Fair Employment: The Machinery Continues to Rust

by Timothy H. Ingram

Black people didn't really disappear during this latest election campaign. It just seemed that way because they played a different role than the one we'd grown accustomed to over the past dozen years. Instead of civil rights and discrimination, the new issues were busing, quotas, and "reverse discrimination." To hear Richard Nixon tell it, quotas had become a more imminent danger to the body politic than racism itself. "Dividing America into quotas is totally alien to the American tradition," he said. "The way to end discrimination against some is not to begin discrimination against others."

The spectre this called up was that of the "New Unemployables"—the white males who must watch with faces pressed against the glass as blacks and women troop in to take their jobs. No better symbol was available for this plight than Averell Harriman, who could not even get a seat at the Democratic convention because he did not fit the ethnic recipe the rule books demanded. Using that convention as a warning of what the quota system might do to America, Nixon and his surrogates played deftly on fears they helped create.

Admittedly, the time may someday come when the country must wrestle with the hardest questions of quotas and discrimination. Employment, unlike schools or neighborhoods, is a finite pie, and if one group is to have a bigger piece, someone else will have to do with less. Will minimum quotas for some people (blacks or women) mean ceilings for others

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(WASPs and Jews)? Is it fair to exclude more qualified people, simply because they don't fit the racial mix? How can the racial balance be changed in times of tight job markets? Is discrimination any more palatable when applied against whites than it is when directed against blacks?

But the time when these worries should make the government put the brakes on its fair-hiring programs is not here yet, no matter what nightmares the political speeches inspired. Far from ramming unskilled black/women/Chicanos into the nation's bluechip industries, the government's hiring programs have been plagued with more familiar problems: a marshmallow-soft touch in dealing with private industries, a rare delicacy in upsetting existing practices, and a refusal to use the few effective tools at the government's disposal. The result has been not reverse-discrimination, but good, old-fashioned, normal discrimination.

In April, 1969, *The Washington Monthly* published a study of the government's elaborate contract compliance machinery, which monitors the fair-hiring practices of every company awarded a federal contract. The findings were disheartening: rust was collecting from disuse. We decided it was about time to check again after all the furor about quotas to see if things had geared up. Results:

- The Office of Federal Contract Compliance (OFCC)—heavy artillery of the government's fair-hiring program—has so far blacklisted exactly three companies for discriminating. All three are tiny enterprises of dubious importance. The 225,000 other plants that hold federal contracts continue to collect their subsidies.
- In its one major test case of anti-discrimination enforcement, the OFCC collapsed, letting Bethlehem Steel walk away the winner.
- Varying standards among government agencies have allowed companies to shop around for the most convenient fair-hiring terms. This has meant, for example, initial approval of an AT&T plan to allot one out of every 1,000 craft positions to women next year.

It Looks Good, But. . . .

On paper, the "affirmative-action" hiring program for government contractors looks as if it has a chance of fighting discrimination. Under Executive Order 11246, to be eligible for procurement and service contracts with the government, a company must not only refrain from intentional discrimination, but must take affirmative steps to hire and promote minorities —setting up timetables for bringing in women, blacks, Chicanos, Puerto Ricans, and other minority groups to yield a balanced labor force. These plans must be filed with, and reviewed by, the various agencies which let contracts; and the whole system is supervised—in some undefined manner—by the Labor Department's Office of Federal Contract Compliance.

The teeth of the program is akin to the Department of Health, Education, and Welfare's fund-cutoff authority, the power to withhold monies from school districts that discriminate. If a contractor does not submit an acceptable plan, or fails to meet his goals, a "show cause" or warning order may be issued; he must prove he has made a "good faith effort" to comply, or face the grim prospect that his government contracts and future bidding rights will be cut off.

Since federal agencies buy just about everything from Wheaties to telephone service to post office buildings, a full third of the nation's labor force is hired by businesses holding federal contracts of one sort or another. A threat to cut off these lucrative droppings because of discriminatory labor practices could be more persuasive than any court order, posing as it does possible devastation of a corporation's economic future.

For example, the Defense Department could single-handedly eliminate sexual and racial job inequities if it wanted to. DOD controls $40 billion

in procurement contracts, about 80 per cent of all government buying. The reason it hasn't ended discrimination is that the Pentagon tries to coax compliance, essentially relying on corporate noblesse oblige rather than trying to bludgeon cooperation, using the full sanctions at its disposal. While the Pentagon canceled over 6,500 contracts between 1964 and 1971 for failing to live up to quality specifications, it did not kill a single contract because of broken fair-hiring promises. A top Defense compliance officer offered this logic: "We're not in the business of terminating contracts. Our purpose is to educate and help companies set affirmative-action programs. If we cut contracts, that would actually hurt minorities, because they're the ones who need the jobs most."

