Victory?" Education Update, Spring, 1984, pp. 8-9.
Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Testimony before the Senate Judiciary Subcommittee on the Constitution, May 30, 1984.