Remarks Prepared

for

Robert J. Brown
Special Assistant

to

President Nixon

by
Office of Public Information
Equal Employment Opportunity Commission

I want to talk to you tonight about discrimination in government. We all know that it exists. Most of you are familiar with the reports of the U. S. Civil Rights Commission which have found grossly disproportionate underrepresentation of minorities and women in Federal, state, county and municipal governments. Even more shocking is the conclusion of the Civil Rights Commission that discrimination in state and local governments is more pervasive than in the private sector.

While state and local government employees have theoretically been protected by the 14th Amendment's guarantee of equal protection, there was little that the Federal Government could do in the past to help them redress their grievances. Now all that has changed. Congress has acted pursuant to the last sentence of the 14th Amendment and has enacted "appropriate legislation" to insure that all citizens are treated equally -- including government workers.

The Equal Employment Opportunity Act of 1972 was strongly supported by this Administration. Under the law, the Equal Employment Opportunity Commission now receives and investigates charges of discrimination from state and local government employees. In cases where EEOC's conciliation of these charges is unsuccessful, the Department of Justice can sue in Federal Court.

Chicanos and Orientals and Indians are not being hired and promoted in anywhere near the numbers that they should be. And the reasons are to be found not in any notion of inferiority, but in our ~~ancient~~ past history. ~~Let me be more specific.~~

~~One of the major reasons why minorities are systematically cut out of many positions is employers' blind~~ sometimes too much reliance on written tests. ~~The testing industry in America is growing faster than McDonalds is cooking hamburgers. Because tests are relatively easy and cheap to administer,~~ too many employers have turned to them as a panacea for their personnel problems. But too few of these employers have gone to the trouble of having their tests and other screening devices validated to determine whether there is a reasonable correlation between test performance and job performance. ~~In its monumental decision in~~ Griggs v. Duke Power Co., ~~the Supreme Court said:~~

> "What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications....any tests used must measure the person for the job and not the person in the abstract."

The same reasoning applies to the question of minimum educational requirements. If you require a high school diploma for workers on the state road crews, or secretaries

in the civil service, or any other job for which skills are needed but that piece of paper isn't, you are excluding some minority group members who have not had so good an opportunity to get the diploma as whites. It's unfair, it's illegal, and it's a practice that we are going to fight with every resource at our command.

You know, we suffer in this country from a bad case of "credentialism." We seem to think that the more degrees a person has, the more qualified he or she is for any job. It just isn't true. In fact, some studies have shown just the opposite for certain jobs: where the work is dull and repetitive, the better-educated employees are less productive.

Another example of illegal disparate effect is the use of arrest records as a barrier to employment for many jobs. Too many employers forget that an arrest is not a conviction and that we have had an unfortunate history of arresting minority group members at a disproportionately high rate on what are often questionable grounds. I do not mean to imply that a conviction is a valid barrier to employment. At least in many situations, it too may be illegal. Minorities have a higher rate of convictions partly because they have not been able to afford the same high-priced legal assistance that whites have. I suppose a bank could legally refuse to hire

Let me add up some of these points I've been discussing and I think you will see what a revolutionary effect the new law is going to have. We have a law which now covers almost the entire national labor force including 10 million State and local government workers. It is a law which incorporates most of the existing case law, a case law in which the concept of employment discrimination is becoming more and more sophisticated. It is a law which can and will be enforced with effective sanctions. The EEOC and the Department of Justice are committed to go into court to protect the rights of charging parties, whether they be employees of private employers of State and local governments. As the remedies, including back pay awards, become more apparent, others will be encouraged to assert their rights.

I believe that the combination of these factors is going to bring about the greatest change in State and local jobs since the civil service laws were enacted a century ago. It's about time.

But, of course, the states should not be sitting back waiting to be sued so a court can tell them how to correct their employment practices. You should be taking affirmative steps today.

Affirmative action is a very complex area and I could spend all ~~night~~ day suggesting things that state governments + private employers should be doing to improve their equal employment posture.

I'm not going to do that because there isn't time, because you already know many of the methods, and because the technical assistance facilities of the Equal Employment Opportunity Commission are available to any employer -- including state governments -- which asks for them.

But there is one thing I want to be understood, and that is the difference between affirmative action and quotas. It seems that every time I bring up the matter of affirmative action, someone confuses the issue by suggesting that I am proposing a quota system. For one thing, quotas are specifically forbidden by the Civil Rights Act and they have been forbidden since 1964. As you know, President Nixon recently ordered a review of all Federal programs in this area to be sure the Government was not imposing quotas. I hope that by dealing with this issue head on, I can clear up a few misconceptions.

Quotas are bad. Almost no one is for them. Goals and timetables which establish a framework for affirmatively remedying the effects of past discrimination are not quotas. They are legitimate means for achieving equal employment opportunity. The popular view has been that talking about goals and timetables is a euphemism for quotas. Concomitantly, this view holds that President Nixon's ban on quotas means an abandonment of goals and timetables and a weakening of the Federal civil rights enforcement effort. This is not true, and it was not at

all what ~~Mr. Nixon~~ the Pres intended.