As any student of Henry Kissinger knows, a credible deterrence requires some glimpse of the ultimate terror, an occasional hauling to the edge of the cliff. Most compliance specialists view the denial of federal contracts to discriminating companies as "overkill." "It's like the H-bomb; it's just too powerful to use." That's the favorite characterization given by a number of civil rights enforcement officials to what they term "the ultimate sanction"—cancellation.

Undersecretary of Labor Laurence Silberman, responding to Senate Labor Committee questioning last year, assured the senators: "I want to hasten to say that our program is not enforcement-minded. The idea is that we have such tremendous sanctions that every time we go to use them, the contractor falls into compliance."

In late September, 1972—following the protests of civil rights groups that the Nixon order to eliminate quotas was a code signal to go slow—newspaper headlines announced that the Department of Housing and Urban Development had barred a Philadelphia plumbing subcontractor from further federally-funded construction work. The Labor Department placed the firm, Russell Associates, Inc., on its ineligible list, and proclaimed the action "a strong example of the manner in which federal agencies are carrying out the provisions of the Philadelphia Plan [a quota-hiring plan] and similar hometown and imposed plans throughout the country." Bernard Peltz of Russell Associates groused that his company was never informed by the master contractor about the hiring goals with which he had allegedly failed to comply. Further, Peltz complained that had the one minority member of his eight-man crew shown up for work, his "quota" would have been filled, and he wouldn't have been barred.

A Short List

What the news accounts neglected to mention was that Labor's list of banned contractors consisted of only two other firms: Edgeley Air Products and Randeb, Inc., both small outfits like Russell (under the Philadelphia Plan). That is, only three concerns out of the more than 225,000 contractors, facilities, and sites receiving government largesse have been found discriminatory and, as a result, have been banned. All others—GM, Standard Oil, Lockheed, Southern textile mills—may advertise that they are Equal Opportunity Employers.

Another potentially effective weapon at the disposal of government contract-compliance offices is publicizing which companies are obeying the law and which are not. The Executive Order spells out this sanction. Public identification of noncomplying firms could aid many civil rights groups, perhaps leading toward boycotts and other pressures. But many government agencies won't disclose details on the hiring practices of particular corporations the agency has reviewed. With compliance offices thus aiding and abetting corporate secretiveness, it becomes impossible to evaluate either the companies' or the agencies' enforcement efforts.

Take the Treasury Department. Its compliance section has responsibility for all commercial banks. The Depart-

ment can deny a non-complying bank its status as a federal contractor; that bank could no longer collect taxes, be a repository for federal funds, sell or cash bonds. Treasury has never invoked this procedure against a major bank, although four small banks decided to reject federal business eight years ago when told the alternative was integration.

A recent year-long study of 18 banks in six metropolitan areas by the privately-funded Council on Economic Priorities (CEP) concluded that minorities and women are relegated to low-level teller and credit jobs. It found that in its sample, less than eight per cent of minority employees have jobs above clerical and office positions, compared to 58 per cent of the white male workers.

When CEP researchers asked David Gottlieb, a program specialist in Treasury's compliance section, how Treasury judges whether a bank is in compliance, he told them: "We generally take a bank at its word." Gottlieb said that the Department has found as many as 17 deficiencies at a single bank, but admitted difficulty in checking up on the banks. "They tell me they're doing X, Y, Z," he said. "How do I know they're telling me the truth?" He added that the Department doesn't maintain records on banks which are not in compliance because, "there just aren't that many."

David Sawyer, director of the Equal Opportunity Program at Treasury, says that compliance reviews and affirmative-action plans are not public documents: "They contain information that might be considered proprietary. For example, they contain the salaries of all employees, and I don't think they want David Rockefeller's salary made public."

Bethlehem: The Big Test

"They're bullshitting us. The Labor Department, the Equal Employment Opportunity Commission, they comes down and talks to us, but they don't do a damn thing. They find the company in violation of civil rights laws, and then they don't move. The government is just unwilling to deal with the problem. Wirtz [Secretary of Labor under Lyndon Johnson] said we'd been discriminated against so many years he only wished we'd brought a complaint before *his* administration was in office. He didn't want to handle it—and neither did Shultz or Hodgson, Nixon's men."

