VII. Perhaps the most dangerous provision in the bill with respect to the bill's vast expansion of Federal authority to places where it hadn't been exercised before is paragraph (4). This paragraph covers "any other entity determined in a manner consistent with coverage provided with respect to entities described in paragraph (1), (2) or (3)."

This provision is vague, open-ended, and standardless. It provides no guidance as to which unnamed entities should be analogized to what entity in the first three paragraphs.

The open-ended nature of this provision permits Federal enforcement officials, private litigants, and Federal judges to fulfill their own policy preferences in particular cases because the statutory scheme created by paragraph (4)'s interplay with the first 3 paragraphs limits the scope of the bill only to the imagination of these individuals. Paragraph (4) amounts to an open invitation to the Federal government to extend its reach virtually without limit throughout American society and for Federal regulators, private litigants, and Federal judges to work their will in places they have never been before.

The bill, for example, would subject to coverage grocery stores or supermarkets participating in the food stamp program. Yet, the Department of Agriculture has never subjected such stores to coverage under these statutes in the past. See letter of Daniel Oliver, General Counsel, Department of Agriculture to Senator Jesse Helms, June 8, 1984. I also want to submit for the record a copy of my letter to the New York Times dated September 22, 1984 which sets forth what coverage for these newly ensnared entities would mean under Section 504.

The analysis of the indirect aid coverage leading to the coverage of grocery stores participating in the food stamp program is as follows: Paragraph 2(A) covers a university which receives indirect Federal aid, i.e., one which enrolls students who themselves receive Federal student aid (Grove City makes this clear, and, of course, H.R. 700 does not overturn that portion of Grove City). Then, paragraph (4) directs coverage of "any other entity determined in a manner consistent with coverage provided with respect to entities described in paragraphs (1), (2), (3)." Thus, the coverage of an indirect aid recipient such as a university in paragraph 2(A) provides the basis of indirect aid coverage in many other instances, by analogy, pursuant to paragraph (4). Accordingly, grocery stores and supermarkets participating in the food stamp program are covered merely by virtue of such participation. This is the same result as obtained under the Civil Rights Act of 1984. 12/

This section also leads to other bizarre results. This can be illustrated in a variety of instances. A letter from counsel to the Knights of Columbus to an aide on the Senate Committee on the Judiciary concerning "The Civil Rights Act of 1984" states:

> Several of [the] local councils [of the Knights of Columbus] may receive some federal financial assistance in connection with their programs for the elderly, and the question could arise whether such assistance is attributable to the national

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12/ See 130 Cong. Rec. H7038 (daily ed. June 26, 1984) (Rep. Simon).

> or regional units of the Knights. As in most fraternal organizations, the relationship between the Knights' national and regional bodies and their local councils is sui generis, involving varying control and independence features. We believe that the legislative history should make clear that in the case of fraternal organizations, local lodges will be treated as units or subunits separate from their national or regional bodies. Otherwise, fraternal organizations will be reluctant to allow their local lodges to participate in such programs, for fear of subjecting the entire organization to complex federal controls. 13/.

How would H.R. 700 affect the Knights of Columbus?

H.R. 700 would clearly subject all of the operations of the entire Knights of Columbus organization and all of its subunits (local councils) to coverage under at least three of the four cross-cutting civil rights statutes whenever even one of its local councils received any Federal aid. This result occurs because of the interplay between "catch-all" paragraph (4) and the first three paragraphs of the bill's definition of "program or activity." Thus, paragraph 2(A) covers all operations of "a system of higher education." A system of higher education can be described as associated entities established for a general, special purpose, i.e., education, performing generally similar functions. These entities are governed, with a varying degree of autonomy and independence, by an over-arching central authority. Many other entities, such as the Knights of

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13/ Letter of Leonard J. Henzke, Jr., to Stephen J. Markman, August 3, 1984.

Columbus, B'nai B'rith, etc., are similarly structured. That is, they have subunits which are accorded a certain amount of autonomy and independence but which perform similar functions aimed at fulfilling common, specific purposes and are governed by a central structure. Paragraph (4) directs that coverage of all of the operations of "any other entity" not listed in paragraphs (1)-(3) be "determined in a manner consistent with the coverage provided with respect to entities described in paragraph (1), (2), or (3)." Thus, the structure of the Knights of Columbus or B'nai B'rith can readily be analogized to a system of higher education, and thereby be subjected to coverage in its entirety if just one subunit, i.e., a local council or lodge, receives any Federal aid.14/

While it is true, of course, that the Knights of Columbus and B'nai B'rith are much different organizations than a system of higher education, the touchstone for coverage under paragraph (4) is not similarity of the entities at issue. Rather, the touchstone is similarity -- consistency -- in the manner of coverage between two entities. Thus, while at first glance, an analogy between a national fraternal organization and a system of higher education seems odd, this is precisely the kind of analogy provided for in H.R. 700.

In effect, the interplay of paragraphs (4) and 2(A) (and perhaps others) establishes a form of automatic "trickle up" coverage as provided in The Civil Rights Act of 1984, but

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14/ Such coverage was not exercised by Federal agencies before Grove City.

avoids the use of "subunits" or "supports" -- terms used in the latter Act which gave rise to opposition to the sweeping nature of the Act. 15/

H.R. 700 also does not exclude "ultimate beneficiaries" from coverage, as most Federal agency regulations do. 16/ The absence of this exclusion, coupled with paragraph (3) and paragraph (4), represents one aspect of the huge expansion of Federal coverage portended by this bill. For example, the failure to exclude ultimate beneficiaries from coverage results in coverage of farmers operating farms receiving crop subsidies. 17/ Congress, however, did not intend that these statutes cover farms receiving crop subsidies 18/ and they had not been so covered by Federal agencies. Yet, many farms are corporations or partnerships or can be deemed a private organization, all covered by paragraph (3), as well as covered under the catch-all scope of paragraph (4). With the absence of the exclusion of ultimate beneficiary in the statute, and the presence of paragraphs (3) and (4), the farmers will be caught in this new Federal net and subject to

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15/ Coverage of "all of the operations of . . . other private organization" [paragraph (3)] could also, independently, yield complete coverage of the entire Knights of Columbus organization when one of its local councils receives any Federal aid.

16/ See, e.g., 7 C.F.R. 15b (Department of Agriculture Section 504 regulation).

17/ This is consistent with the scope of the Civil Rights Act of 1984.

18/ See, e.g., 110 Cong. Rec. 6515 (1964) (Sen. Humphrey) (Title VI).

thousands of words of new regulations, new paperwork requirements, random on-site compliance reviews even in the absence of an allegation of discrimination, the application of a discriminatory effects standard, and burdensome accommodation requirements under Section 504.