On the contrary, we oppose quotas precisely because they are discriminatory, because they are illegal and because they do not work.

On May 11, 1971, Mr. Robert Hampton, Chairman of the Civil Service Commission, sent to the heads of all departments and agencies a memorandum spelling out Civil Service policy on the matter of Goals and Timetables for the hiring of minorities and women in federal employment. He defined "goal" as a realistic objective for an agency to achieve on a timely basis within the context of the merit system of employment. He indicated that the establishment of goals and timetables is a useful management concept, and should be used by federal departments and agencies "where they will contribute to the resolution of equal employment opportunity problems." The phrase "resolution of equal employment opportunity problems" in plain English means the improvement of the employment picture to show more ~~racial~~ minorities and women all the way through the employment structure, and that his statement meant that "goals and timetables" ~~should~~ can be used as a tool to increase the numbers of minorities and women at all levels of federal service.

But what is a "goal" or a "timetable." Mr. Hampton made a very clear distinction between a "goal", which he defined as realistic employment objective, and a "quota", which he defined as a required number or proportionate

representation without regard to merit system requirements. He indicated that quotas are incompatible with merit principles, and, when they are defined in this manner, of course they are. No one is suggesting that any organization be it a private employer, or a state government, or the federal government, be required to employ people who cannot adequately do the job.

But where an employer has taken no steps to achieve equal employment opportunity, the chances are that his workforce will reflect that lack of effort. Even if that employer stops discriminating today, the effects of his past discrimination could linger on for years. Thus, for example, if promotions are made by seniority, and minorities and women have been excluded in the past, future promotions will continue to be discriminatory as the presently employed white males continue to move into the best jobs.

This is the sort of situation where Federal courts have been able to provide an effective remedy. If that remedy forces an employer to rectify his past wrongs by some affirmative hiring program, so be it. This administration supports the law of the land and will continue to bring before the courts employers and unions which steadfastly resist implementation of EEO programs. And in that group of employers we include any state or local government which has made an insufficient EEO effort.

That's not imposing a quota. That's simply announcing that we expect state and local governments to obey the law

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While state and local government employees have theoretically been protected by the 14th Amendment's guarantee of equal protection, there was little that the Federal Government could do in the past to help them redress their grievances. Now all that has changed. Congress has acted pursuant to the last sentence of the 14th Amendment and has enacted "appropriate legislation" to insure that all citizens are treated equally -- including government workers.

The Equal Employment Opportunity Act of 1972 was strongly supported by this Administration. Under the law, the Equal Employment Opportunity Commission now receives and investigates charges of discrimination from state and local government employees. In cases where EEOC's conciliation of these charges is unsuccessful, the Department of Justice can sue in Federal Court.

This increased coverage will undoubtedly increase the already torrential flow of discrimination charges being filed at EEOC offices around the country. Since we want the EEOC to have the staff and funds needed to handle its workload efficiently, the Administration has asked Congress for a substantial budget increase for EEOC.

With an adequate budget and the enforcement powers it now has, the EEOC will be an effective advocate for state and local government employees now protected by the new law.

But what kind of a law is it that Congress has enacted? It's a law that has already provided the courts with a vehicle to refine the concept of discrimination over a period of seven years, and indeed a law which reaffirms the direction the courts as well as the Commission have taken in understanding and refining the concept of discrimination.

Back when the Civil Rights Act was passed in 1964, most of us thought of discrimination as some kind of economic bolt of lightning thrown by evil employers at certain other people they didn't like because of the color of their skin, or their accent, or their religion. That kind of discrimination is typified by the sign on the personnel office door which says "whites only" or separate rest rooms and drinking fountains.

Well, you don't see much of that anymore and it's a good thing we've been able to get rid of it. But, perhaps because we've almost licked that kind of discrimination, we've gradually become aware of a much bigger, more insidious problem. It's called different things by different people: systemic discrimination, institutionalized bias, disparate effect. Take your pick. Whatever you call it, it means any practice by any employer, more than likely a neutral one on its face, which ends up putting any class of people -- such as blacks or women -- at a disadvantage. What makes this kind of discrimination so hard to combat is the fact that most employers are not even aware of it. By and large, the employers in this country think they are making an honest effort to promote equal opportunity because most of them are trying not to actively threat people differently. "I'll hire any qualified person who walks in that door, regardless of color or sex," or "I wish I could find a qualified black or woman to fill that position" are just two of the oft heard phrases in the business community which may be well-meaning enough but carry a hidden, and very destructive agenda.

Few employers may <u>want</u> to discriminate. Most of the more obvious barriers which I spoke of have been torn down. Yet the statistics still show that blacks and women and

Chicanos and Orientals and Indians are not being hired and promoted in anywhere near the numbers that they should be. And the reasons are to be found not in any notion of inferiority, but in our nations history. Let me be more specific.