That's black steelworker Johnny Fair's assessment of federal equal-employment enforcement. The 40-year-old Fair is a mechanical helper and union grievance committeeman at the Bethlehem Steel plant at Sparrows Point, Maryland, about 10 miles outside Baltimore. He has reason to be cynical. First hired by Bethlehem in 1955, he was assigned to an all-black labor unit in the acid plant, making sulphuric acid in the coke ovens department. Eighty per cent of the blacks at the mill are still segregated in black or predominantly black departments, in the hottest, dirtiest jobs—in the ovens, the blast furnaces, the laboring units at the open hearth. The company's seniority system has the effect of locking these workers into the dead-end jobs they were initially forced into five, ten, and even twenty years ago. If they attempt to advance into one of the better units now integrated and open to them, they lose their seniority and risk being bumped in any subsequent cutback. So many stay frozen where they are.

In 1968, the Labor Department's compliance office threatened to cancel Bethlehem's $250-million of government contracts unless Bethlehem scrapped alleged discriminatory policies and revamped its seniority system.

From the start, the move against the giant steel concern was plagued by the Labor Department's own clumsiness. The panel set up to hear the case took almost two years to reach a decision. The three-man panel could never get together more than one or two days a month. Ultimately, Spar-

rows Point was found to be not in compliance with federal anti-bias regulations. A recommendation calling for a limited interim plan was sent to Labor Secretary James Hodgson for his approval. An aide to Secretary Hodgson announced that he expected a relatively rapid decision, since the case against Bethlehem had been "dragging on" for several years. That was Christmas, 1970. The case has been sitting on Hodgson's desk ever since.

Even Labor Department officials find it hard to take civil rights sanctions seriously after the Bethlehem cave-in. It was blatantly political. Hodgson had numerous face-saving options. He could have given the company another 30 days to improve, or face debarment. Or, he could have either approved the less vigorous panel plan (already agreed to by Bethlehem) or overruled the panel, finding no evidence of discrimination—in either case, at least clearing the way for individual workers or the Justice Department to take their cases to the courts.

But there was an additional item. Bethlehem's principal witness during the hearing was its assistant manager of industrial relations, Richard F. Schubert. In 1971, while the recommendation was still on Hodgson's desk, Hodgson named Schubert his executive assistant, and later Solicitor of the Department. Even though Schubert may be insulated from the Bethlehem case, the choice of a man with such potentially conflicting interests can only underscore Hodgson's moral and legal insensitivity to the issue.

The five-year effort to use contract cancellation to compel an end to Bethlehem policies that allegedly perpetuated racism sums up both the potential and the ultimate failure of federal contract compliance. Bethlehem was not just one disaster following a string of victories; Bethlehem has been the *only* major industrial company to be taken to the mat by Labor through the hearing process. The case was to have been *the* test case of the government's mettle. The steel firm has simply gotten up and walked away, leaving Labor to wrestle with itself. Companies waiting in the wings must have enjoyed the show.

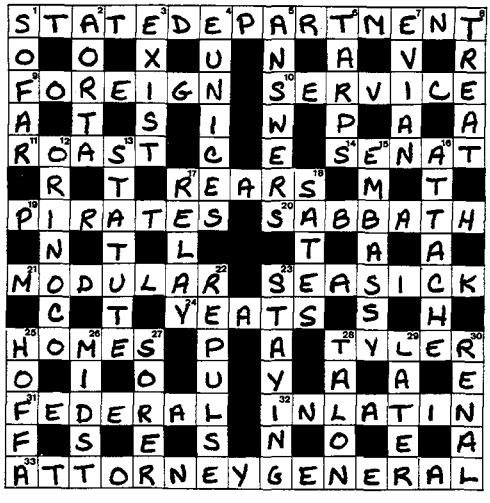
Whipsaw

It would be one thing if the compliance agencies were just another group of malfunctioning and sputtering bureaucracies. But in a number of instances they threaten to undercut the meager advances made by other civil rights cops, particularly the Equal Employment Opportunity Commission, and its suits under Title VII of the 1964 Civil Rights Act.

The affirmative-action plans approved by contract-compliance specialists are often weaker than those the EEOC or a plaintiff in a suit could achieve in court with Title VII. This naturally tempts companies to shop around for the most attractive deal from the government and play one agency off against the other.

Washington attorney Thompson Powers, who has represented a number of corporations in fair-employment suits, complains that there is often a rivalry between field staff members of the EEOC and federal procurement officers. Conceivably, this might lead to even stricter re-

Answers to November puzzle:



quirements, as the agencies compete with each other. In fact, it has more often worked to the companies' advantage. The AT&T case is a good example of this "whipsaw" effect:

"The Bell monolith is, without doubt, the largest oppressor of women workers in the United States." This is the thrust of over 17,000 pages of testimony already filed by EEOC attorneys before a special Federal Communications Commission (FCC) hearing. Since January, 1971, the EEOC has been pressing its case against the communications giant, arguing that the FCC should turn down any rate hike requested by AT&T because of the company's alleged pervasive racist and sexist job discrimination.