Some sponsors of the bill have made the erroneous assertion that Federal agency definitions of "recipient" will remain undisturbed by the enactment of H.R. 700. 19/

The bill, however, does not add the word "recipient" to the four statutes. Paragraphs (1) through (4) of the definition of "program or activity," in effect, lists those entities which become recipients under the statutes amended by the bill. The bill reflects no indication that the term "recipient" as defined in agency regulations has any role to play in enforcing these statutes. This is particularly so once the statutory term "program or activity" is defined as broadly as it is and in terms of the entities listed in paragraphs (1) through (4); at that point, the statutes' scope of coverage, as amended by the bill, is completed. The bill, in short, supersedes current

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19/ 131 Cong. Rec. S1303 (daily ed. Feb. 7, 1985) (Sen. Kennedy) ("The regulatory definition of who or what is a 'recipient' of Federal financial assistance under these laws remains unchanged and the bill does not require any change in it.") See also 131 Cong. Rec. S1310 (daily ed. Feb. 7, 1985) (Sen. Simon); Statement of Congressman Hamilton Fish, before the Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, March 7, 1985, at page 4.

agency regulatory definitions of "recipient" and renders them superfluous, as can readily be seen by looking at one typical agency definition of "recipient":

> The term "recipient" means any State, political subdivision of any State, or instrumentality of any State, or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program. 20/

The redundancy, overlap, and confusion that would result from any effort to overlay agency definitions of "recipient" onto the bill's definition of "program or activity" in establishing coverage would seem self-evident. Indeed, to do so would rob the bill of any clarity it achieves in its second and third paragraphs 21/ and render the bill virtually incoherent. Indeed, even the apparent meaning of paragraph (1) is rendered questionable by the suggestion that the agency definition of "recipient" survives enactment of the bill. For example, paragraph (1) of the bill's definition of "program or activity" deals with state and local government agencies and the

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20/ 34 C.F.R. 100.13(i) (Department of Education's Title VI regulation).

21/ These two paragraphs are reasonably clear -- and in their clarity they demonstrably exceed the scope of coverage some agencies exercised before Grove City. Paragraph four is vague and open-ended, even without reference to agency regulations. Paragraph one is less than clear.

circumstances in which they are covered. What, then, can be added to an understanding of the bill's scope of coverage of these particular governmental entities by referencing the agency regulation's definition of "recipient" as including "any State, political subdivision of any State . . . any public . . . agency . . . in any State. . . .?" 22/

The bill's definition of "program or activity" also includes a "catch-all" paragraph (paragraph (4)). This catch-all provision provides coverage of any conceivable entity "in a manner consistent with the coverage provided with respect to entities described in paragraph (1), (2) or (3)." 23/ Even if the bill's sponsors wish to add express coverage of specific entities listed in the agency definition of "recipient," such as "instrumentality of any state," notwithstanding their implicit coverage under catch-all paragraph (4), they could do so in paragraphs (1) through (3), or by adding a new paragraph, in the definition of "program or activity." There is no need to refer to agency regulations in light of paragraph (4)'s catch-all scope.

Thus, the suggestion of three sponsors that the agency regulatory definition of "recipient" would be viable after enactment of H.R. 700 is puzzling. The purpose of such a claim, however, may be reflected in Senator Kennedy's further statement

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22/ 34 C.F.R. 100.3(f).

23/ Only "individuals" are not covered by the bill's "program or activity" definition.

that, since the agency definitions of "recipient" will be unchanged, "entities or persons, such as farmers, which were determined not to be recipients under prior law because they were the ultimate beneficiaries of Federal assistance would not have their status changed."[2/] Of course, if the bill's sponsors had intended to exclude ultimate beneficiaries of Federal financial assistance from coverage (the overwhelming majority of agency regulations exclude such ultimate beneficiaries), they could have simply inserted that exclusion into their bill. Indeed, their failure to do so in the language of their bill, in the face of their acknowledged awareness of that exclusion in agency regulations, is evidence of their intent to discard the exclusion altogether.

In my view, it is likely that a substantial part of the purpose behind the sponsors' claim that their definition of recipient is viable after their bill would be enacted is a rhetorical one: they can seek to meet at least some of the criticisms they expect the bill to receive by pointing to agency regulations.

As a matter of statutory construction, however, the far more sensible reading of the bill's plain language, which is the most important guide to the bill's meaning, is that the bill's definition of "program or activity," in its paragraphs

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2/ 131 Cong. Rec. S1303 (daily ed. Feb. [illegible], 1985) (Sen. Kennedy).

(1) through (4), renders agency definitions of "recipient" superfluous and of no effect. Sponsors' suggestions to the contrary, if reflective of the purpose of the bill, would render this bill incoherent.

In conclusion, even as a measure aimed at restoring the scope of coverage undertaken by some Federal agencies prior to Grove City, H.R. 700 is fundamentally and fatally flawed. Its scope of coverage is way, way beyond that of even the broadest coverage undertaken by Federal agencies. The failure to exclude "ultimate beneficiaries" from coverage, the notoriously broad paragraph (4), and other provisions of the bill, render it an unworthy vehicle even for the purposes publicly stated by its sponsors.

The Commission statement also points out instances where both H.R. 700 and S. 272 conflict with the Commission's objectives. What I wanted to do in this testimony was to demonstrate how, even as a fulfillment of its sponsors' objectives, H.R. 700 is so fundamentally flawed.

MR. CHAVEZ. Thank you, Mr. Chairman.

As Chairman Pendleton has indicated, staff has undertaken analyses of both H.R. 700 and S. 272. We would like to submit these memoranda for the written record of these proceedings.

Ms. CHAVEZ. My testimony is based largely on these memorandums. I intend to set forth staff views as to where H.R. 700, the subject of this hearing, extends coverage even beyond the broad scope undertaken by some Federal agencies before the *Grove City* decision.

First, I would like to make some preliminary observations, however.

H.R. 700, the so-called Civil Rights Restoration Act of 1985, is the third bill produced in a 9-month period by largely the same group of congressional sponsors with the support of the Leadership Conference on Civil Rights. Each bill is significantly different in wording and structure.

Yet each bill was described on its introduction by its sponsors as the appropriate solution to the *Grove City* decision.

By this time it should be clear, as these three very different proposals indicate, that the *Grove City* issue is a difficult matter of legislative drafting, even for those who subscribe to a broad view of coverage under the four cross-cutting civil rights statutes amended by H.R. 700.

Accordingly, criticism of the bill is not a matter of mere obstructionism or scare tactic. Yet there are some supporting the bill who, like a broken record, repeatedly cry that, in the words of Ralph Neas, executive director of the Leadership Conference, "Senators Hatch and Helms and the Reagan administration will employ the same delay and scare tactics they used last year. Indeed, the radical right has already placed the defeat of the measure at the top of their legislative agenda."

I cannot speak for any of those identified by Mr. Neas. I can tell you, however, that any effort to paint critical commentary on H.R. 700 as a scare tactic or part of some radical right scheming is itself a scare tactic which seeks to stifle honest and open debate.

To try to tar those who dare raise questions about a bill labeled "civil rights" and supported by the Leadership Conference as obstructionist or radical is a disservice both to the Congress and the American people. That tactic almost succeeded last year as this bill went through the House of Representatives. But it ultimately failed.

No group or individual has a monopoly of wisdom or knowledge concerning the issues raised by H.R. 700. I hope the criticism of this bill be accepted as constructive and on its merits.

In order to save time, I have chosen in my oral comments to concentrate on the definitions of program or activity in H.R. 700 and the resulting expansion of civil rights coverage these definitions would entail.

Under paragraph 2(A) of the bill, the definition of "program or activity", if one department of a college or university in a system of higher education receives Federal financial assistance, all operations of every college or university in that system are covered.

Prior to *Grove City*, Federal agencies only covered all of the educational activities of the college or university itself, not other colleges or universities in the same system.

This expansive approach to coverage becomes even more significant because paragraph (4) of this section permits judges and executive enforcement agencies to analogize coverage of entities not specifically mentioned by the bill to ones which are so mentioned, such as a system of higher education.

Paragraph 2(B) of the definition of "program or activity" covers local and State educational agencies operating public elementary and secondary schools. It also adds new language not appearing in earlier versions of the bill or in agency regulations covering other school systems.

Accordingly, all of the operations of private elementary and secondary school systems will be covered if any one school in that system receives any Federal aid. Thus, all operations of private religious elementary and secondary school systems will be covered whenever one such school enrolls one or more students for which it receives title I Federal education aid for disadvantaged students or if one school receives other Federal aid.