One of the major reasons why minorities are systematically cut out of many positions is employers' blind reliance on tests. The testing industry in America is growing faster than McDonalds is cooking hamburgers. Because tests are relatively easy and cheap to administer, too many employers have turned to them as a panacea for their personnel problems. But too few of these employers have gone to the trouble of having their tests and other screening devices validated to determine whether there is a reasonable correlation between test performance and job performance. In its monumental decision in Griggs v. Duke Power Co., the Supreme Court said:

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Another example of illegal disparate effect is the use of arrest records as a barrier to employment for many jobs. Too many employers forget that an arrest is not a conviction and that we have had an unfortunate history of arresting minority group members at a disproportionately high rate on what are often questionable grounds. I do not mean to imply that a conviction is a valid barrier to employment. At least in many situations, it too may be illegal. Minorities have a higher rate of convictions partly because they have not been able to afford the same high-priced legal assistance that whites have. I suppose a bank could legally refuse to hire

a convicted embezzler; but for anything less obvious, an employer had better be pretty sure of his grounds.

Everything I have said about testing, educational criteria, arrest and conviction records applies in the same way to the matter of garnishments. It also creates an illegal disparate effect to rely on word-of-mouth referral for recruitment where the present workforce is predominantly white and male, -- and I think that applies to every state government and most local governments. The refusal to hire women with pre-school age children, when men with such children are hired, has been illegal since a Supreme Court decision two years ago. And maintaining minimum height and weight requirements for state troopers or any other state employees creates an illegal disparate effect regarding Spanish-surnamed Americans, women and Orientals.

All of these things I have been talking about are examples of employment practices which are applied "equally" -- that is, they are applied to everyone regardless of race, sex, religion or national origin -- yet every one of them has been declared illegal by the courts because they serve no legitimate business purpose and they exclude large classes of people.

And allow me to reiterate the point that we don't have to prove any intention to discriminate. Good faith and motives don't count when we take you into court. All that judge wants to know is: can you show any real necessity for the practice and does it exclude any protected class of people.

As you can see from what I've said, illegal employment discrimination is, almost by definition, class discrimination. That means that a charge of discrimination filed by, for example, a black man, is really filed on behalf of every black person who works for, or seeks to work for, your government. You can see how this leads to sweeping awards of damages and other relief to bery large numbers of people. And state governments are such large employers that just one major court order could make quite a dent in a state budget. You might have a hard time explaining that to the taxpayers who elect you.

Let me tell you a few other things about this new law that Congress has passed. It's a law which allows people to establish a prima facie case of discrimination on the basis of statistics. And the equal employment statistics of most governmental bodies are pretty bad. It's also a law which allows charges to be filed on behalf of individuals by some other person or group (a union, for example) so no person need be intimidated about

having his grievance brought to the EEOC. It's a law which recognizes the legitimate rights of women. And I predict that women are going to make gigantic gains in their representation at the higher levels of the workforce. Nowhere is this going to be more evident than in public sector jobs.

Finally, the new law is one which recognizes that the courts may take broad remedial action to correct discriminatory systems. The courts will award back pay to individuals and entire classes of people; they will award attorney's fees; they will rewrite collective bargaining agreements and, when it is necessary, they will prescribe preferential hiring programs. Of course, the courts will also grant sweeping injunctive relief to stop any practice which is illegal. Thus, for example, under the new law, a court could enjoin an entire state government from using any screening devices, such as tests, which had not been validated.

Let me add up some of these points I've been discussing and I think you will see what a revolutionary effect the new law is going to have. We have a law which now covers almost the entire national labor force including 10 million State and local government workers. It is a law which incorporates most of the existing case law, a case law in which the concept of employment discrimination is becoming more and more sophisticated. It is a law which can and will be enforced with effective sanctions. The EEOC and the Department of Justice are committed to go into court to protect the rights of charging parties, whether they be employees of private employers of State and local governments. As the remedies, including back pay awards, become more apparent, others will be encouraged to assert their rights.

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This is the sort of situation where Federal courts have been able to provide an effective remedy. If that remedy forces an employer to rectify his past wrongs by some affirmative hiring program, so be it. This administration supports the law of the land and will continue to bring before the courts employers and unions which steadfastly resist implementation of EEO programs. And in that group of employers we include any state or local government which has made an insufficient EEO effort.

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as any other employer would and we will take the same legal action we would against a private employer where it is indicated.

State governments should be taking affirmative action specifically directed at improving their EEO statistics. And that action should be within specific time frames established for their improvement. You are not going to make much progress until you do that. A bunch of lofty goals will get you nowhere. All the good faith in the world may get you to the same place. Don't rely on the good intentions of lower-level supervisors to change systemtic discrimination. Intentions and attitudes are not enough to turn the tide of history. Results are what count -- with us and with the courts. You must not only do, but you must do enough to make a difference. And the job won't get done unless the governor of each state makes it his or her personal business to see that the job gets done.

Government must be the prime mover in the area of equal employment opportunity. Private industry is watching and learning from us. The President, through his Executive Orders and statements, has made a solemn commitment to eradicate discrimination in the Federal Government. I challenge you to do the same at the state level.