Segregation-by-sex is virtually complete within the system. The 400,000 women who work for the Bell System are either telephone operators, representatives, or clerical workers. Virtually none have filtered into the higher-paying craft jobs (phone installers, line workers, cable splicers).

A Woman's Place is in the Nunnery

This is no accident, for AT&T has a dual hiring system. Men and women are funneled through separate employment offices, take separate batteries of tests, have segregated job interviews, and meet different hiring standards. Women with low skills, for example, are recruited with special vigor, on the theory that they are better suited for some of the operator-type positions. Bell advertisements have so identified operators as women that it is hard for the public to imagine a man in the job. Ninety-nine per cent of the operators are women, and the department is aptly dubbed a "nunnery" by Bell officials.

In the managerial positions, one third of the jobs are held by women. This is not quite what it appears, however, for nearly all the women managers (94 per cent) are stuck at the lowest managerial level. In the higher positions, only 31 of the 2,650 managers were women in 1971.

Early this year, while the Equal Employment Opportunity Commission was presenting its case downtown before the FCC, Bell System executives decided to draw up a company-wide minorities plan and sell it to compliance officers at the Government Services Administration (GSA), the federal purchasing agency. John J. Brosnahan, GSA's contract-compliance director, says, "AT&T called and asked us, 'Can we sit down and develop a model—a guide—that the system can use in all its operating companies?' "

According to Equal Employment Opportunity Commission staff members, an insider at GSA called and tipped them that Bell had presented a proposed action plan to GSA and was jockeying for approval. The same Equal Employment sources claim they had been kept in the dark about the negotiations and that when they had previously asked the phone company for copies of the action plan they were reportedly told, "It's not finished yet." David Copus, who heads the "AT&T task force" at EEOC, flew to New York to Bell System headquarters to personally and unexpectedly ask for the plan after learning of its existence. He was told it wasn't available.

Going Slowly

One of the key points of dispute in the AT&T affirmative-action proposal was the hiring goal for women as installers and line workers. Even if the company hired only women, and not a single male, to fill openings in the plant department over the next 15 months, women would still total less than one per cent of the employees in these craft jobs. GSA compliance director John Brosnahan argued that at least 38 per cent of the new employees should be women (since women make up 40 per cent of the national work force). Bell's plan aimed at a three-percent intake of women. A 10-percent compromise

goal was set, which would yield a one-tenth of one per cent female total in craft jobs.

A second major item was whether back pay should be given for wages lost as a result of denying access to better salaried positions. The phone company hung up on claims that women as a group were discriminated against, and refused to provide any back pay.

The Byzantine politics became more complex this fall, as the Labor Department's contract-compliance office announced it was assuming jurisdiction of the AT&T case on September 28, and would decide whether to approve the plan, reject it, or hold more hearings after the election in November. Asked whether the take-over meant AT&T should defer implementation of the plan, a Labor spokesman said: "What they do is at their own peril."

The attitudes the government brought with it to the AT&T bargaining table may have influenced the deal it got. Contract-compliance officers often say they are in a stronger position than other civil rights enforcers since they do not have to amass definite legal proof that a company discriminates. They can require affirmative-action programs even if they can't prove obvious bias. Unfortunately, this legal edge has had a perverse effect: since the officers don't have to prove a case, they often fail to gather any of the evidence at all. So, when they sit down to bargain, they are more likely to succumb to the company's explanations. In the AT&T case, Brosnahan didn't bother to look at hiring data the EEOC had collected during the last two and a half years. When AT&T started denying that women were discriminated against as a class, Brosnahan didn't have much to say in reply.

Further, many of the officers have, at best, a vague notion of what the law requires. "It's not my job to enforce Title VII of the Civil Rights Act," one beleaguered compliance specialist snapped. Not only do the nuances of recent court decisions escape these men, but the effects of a "neutral" hiring policy—which perpetuates past discrimination—seem too fine for them to detect.

The Professor As Hardhat

The compliance effort subjected to the greatest attack has been one of the few aggressive programs: HEW's demand that colleges open their academic, administrative, and clerical staffs to more women, blacks, and other minorities. Over the past year, HEW has temporarily suspended some $23 million in federal research grants to 14 major universities, including Columbia and Michigan, for lack of cooperation.