Prior to *Grove City*, Federal agencies treaded very lightly with respect to private religious schools. Generally, they intruded as minimally as possible on a program-specific basis.

They did so to avoid excessive entanglement and a collision with the first amendment's establishment clause when enforcing these laws with respect to religious institutions.

Such agencies not only covered the individual school receiving aid narrowly, they never sought to review any other school in a private school system.

In short, this provision represents a fundamental, clear, frontal assault on private schools and particularly private religious schools in this country. This part of the definition of program or activity is totally uncalled for if the objective is truly to restore coverage to that which agencies had undertaken before *Grove City*.

As already noted, paragraph (3) subjects to coverage all of the operations of an entire corporation, partnership, or other private organization if any part of such entity is extended Federal aid. This coverage is also excessive in terms of pre-*Grove City* coverage.

Perhaps the most dangerous provision of the bill with respect to the bill's vast expansion of Federal authority to places where it hadn't been exercised before is paragraph (4). This paragraph covers "any other entity determined in a manner consistent with coverage provided with respect to entities described in paragraph (1), (2) or (3)."

This provision is vague, open-ended, and standardless. It provides no guidance as to which unnamed entities would be analogized to what entity in the first three paragraphs.

The open-ended nature of this provision permits Federal enforcement officials, private litigants, and Federal judges to fulfill their own policy preferences in particular cases because the statutory scheme created by paragraph (4)'s interplay with the first three paragraphs limits the scope of the bill only to the imagination of these individuals.

Paragraph (4) amounts to an open invitation to the Federal Government to extend its reach virtually without limit throughout American society and for Federal regulators, private litigants, and Federal judges to work their will in places they have never been before.

The bill, for example, would subject to coverage grocery stores or supermarkets participating in the Food Stamp Program. Yet the Department of Agriculture has never subjected such stores to coverage under these statutes in the past.

I also would like to submit for the record a copy of my letter to the New York Times dated September 22, 1984, which sets forth what coverage for these newly ensnared entities would mean under section 504.

The analysis of the indirect aid coverage leading to the coverage of grocery stores participating in the Food Stamp Program is as follows:

Paragraph 2(A) covers a university which receives indirect Federal aid, that is, one which enrolls students who themselves receive Federal student aid. *Grove City* makes this clear, and, of course, H.R. 700 does not overturn that portion of *Grove City*.

Then paragraph (4) directs coverage of "any other entity determined in a manner consistent with coverage provided with respect to entities described in paragraph (1), (2) and (3)."

Thus, the coverage of an indirect aid recipient such as university in paragraph 2(A) provides the basis of indirect aid coverage in many other instances by analogy, pursuant to paragraph (4).

Accordingly, grocery stores and supermarkets participating in the Food Stamp Program are covered merely by virtue of such participation. This is the same result as obtained under the Civil Rights Act of 1984.

This section also leads to other results. This can be illustrated in a variety of instances.

A letter from counsel to the Knights of Columbus to an aide to the Senate Committee on the Judiciary concerning the Civil Rights Act of 1984 states, and I quote:

> Several of the local councils of the Knights of Columbus may receive some federal financial assistance in connection with their programs for the elderly, and the question could arise whether such assistance is attributable to the national or regional units of the Knights. As in most fraternal organizations, the relationship between the Knights' national and regional bodies and their local councils is sui generis, involving varying control and independence features. We believe that the legislative history should make clear that in the case of fraternal organizations, local lodges will be treated as units or sub units separate from their national or regional bodies. Otherwise, fraternal organizations will be reluctant to allow their local lodges to participate in such programs for fear of subjecting the entire organization to complex federal controls.

How would H.R. 700 affect the Knights of Columbus?

H.R. 700 would clearly subject all of the operations of the entire Knights of Columbus organization and all of its sub units or local councils to coverage under at least three of the four cross-cutting civil rights statutes whenever even one of its local councils received any Federal aid.

This result occurs because of the interplay between the catch-all paragraph (4) and the first three paragraphs of the bill's definition

of "program or activity." Thus, paragraph 2(A) covers all operations of a system of higher education.

A system of higher education can be described as associated entities established for a general, special purpose; that is, education, performing generally similar functions. These entities are governed, with a varying degree of autonomy and independence, by an over-arching central authority.

Many other entities, such as the Knights of Columbia, B'nai B'rith, et cetera. are similarly structured. That is, they have sub units which are accorded a certain amount of autonomy and independence but which perform similar functions aimed at fulfilling common, specific purposes and are governed by a central structure.

Paragraph (4) directs that coverage of all of the operations of any other entity not listed in paragraph (1) through (3) be "determined in a manner consistent with the coverage provided with respect to entities described in paragraph (1), (2), or (3)."

Thus, the structure of the Knights of Columbus or B'nai B'rith can readily be analogized to a system of higher education and thereby be subjected to coverage in its entirety if just one sub unit, that is, a local council or lodge, receives any Federal aid.

While it is true, of course, that the Knights of Columbus and B'nai B'rith are much different organizations than a system of higher education, the touchstone for coverage under paragraph (4) is not similarity of the entities at issue. Rather, the touchstone is similarity, or consistency, in the manner of coverage between two entities.

Thus, while at first glance an analogy between a national fraternal organization and a system of higher education seems odd, this is precisely the kind of analogy provided for in H.R. 700.

In effect, the interplay of paragraphs (4) and 2(A) and perhaps others establishes a form of automatic trickle up coverage as provided in the Civil Rights Act of 1984, but avoids the use of "sub units" or "supports", terms used in the latter act which gave rise to opposition to the sweeping nature of the act.

H.R. 700 also does not exclude "ultimate beneficiaries" from coverage, as most Federal agency regulations do. The absence of this exclusion, coupled with paragraph (3) and paragraph (4), represents one aspect of the huge expansion of Federal coverage portended by the bill.

For example, the failure to exclude ultimate beneficiaries from coverage results in coverage of farmers operating farms receiving crop subsidies. Congress, however, did not intend that these statutes cover farms receiving crop subsidies and they had not been so covered by Federal agencies.

Yet many farms are corporations or partnerships or can be deemed a private organization, all covered by paragraph (3), as well as covered by the catch-all scope of paragraph (4).

With the absence of the exclusion of ultimate beneficiary in the statute and the presence of paragraphs (3) and (4), the farmers will be caught in this new Federal net and subject to thousands of words of new regulations, new paperwork requirements, random on-site compliance reviews, even in the absence of an allegation of discrimination, the application of a discriminatory effects standard, and burdensome accommodation requirements under section 504.

Some sponsors of the bill have made the erroneous assertion that Federal agency definitions of "recipient" will remain undisturbed by the enactment of H.R. 700. The bill, however, does not add the word "recipient" to the four statutes.

Paragraph (1) through (4) of the definition of "program or activity", in effect, lists those entities which become recipients under the statutes amended by the bill. The bill reflects no indication that the term "recipient", as defined in agency regulations, has any role to play in enforcing these statutes.

This is particularly so once the statutory term "program or activity" is defined as broadly as it is, and in terms of the entities listed in paragraphs (1) through (4). At that point the statutes' scope of coverage, as amended by the bill, is completed.

The bill, in short, supersedes current agency regulatory definitions of "recipient" and renders them superfluous.

The redundancy, overlap and confusion that would result from any effort to overlay agency definitions of "recipient" onto the bill's definition of "program or activity" in establishing coverage would seem self-evident.

Indeed, to do so would rob the bill of any clarity it achieves in the second and third paragraphs and render the bill virtually incoherent.

Indeed, even the apparent meaning of paragraph (1) is rendered questionable by the suggestion that the agency definition of "recipient" survives enactment of the bill.

For example, paragraph (1) of the bill's definition of "program or activity" deals with State and local government agencies and the circumstances in which they are covered.

What, then, can be added to an understanding of the bill's scope of coverage of these particular governmental entities by referencing the agency regulation's definition of "recipient" as including "any State, political subdivision of a State, any public agency in any State"?

The bill's definition of "program or activity" also includes the catch-all paragraph (4) earlier mentioned. This catch-all provision provides coverage of any conceivable entity "in a manner consistent with the coverage provided with respect to entities described in paragraph (1), (2) or (3)."

Even if the bill's sponsors wish to add express coverage of specific entities listed in the agency definition of recipient, such as "instrumentality of any State", notwithstanding their implicit coverage under catch-all paragraph (4), they could do so in paragraphs (1) through (3) or by adding a new paragraph in the definition of "program or activity". There is no need to refer to agency regulations in light of paragraph (4)'s catch-all scope.

Thus, the suggestion of the sponsors that the agency regulatory definition of "recipient" would be viable after enactment of H.R. 700 is puzzling. The purpose of such a claim, however, may be reflected in Senator Kennedy's further statement that, since the agency definition of "recipient" will be unchanged, entities or persons, such as farmers, which were determined not to be recipients under prior law because they were the ultimate beneficiaries of Federal assistance would not have their status changed.

Of course, if the bill's sponsors had intended to exclude ultimate beneficiaries of Federal financial assistance from coverage, they could have simply inserted that exclusion into their bill.

Indeed, their failure to do so in the language of the bill, in the face of their acknowledged awareness of the exclusion in agency regulations, is evidence of their intent to discard the exclusion altogether.

In my view, it is likely that a substantial part of the purpose behind the sponsors' claim that the definition of "recipient" is viable after their bill would be enacted is a rhetorical one. They seek to meet at least some of the criticisms they expect the bill to receive by pointing to agency regulations.

As a matter of statutory construction, however, the far more sensible reading of the bill's plain language, which is the most important guide to the bill's meaning, is that the bill's definition of "program or activity" in its paragraphs (1) through (4) renders agency definitions of "recipient" superfluous and of no effect. Sponsors' suggestions to the contrary, if reflective of the purpose of the bill, would render this bill incoherent.

In conclusion, even as a measure aimed at restoring the scope of coverage undertaken by some Federal agencies prior to *Grove City*, H.R. 700 is fundamentally and fatally flawed. Its scope of coverage is way beyond that of even the broadest coverage undertaken by Federal agencies.

The failure to exclude "ultimate beneficiaries" from coverage, the notoriously broad paragraph (4), and other provisions of the bill render it an unworthy vehicle even for the purposes publicly stated by its sponsors.

The commission's statement also points out instances where both H.R. 700 and S. 272 conflict with the commission's objectives. What I wanted to do in this testimony was to demonstrate how, even as a fulfillment of its sponsors' objectives, H.R. 700 is flawed.

Thank you.

The CHAIRMAN. Thank you, Ms. Chavez.

The CHAIRMAN. The next witness is Ms. Mary Frances Berry, Commissioner, U.S. Civil Rights Commission.

Ms. Berry, you are recognized.

STATEMENT OF MARY FRANCES BERRY, COMMISSIONER, U.S. COMMISSION ON CIVIL RIGHTS

Ms. BERRY. Thank you very much, Mr. Chairman.

I was happy to see that we have a ½ an hour or 45 minutes to testify, if we want to. I am only kidding.

The CHAIRMAN. The Chair suggests, however, that we are being very lenient, but I hope that we can expedite it, and I hope that you will summarize and give us the highlights of your statement, if I may suggest, Ms. Berry.

Ms. BERRY. I understand, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. CONYERS. Mr. Chairman.

The CHAIRMAN. Yes?

Mr. CONYERS. After that statement, she may need 45 minutes or twice 45 minutes, and I am for giving her some more time.

The CHAIRMAN. Which witness are you referring to, Mr. Conyers?

Mr. CONYERS. Well, after Ms. Chavez' statement, Ms. Berry may need more time than she thought she would need.

The CHAIRMAN. Well, let's try to restrict the time. I think Ms. Berry is understanding enough to know that when 5 or 6 o'clock arrives, the Chair may be the only person listening to the witnesses.

Mr. CONYERS. I will be here, Mr. Chairman.

The CHAIRMAN. Let us proceed. Thank you, Ms. Berry.

Ms. BERRY. I will proceed as quickly as possible.

Mr. Chairman, I am pleased to respond to your invitation to testify on the Civil Rights Restoration Act of 1985, and I understand that my written testimony will be included in the record. Is that correct?

The CHAIRMAN. Without objection, so ordered.

[Prepared statement of Mary Frances Berry follows:]

PREPARED STATEMENT OF MARY FRANCES BERRY, MEMBER OF THE U.S. COMMISSION ON CIVIL RIGHTS

Mr. Chairman: I am pleased to respond to your invitation to testify on the Civil Rights Restoration Act of 1985. A milestone was reached in the Nation's commitment to equal opportunity when the Civil Rights Act of 1964 was passed with its Title VI, using the receipt of Federal funds as a basis for opening opportunity to persons who were previously denied opportunity on the basis of race. Similar progress was signaled in the enactment of Section 504 of the Rehabilitation Act of 1973, Title IX, and the Age Discrimination Act. Unfortunately, these statutes were not enforced as aggressively as proponents of opportunity would have liked, but the viability of the laws in question remained in force. The Supreme Court's *Grove City* decision was a setback. Congress failed last year to remedy the effects of the Court decision on those who were supposed to benefit from the laws at issue. The complaints ignored, or resolution of complaints and investigations delayed in the Department of Education give testimony to the practical effect of the Court's decision.

Last year I testified, based on Department of Education records, that since *Grove City* was decided, under Title IX at least 23 education complaints involving large institutions had been closed because it was not clear whether the alleged discrimination occurred in activities funded directly by the Federal government. They were in the areas of admissions, student services, and student support services. In six instances, the scope of compliance reviews was narrowed, and eighteen other compliance reviews and five complaint investigations had been interrupted for redefinition. In addition, nine cases involving elementary and secondary institutions and 46 involving postsecondary institutions were under review to determine whether they could proceed in view of the decision.

I testified further that since the *Grove City* decision, in OCR-Education under Section 504, five complaint cases and one pending compliance review had been narrowed as a result. Seven cases were being reviewed due to the decision to see if they could go forward. The issue most affected has been program services for disabled persons. Title VI has similary been affected in OCR-Education. One Title VI complaint had been closed, and five complaint investigations had been modified because they involved athletics, admissions programs requirements, and employee evaluation/treatment, activities not administered by the student aid office, and it was not clear whether or not they were Federally funded.

Commissioner Ramirez and I have tried unsuccessfully to get our colleagues on the U.S. Commission on Civil Rights to insist that the Staff Director collect systematically additional information on the enforcement practices in Federal agencies since the time of last year's testimony. Perhaps the Committee can do better at compiling additional information.

Last year's effort by the Congress to restore the validity of the civil rights laws that were undermined by *Grove City* failed. Apparently losing sight of the purpose of the sponsors in the national interest, opponents engaged in arguments about a state government's right to discriminate on the basis of race, or sex, or age, or handicap even when using taxes paid by all of the taxpayers and arguments about the

right of individuals to receive Federal funds while discriminating. I was reminded of the states' rights amendments made by opponents of ending the exclusion of blacks from opportunity in the days when the civil rights movement impelled the passage of the civil rights laws of the 1960's. As a result of last year's failure, we now have in place a situation that many of us thought in the 1960's would never again be tolerated. We should be embarrassed that the Federal government can today subsidize invidious discrimination by institutions on the basis of race in some instances, and the Congress has not acted.