The program was open, initially at least, to attacks of arbitrariness. HEW's Office of Civil Rights appeared insensitive to the differences between universities and the construction industry and seemed to be applying wholesale to faculty members the same standards it used for hard-hats under the Philadelphia Plan. The

assumption apparently was that qualified candidates would be equally available, whether they were carpenters or physics professors. The burden was placed on the universities to put together attractive compliance reports and propose hiring goals. Funds were withheld, not after a hearing and a finding of discrimination had been made, but because colleges had failed to come up with adequate plans. When forced to clarify their hiring goals, the schools found the distinction between "goal" and "imposed quota" a fine one.

HEW simply had not counted on the resistance and hostility it encountered from the universities, however. Colleges refused to open sacrosanct candidate-evaluation files to federal evaluators wanting to check hiring standards. Most universities had no equal-opportunity coordinators, and had assigned the task to committees of history or political science teachers who had little experience in minority recruitment. Some university presidents seriously suggested the government should *pay* the schools the cost of evaluating their minority programs.

HEW was trying to advance into new enforcement waters. Should, for example, schools be compelled to hire not "qualified" candidates, but those "qualifiable?" Might they, for instance, hire a black biologist with a master's, rather than a white Ph.D., and train the black in a doctoral program as he teaches? HEW was alone, and pushing. It received no backing from civil rights groups, exhausted from the busing contest, and no support from other compliance agencies. University professors, with ready access to the media, started writing and complaining. The result was Nixon's August 17 announcement of a campaign to end quotas.

Quotas or Not?

The campus contest illustrates some of the pragmatic and philosophical quarrels over quotas. Compliance officials deny they are applying quotas, and use words like "goals" and "timetables." They say these are not absolute quotas, because the employer can show extenuating circumstances ("good faith") when the "goals" are not met, and because the percentage of minority workers in the population is not the only factor considered in setting goals.

That's not completely honest. Quotas, in Nixon's pejorative sense, are not being applied—an employer is not required to haul just any woman or black or Chicano off the street to fill his rainbow of jobbers. What affirmative action means, instead, is this: with a 10-percent minority goal, 10 job openings, and 20 candidates, when it comes down to the last position to be filled and no minoritiy person has been hired, with all else equal, a preference will be given to the minority applicant. And, if abuses occur, the campus crusade is proof enough that whites have more means to protect themselves than blacks, with access to media, public opinion, and government review.

The line between goals and quotas is fine, and easy to overstep. Quotas are simpler to administer—one merely looks at the numbers. Goals are subtler, but achieve the same result if properly used. The snarl is that civil rights enforcement is an area where nuances and signals are everything—and one can only wonder whether this Administration can appreciate those subtleties.

The heart of Nixon's pitch is the idea that "quotas are anti-ability whenever applied." Underlying this is the glib assumption that hiring and promotion are now based on merit, and so must remain untouched by meddlesome government-types. But word-of-mouth recruiting, nepotism, who-you-know, and evaluation of character, stability, and ability to relate are criteria which have worked against blacks and women for years, and still do. By comparison, the dangers of reverse-discrimination are not yet too frightening. ■

Whizzer White and the Fearsome Foursome

by Robert Zelnick

As if to give a sign of what Nixon's first term has meant to jurisprudence and to hint what the next four years might bring, the Supreme Court ended its 1971-72 term last June with five major decisions involving the right to speak and the right to hear:

■The Branzburg, Pappas, and Caldwell cases, three of the most important First Amendment cases of recent years, which declared that reporters must either reveal their confidential sources to grand juries during investigations or go to jail;

■*Lloyd Corporation v Tanner*, which allowed the owners of giant shopping centers to keep political campaigners off their premises;

■*Laird v Tatum*, which refused to curb the Pentagon's snooping activities against anti-war activists;

■*Gravel v U. S.*, one of several "Pentagon Papers" cases, in which the Court rejected the proposition that Senator Gravel should be no more subject for questioning about publishing the Pentagon Papers in book form than he would be for reading them in the halls of Congress;

■*Mandel v Kleindienst*, which upheld the Justice Department's decision banning a Marxist scholar from entering the country to speak to an academic group.

Apart from their various constitutional implications, these five decisions made clear a change that had been suspected ever since the eldest of the Warren Court holdovers, Hugo Black, died last year. In each of the cases, Nixon's four appointees—Justices Harry Blackmun, William Rehnquist, Lewis Powell, and Chief Justice Warren Burger—stuck together, choosing government rights over the individual's, protecting property rights against protestors. It is easy to imagine Nixon thinking of them as his Fearsome Foursome, mowing down the opposition of weak knees and bleeding hearts on the way to the goal line. (Last year they voted together 54

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