This year those with a clear vision of our national commitment to equal opportunity have made simple and straighforward adjustments to the textual difficulties some perceived in the proposed Civil Rights Act of 1984. Some people may see this as using "the *Grove City* decision as an opportunity to seek a vast expansion of authority," as my colleagues on the Commission assert. Others may believe at a time when a majority of America's voters apparently are not interested in equal opportunity issues, we should simply accept the use of our taxpayer funds to finance discrimination. But I believe Congress should provide every reasonable tool to assure the taxpayers' money is not used to construct or maintain barriers that deny opportunity to people to obtain a quality education or to receive services in hospitals or in other institutions or agencies receiving Federal funds.

Opponents and proponents know it is difficult to draft legislative language in any complex area that is entirely free of ambiguity. Congress should in this area, as others, reduce the ambiguity as much as possible. But Congress should also keep in mind the fundamental objective. The goal is at least to restore the application of the four civil rights statutes in question to the generally accepted interpretation prior to the Supreme Court's ruling in the *Grove City College* v. *Bell* case. Nothing more, nothing less.

Ms. BERRY. I also ask, Mr. Chairman, the Commission's statement which was referred to by Chairman Pendleton had a dissent written by Commissioner Francis Guess in which I joined and Blandina Cardenas Ramirez. I ask if that also can be entered into the record?

The CHAIRMAN. Without objection, so ordered.

Ms. BERRY. Thank you very much, Mr. Chairman.

We dissented from the Commission's statement for some very clear reasons, most of which relate to the statement you have just heard from the Chairman and the staff director.

We felt that the criticisms that they were making of H.R. 700, the specific criticisms that they were making had no validity.

We were aware, for example—I will only refer to three here that come to mind, since this was presented to you here in oral testimony.

The first one was a concern about corporations, entire corporations being covered, and that this was something that had not happened before.

We were familiar with the law in that regard and although Mr. Taylor, I think, is covering this in his written testimony, I will just point out here that we know that on corporate coverage since the statute was passed, there haven't been as many cases involving services as employment, because that is usually the kind of case you get.

But where there have been questions of this kind, corporate-wide coverage has been the announced rule by the court, and there are any number of cases that can be cited, and we were aware of that.

So, we weren't concerned about this bill expanding corporate coverage more than it was before.

As far as systems of higher education are concerned, Mr. Chairman, I had had experience both in the Nixon administration, when I was a consultant to the Office of Higher Education in HEW and

organized that office with the enforcement of the civil rights laws that were on the books, including title VI, as they regard higher education institutions—I then had experience as chancellor at the University of Colorado at Boulder, administering a campus and a system of higher education and was familiar with the requirements of the law that we had to abide by.

Before that I was provost at the University of Maryland, College Park, which is another campus within a system and was very familiar with what we had to abide by, and after that served as Assistant Secretary in HEW for all of education and worked with Mr. David Tatel, who testified here on March 28 to his experience.

And I can say most emphatically that there is nothing in H.R. 700 that says anything that relates to a system of higher education that is contrary to what we enforced.

I agree with Mr. Tatel's statement, in particular with the *Adams* cases that have been going on almost as long as *Jarndyce* v. *Jarndyce* and *Bleak House,* involving southern State systems of higher education.

As long as one program or any program or department in the system received Federal money, that was the basis for proceeding, and that was the general rule that was abided by, and I don't see anything in H.R. 700 that would change that.

So that as for the analogy to the Knights of Columbus and B'nai B'rith, which was supposed to present a problem since it would be treated like systems of higher education, since systems of higher education don't present a problem, then I don't understand why the analogy would.

Commissioner Guess, Commissioner Ramirez, and I understood these matters, which is why we rejected out of hand the Commission's attempt to justify a retreat in the enforcement of the civil rights laws that have been on the books for so long.

Furthermore, we believed that the most important thing the Commission on Civil Rights could have done to help the Congress and the people was to make a fact-finding investigation as to what has been happening since *Grove City* to actual students and teachers and people out there, whether it is in health care or any area of the law.

I testified here last year based on Department of Education records that someone was kind enough to give to me about the number of complaints that had been delayed and not investigated. That was finally attested to by Secretary Bell when he came to testify, that my information was correct.

And Commissioner Ramirez and I have tried unsuccessfully ever since last year to get our colleagues on the Commission on Civil Rights to insist that our staff director use the staff to collect systematically additional information on the enforcement practices in Federal agencies, and I think that would have helped to shed some light on what was going on here, in addition to giving us the Commission's general counsel's office legal analysis.

I hope that this committee can perhaps get some better information. Maybe you have ways of getting our staff to do things that we don't have the ability to do.

But I would be very interested in seeing what that data is, Mr. Chairman.

Now, last year, despite the best efforts of members of this committee and despite the best efforts of the House, we did not restore the validity of the civil rights laws that were undermined by *Grove City.*

And what disturbed me and my colleagues, Guess and Ramirez, in the debates more than anything else—and this year again—is that we seem to be losing sight of the purpose of the sponsors of the legislation.

We are arguing and refighting battles that many of us thought we had fought out in the 1960's. We are refighting the issue as to whether States or individuals or institutions ought to be able to get Federal funds and go ahead and discriminate if they feel like it on the basis of race or sex or solely on the basis of handicap or age.

What we are really doing, and we have had since last year a situation that many of us thought in the 1960's would never again be tolerated in this country, and we have been tolerating it since last year, and now we sit here talking about States' rights and institutions' rights to discriminate, and individuals' rights to discriminate, as if that is a question we want to revisit.

Perhaps we do. But what we hope you will do, Ramirez, Guess, and I, is that at least you will restore the applicability of the laws back to where they were last year.

And anyone knows that it is difficult to draft legislative language in any complex area of the law. Anyone knows that. And it is difficult to draft legislation that is entirely free of any possible ambiguity.

All that Congress can do in this area, as others, is reduce the ambiguity as much as possible. But I hope you will keep in mind the fundamental objective, which is not to fight those battles of the 1960's over again, but to at least restore the application of these four civil rights statutes, nothing more, nothing less.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Ms. Berry.

The next witness is Mr. Gordon Jones, vice president for government and academic relations at Heritage Foundation.

STATEMENT OF GORDON JONES, VICE PRESIDENT FOR GOVERNMENT AND ACADEMIC RELATIONS, HERITAGE FOUNDATION

Mr. JONES. Thank you, Mr. Chairman.

I can assure the committee that I will not take more than my 5 minutes.

I appreciate this opportunity to testify. I have looked with some care at testimony of previous witnesses and listened with appreciation today to what I have heard. I always like to analyze the legal complexities and the letter of the law, though I tend myself—my eyes tend to glaze over before too long and I generally try to retreat to the high ground of principle.

I appreciated what Dr. Berry said about fighting battles that we thought were settled in the 1960's, and in a sense I think that she is right. That is what this discussion is about.

The question is not will we tolerate discrimination supported by Federal funds, but what constitutes discrimination.

And I am reminded that in the *Grove City* case, which sparked all this legislative interest, there was no finding of discrimination by Grove City College, and as far as I am aware no one has ever charged Grove City with discrimination.

What Grove City did was refuse to participate in a compliance procedure which many Americans think has very little to do with discrimination but a great deal to do with what we used to call reverse discrimination—that is, inequality of result.

And I think I would like in my few minutes to return to that basic question of what the policy of our Nation ought to be with respect to race, ethnic, and gender considerations in this country.

I believe that as to legal policy that the national policy should be a policy of colorblindness. Existing civil rights statutes certainly should be vigorously enforced with respect to individuals, but we should recognize that civil rights inhere in individuals and not in groups.

The concept of group rights should be, I believe, rejected and I believe that it is rejected by the majority of Americans of all races and all ethnic groups.

In the last couple of days there were articles in the Washington Post that I think illustrate some of the dangers of dealing with or pampering or looking at the possibility of considering rights as groups.

Mayor Barry of the city of Washington is charged by Hispanics with not meeting their needs. They constitute 10 percent of the population of the District of Columbia, but they have only 1 percent of the employment positions in the District of Columbia.

It seems to me I have heard that argument before.

And then the U.S. District Court has thrown out the fire department's promotion policy as unconstitutional and illegal.

Now, I don't know what the right or the wrong of either of those situations is. But I do know that that is the kind of battle that you can expect when rights are thought to inhere in groups and any group has an established valid claim to certain outcomes, either in employment or in education or in anything else.

And that is why, in my written testimony, Mr. Chairman, I suggested that the committee ought to consider the possibility of establishing a racial and ethnic classification commission of some kind, because somebody is going to have to start deciding who fits these criteria.

If the Government is going to allocate benefits, and that is what we are talking about—if the Government is going to allocate benefits on the basis of such irrelevant criteria as race and ethnicity and gender, then somebody is going to have to make decisions.

Now, we may be able to tell who is a man and who is a woman, although the *Rene Richards* case should make us think that even that can be a chancy question.

But we have seen in the South, we have seen in Nazi Germany, we see in South Africa today very complex systems established for determining who is black, who is white, who is in this ethnic group and who is in that.

And I don't believe that in this Nation we want to follow the path of Lebanon and Lebanize our political system.

And I urge the committee and the Congress to pull back from a very dangerous course of legislative action.

Thank you.

The CHAIRMAN. Thank you.

[Prepared statement of Gordon Jones follows:]

PREPARED STATEMENT OF GORDON S. JONES, VICE PRESIDENT, GOVERNMENT AND ACADEMIC RELATIONS, HERITAGE FOUNDATION

Mr. Chairman: My name is Gordon Jones, and I am Vice President for Academic and Government Relations for the Heritage Foundation. I would like to thank you for this opportunity to address the Committee on H.R. 700. It is critically important that the Committee hear from those who are urging caution on this legislation. We are dealing here with legislation of considerable impact. That much is admitted on all sides of the issue. There is no reason to rush into action before all the implications are thoroughly explored.

As an example, let me remind the Committee that legislation was proposed last year to correct the supposed problems of the Grove City decision of the Supreme Court. We were told that the legislation then proposed was immutable, perfect, that not a comma could be changed without destroying it.

Here we are almost a year later with quite a different bill before us, designed to accomplish the same ends. And once again we are being told that there will be no amendments, that the bill is perfect. I would like to suggest that last year's bill could have been improved, and that this year's bill can be improved.

Let me suggest some areas of potential difficulty which should be addressed before this legislation is passed.

One is the question of what constitutes "assistance," or "aid." There are profound difficulties in accepting the Supreme Court's decision that aid to a student equals aid to the university where the student spends that aid. If indirect aid equals direct aid in that situation, there are no limits to the reach of the federal government, because everyone receives benefits of some kind. Anyone who provides goods and services to recipients of food stamps, Small Business Loans, Social Security checks, dairy price supports, or any other payment from the government would be subject to all the reporting, administrative, and enforcement procedures of the federal bureaucracy. I don't believe the principle is firmly established, but there is even some case law holding that tax exemptions constitute a benefit to an individual or an institution.

I had always thought that there was some benefit in preserving some areas of our lives which are not subject to federal authority. There will be no such areas if this legislation passes without some clarification of what is meant by the term "aid."

Another way to preserve enclaves of our lives free from federal intervention is by tightening the definition of "recipient." In particular, there needs to be an exclusion for "ultimate beneficiaries," as has existed previously.

It may be permissible, desirable even, to include an entire university campus if discrimination is found in a federally assisted program of the school, but it is quite a different matter to say that an infraction in a job training program run by a company in one State brings under coverage every aspect of what may be a multi-national corporation, or to say that a violation in a police department in rural Michigan brings under coverage every unit or subunit of the State government. In the particular argot that is developing around these proposals, the "trickle down," "trickle up," and "trickle around" theories need to be explicitly rejected.

In that last statement, I was careful to use the term "violation," rather than "discrimination." The reason is that under many regulations promulgated by federal agencies, regulations that would be explicitly approved and encouraged by this legislation, no discrimination need be proved before penalties, in the form of goals, quotas, and federally-imposed timetables are called into play. All that need be shown is that there is a statistical imbalance in employment, in admission, in compensation, or whatever other criterion can be devised by inventive federal bureaucrats or civil rights lawyers. In other words, the usual understanding that the accused is innocent until proven guilty is reversed. This reversal has been adopted in a number of specific instances in law, in regulation, and in some court decisions, but we should never be comfortable with it. We should never stand by and acquiesce in its pernicious effects on our freedoms.

I am particularly concerned about one provision of H.R. 700. That is the language that writes into law "all of the regulations" issued under the four civil rights statutes "as presently interpreted." In all candor, Mr. Chairman, I have to say that that

is the single worst example of statutory language I have ever seen. Laws ought to be as clear as they can be made, and to include in them regulatory language that is subject to interpretation varying from department to department, and from administrator to administrator, and from court to court, is a prescription for confusion unparalleled in my experience. If nothing else is changed in this bill, that language should be discarded.

The regulation in question contain requirements and provision for what are usually called goals and quotas for minority hiring and advancement. Including them makes it imperative to include in the legislation careful definitions of what constitutes status in a minority group.

We have already seen, for example, that where there are minority business setasides in some federal contract requests, non-minority businesses attempt to get in on the action. The plain fact is that when government allocates benefits on the basis of race, ethnicity or gender or other irrelevant criteria, individuals will attempt to qualify under those criteria. Someone is going to have to decide, under this legislation, who is black, who is Hispanic, and so on. It may be easiest to decide who is a man and who is a woman, but as Pence Richards should have taught us, even that is chancey at times.

I assume that if this legislation passes, it will necessary to establish some form of Ethnic and Racial Classification Commission, charged with making these tricky judgments. In fact, the Committee may wish to consider the need for such a commission before reporting this legislation to the full House. At the very least, it should provide the courts, who will be called upon to settle the inevitable controversies, with as much guidance as possible as to the criteria which should be used.

I offer that suggestion in all seriousness, because something like such a commission will clearly be needed if this legislation passes. However, I hope that the members of this Committee will think better of this entire line of legislation. The fact is that it would be a mistake to write into law a requirement that race, gender, and ethnicity be considered in the allocation of governmental benefits. The 1964 Civil Rights Act established the legal equality of all men and women, of whatever race, color, creed, or ethnic group. That equality is enforceable in the courts with respect to individuals, and such enforcement should be vigorous and permanent. But rights inhere in individuals. They do not belong to groups. To insist on numerically equal outcomes in every aspect of our society is to grant to the government the kind of absolute power associated with totalitarian states. The temptation is great, but if we are to remain a free nation, it is a temptation that must be resisted.

I urge the Committee and the Congress to reject the philosophical position that underlies this legislation, and to insist that our laws remain colorblind. The mistakes of our past should not lead us into even greater mistakes in the future.

The CHAIRMAN. The next witness is Mr. Mark de Bernardo, manager of Labor Law, Chamber of Commerce of the United States.

Mr. de Bernardo, we welcome you.

STATEMENT OF MARK A. de BERNARDO, MANAGER OF LABOR LAW, CHAMBER OF COMMERCE OF THE UNITED STATES

Mr. DE BERNARDO. Thank you, Mr. Chairman.

I am Mark A. de Bernardo. I am manager of Labor Law for the U.S. Chamber of Commerce. I am also committee executive of the chamber's labor relations committee.

Accompanying me today, to my right in the first row seats Virginia Lamp. She is a labor relations attorney for the U S. Chamber of Commerce.

The chamber welcomes this opportunity to appear before this joint hearing, to express our concerns about the *Grove City College* case, our opposition to the Civil Rights Restoration Act of 1985, and our support for the civil rights amendments of 1985.

The chamber also wishes to commend and thank the chairman, the ranking minority members, the members of the committee and subcommittee for conducting these joint hearings, for providing this forum for discussion and debate on what is a very critical issue for all concerned.

The U.S. Chamber, on behalf of its more than 180,000 members, has a keen interest in our Nation's equal employment and civil rights laws. The chamber is committed to the principles of equal employment opportunity and affirmative action and heartened by the advances which have been made in these areas, particularly in the last 25 years. There is no room in America's work places for discrimination.

However, there also is no room for the radical and unwarranted expansion of Federal authority which H.R. 700 represents.

While the chamber has long espoused a policy of promoting an informed and conscientious business community's adherence to both the letter and spirit of title VII and other antidiscrimination laws, we also are cognizant that extremism in public policy can create more problems than it solves.

Extreme Government intervention can be more of a threat to civil rights and liberties than the safeguard its proponents intend it to be, and in our opinion H.R. 700 typifies such extremism.

To summarize the chamber's position, we oppose H.R. 700. We feel that this legislation substantially and inappropriately expands the coverage and sanctions of four civil rights statutes.

H.R. 700 and its identical Senate companion bill, S. 431, represent a massive expansion of Federal authority over the workplace. Similarly, these bills would expand greatly Federal control and authority over State and local governments, educational institutions, and a wide range of private institutions.

The chamber believes that H.R. 700 goes far beyond reversing the *Grove City* decision. This bill represents a sweeping transformation of our civil rights laws beyond not only the current status of the law, but also the original intent of Congress and the interpretation of these laws prior to the *Grove City* decision.

The U.S. Supreme Court in the *Grove City* case dealt with the issue of what limitations should exist on the application of civil rights statutes to educational institutions receiving Federal funds. That issue is highly parochial compared to the issues being addressed by Congress under the name of *Grove City*.

What is at stake now is a massive expansion of Federal authority over the workplace, and farms, State and local governments, schools, religious institutions, social clubs, even individuals.

H.R. 700 represents a threat to the business community because of overlapping and contradictory enforcement structures, because of duplicative recordkeeping, new private rights of action, and a quantum leap in Federal control of private employment practices.

This legislation would extend dramatically the coverage of four heretofore specialized civil rights laws to a wide spectrum of employers, especially small businesses, who were never covered or intended to be covered in the past

Moreover, if enacted, H.R. 700 would exacerbate the worst aspects of our judicial system, forum shopping, multiple claims, and harassment actions.

But ironically, H.R. 700 also represents a threat to the disadvantaged and underprivileged of our society.

What would be the ultimate response of employers to enactment of H.R. 700? The Chamber fears that employers would be forced

into a position whereby the price that employers would be forced to pay to participate in Federal programs would be too high.

The CHAIRMAN. Mr. de Bernardo, the Chair regrets having to interrupt, but there is a vote pending in the House. The Members have only about 10 minutes to make that vote. For that reason, I would appreciate you suspending at this time so the committee can take a recess, a 10-minute recess. And you will be, obviously, the witness in the chair at the time that we return.

Thank you very much.

The committee is in recess for 10-minutes.

[Recess.]

The CHAIRMAN. The committee is called to order.

Mr. de Bernardo was testifying at the time we recessed. We will begin with him.

Mr. DE BERNARDO. Mr. Chairman, I was just pointing out that in many respects, H.R. 700 represents a threat to the business community, and listed some of the aspects in which we see it as a threat to the business community.

Second, I was pointing out that, ironically, we also see it as a threat to the disadvantaged because of the effect it would have in creating a disincentive for employers to be involved in the voluntary programs, such as programs in the training and education areas.

Rather than accept the plethora of strings attached to Federal dollars, corporations understandably might retreat into a private sector shell to the disadvantage of many.

For example, handicapped, veterans, and minorities who are involved in job programs which include some Federal funding may find the business community reluctant to participate when participation subjects employers to broadly applied, substantial new administrative costs, compliance reviews, and potential legal liabilities.

The spirit of volunteerism in employers, no matter how well intentioned, may well be dispirited by this legislation.

Perhaps the biggest area of concern for us deals with H.R. 700's scope, and if I could point out a couple of aspects of that in terms of our concerns.

A major problem with last year's legislation was the broad definition of "recipient." This year's legislation does not solve that problem. It merely transfers it to another definition.

While H.R. 700 fails to define "recipient" appropriately or inappropriately, it does define "program or activity" for the purposes of determining coverage of the four affected statutes.

The bill defines "program or activity" in such a broad fashion that it is questionable whether any parameters at all have been set to delineate the reach of these laws.

Through tracing the flow of Federal dollars through trickle down, trickle up, and trickle across, this legislation has the potential of radically altering any previous concept or application of Federal authority.

The strings attached to Federal funds would thus become chains, chains of an almost indeterminable length.

The precise scope of coverage of H.R. 700 is unclear. However, what is clear is that H.R. 700 is far too broad in the range of cover-

age which is possible and would be, if enacted, fundamentally unfair to business and many other affected parties.

I would like to make a note on the funding termination provision, as well, which we see as being a wrong approach.

Earlier I pointed out that the bill, H.R. 700, if enacted, would create a disincentive for employers to become voluntarily involved in programs which we consider to be good government programs, programs which benefit many.

In the same line of thinking, the fact that the breadth of the funding termination provision is so broad would also affect the innocent and a wide range of programs negatively, as well.

H.R. 700 eliminates the pinpoint provision and allows the various enforcing agencies to withdraw all Federal assistance to the entire entity in noncompliance.

Such broad stroke funding termination would penalize the innocent, cutting off Federal assistance to a much wider range of entities and, correspondingly, to a much wider range of individuals benefiting from those Federal programs.

I would also like to make a note on the law pre-Grove City.

The Civil Rights Restoration Act of 1985 does not restore previous law in our opinion, at all, but in fact goes far beyond, far beyond the current law, far beyond the concensus interpretation of the law prior to the *Grove City* decision, and far beyond the majority judicial interpretations of congressional intent.

If the intent of Congress is to return the law to where it was pre-Grove City, H.R. 700 does not do it.

In our conclusion I would like to state that the Supreme Court's *Grove City College* v. *Bell* decision could have inequitable ramifications. In this regard, the Chamber of Commerce supports legislation which would provide for a simple reversal of this decision.

We believe that S. 272, the Dole-administration bill, accomplishes this goal in a fair and appropriate manner.

The Civil Rights Restoration Act of 1985, however, is an inappropriate and unacceptable response to the *Grove City* decision.

The U.S. Chamber opposes H.R. 700 and S. 431 and urges Congress not to enact this legislation.

Thank you, Mr. Chairman, and members of these committees.

The CHAIRMAN. Thank you.

[Prepared statement of Mark A. de Bernardo follows:]

PREPARED STATEMENT OF MARK A. DE BERNARDO, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

I. Statement of Interest

I am Mark A. de Bernardo, Manager of Labor Law for the Chamber of Commerce of the United States. I serve as the Committee Executive for the U.S. Chamber's Labor Relations Committee and am a member of the District of Columbia Bar and the American Bar Association labor committees. Accompanying me today is Virginia B. Lamp, Labor Relations Attorney for the U.S. Chamber.

The U.S. Chamber welcomes this opportunity to appear before this joint hearing of the House Education and Labor Committee and the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee to express our concerns about the Grove City College v. Bell decision[1/], our opposition to the Civil Rights Restoration Act of 1985 (H.R. 700/S. 431), and our support for The Civil Rights Amendments of 1985 (S. 272).

The Chamber also wishes to commend and thank the Chairmen, Ranking Minority Members, and Members of the Committee and Subcommittee conducting these joint hearings for providing this forum for discussion and debate on what is a very critical issue for all concerned. It is our hope that a full and reasoned examination

1/ 104 S. Ct. 1211 (1984).

of all the issues involved in the Grove City debate and all the potential ramifications of the legislative alternatives now under consideration will prove well worth the time and effort.

The U.S. Chamber, on behalf of its more than 180,000 members, has a keen interest in our nation's equal employment and civil rights laws. The Chamber is committed to the principles of equal employment opportunity and affirmative action and heartened by the advances which have been made in these areas, particularly in the last 25 years. There is no room in America's workplaces for discrimination.

However, while the Chamber has long espoused a policy of promoting an informed and conscientious business community's adherence to both the letter and spirit of Title VII and other anti-discrimination laws, we also are cognizant that extremism in public policy can create more problems than it solves.

Extreme government intervention can be more of a threat to civil rights and liberties than the safeguard its proponents intend it to be.

H.R. 700 typifies such extremism.

II. Summary of the Chamber Position

The U.S. Chamber of Commerce opposes The Civil Rights Restoration Act of 1985 because this legislation substantially and inappropriately expands the coverage and sanctions of four civil rights statutes.[2/]

2/ H.R. 700, if enacted, would amend Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d et seq., Title IX of the Education Amendments of 1972, 20 U.S.C. Sec. 1681 et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794, and The Age Discrimination Act of 1975, 42 U.S.C. Sec. 1601 et seq.

H.R. 700 and its identical Senate companion bill, S. 431, represent a massive expansion of federal authority over the workplace. Similarly these bills would expand greatly federal control and authority over state and local governments, educational institutions and a wide range of private institutions.

The Chamber believes that H.R. 700 goes far beyond reversing the Grove City decision. This bill represents a sweeping transformation of our civil rights laws beyond not only the current status of the law but also the original intent of Congress and the interpretation of these laws prior to the Grove City decision.

The U.S. Supreme Court in the Grove City case dealt with the issue of what limitations should exist on the application of civil rights statutes to educational institutions receiving federal funds. That issue is highly parochial in contrast to the issues being addressed by Congress in the name of "Grove City."

What is at stake now is a massive expansion of federal authority over the workplace -- and farms, state and local governments, schools, religious institutions, social clubs, even individuals.

H.R. 700 represents a threat to the business community because of overlapping and contradictory enforcement structures, duplicative recordkeeping, new private rights of action, and a quantum leap in federal control of private employment practices. This legislation would extend dramatically the coverage of four heretofore specialized civil rights laws to a wide spectrum of employers, especially small businesses, who were never covered or intended to be covered. Moreover, if enacted, H.R. 700 will exacerbate the worst aspects of our judicial system -- forum shopping, multiple claims, and harassment actions.

But H.R. 700 also represents a threat to the disadvantaged and underpriviledged of our society. What would be the ultimate response of employers to enactment of H.R. 700? The Chamber fears that employers would be forced into a position whereby the "price" of participating in federal programs would be too high. Rather than accept the plethora of strings attached to federal dollars, corporations understandably might retreat into a private sector shell to the disadvantage of many. For example, handicapped, veterans, and minorities who are involved in job programs which include some federal funding may find the business community reluctant to participate when participation subjects employers to broadly-applied, substantial new administrative costs, compliance reviews, and potential legal liabilities. The spirit of volunteerism in employers -- no matter how well-intentioned -- may well be dispirited by this legislation.

The U.S. Chamber in its policy on equal employment opportunity:

- Supports "all reasonable and necessary steps designed to achieve the goal of equal employment opportunity for all";
- Believes "governmental action should be carefully guided ... to insure fairness and due process of law for all"; and
- Further believes that "grants of authority to administrative agencies should be strictly construed and carefully defined."[3/]

The Civil Rights Restoration Act of 1985 contradicts each of these precepts:

3/ Policy Declarations, adopted by the Chamber of Commerce of the United States, p. 134 (emphasis added).

- Because its scope of coverage and sanctions is far too broad, H.R. 700 is unreasonable and unnecessary to the appropriate goal of preservation of civil rights;

- Because the bill is overbroad and ambiguous, particularly in its definition of "program or activity" which triggers coverage, it is not "carefully guided," "strictly construed" or "carefully defined;" and

- Because H.R. 700 would, inter alia, subject farmers, ranchers, and other small business men and women to a hailstorm of new rules and regulations from incidental contact with federal dollars, this bill does not "insure fairness"; it insures unfairness.

When The Civil Rights Act of 1984 [4] was introduced, the U.S. Chamber directly addressed the issues presented in the Grove City debate. The result was adoption of the following policy:

> The Chamber of Commerce of the United States opposes any legislation which would unnecessarily: (1) expand federal control of private employment practices, (2) enlarge federal jurisdiction in the public sector, especially over state and local government institutions, (3) increase the number of agencies able to bring equal employment opportunity enforcement proceedings, or (4) create a great surge in litigation by granting broader rights of action to private plaintiffs.[5]

The Civil Rights Restoration Act of 1985 clearly conflicts with this policy. H.R. 700 should not be enacted.

[4] S. 2568/H.R. 5490

[5] This policy statement was approved by the Chamber's Labor Relations Committee, and subsequently by its Board of Directors, becoming the official policy of the Chamber on July 25, 1984. This statement provided the basis for Chamber oppositions to The Civil Rights Act of 1984, S. 2568/H.R. 5490.

III. Decreased Employer Participation in Federal Programs

A major effect of H.R. 700 on the private sector would be a withdrawal of employers from participation in voluntary federal programs, to the detriment of large segments of our society.

Employers recognize that H.R. 700 would greatly expand the application of a myriad of current regulations to company activities totally unrelated to the operation of a federally-assisted program. Because "good faith" involvement in a federally funded program would subject that employer in all of its operations to increased reporting requirements, compliance reviews, and potential legal claims, that employer might be likely to withdraw from such participation altogether.

One critical area where there would be significant adverse consequences would be federal training and employment programs. Although Section 167 of The Job Training Partnership Act (JTPA) clearly subjects those entities operating training programs to nondiscrimination prohibitions, JTPA does not extend those prohibitions to employing establishments that are in contact with JTPA programs. Under H.R. 700, because such employers would be "a corporation ... or any other entity ... any part of which is extended Federal financial assistance,"[6/] coverage would be extended and employers might not participate for fear of increasing their exposure and liability under the various civil rights laws.

6/ Sections 3, 4, and 6, paragraphs (3) and (4); and Section 5, paragraphs (4)(c) and (d), of H.R. 700 which, in part, defines "program or activity" for purposes of coverage.

Under Secretary of Labor Ford B. Ford expressed this concern while responding to a Senate inquiry about what the effect of The Civil Rights Act of 1984 would be on Department of Labor programs:

> It is possible, therefore, that S. 2568 would cause employers to avoid federally supported training and employment services in a belief that they were prudently avoiding 'new' burdens or compliance risks. Under such circumstances, employers:
>
> - Might not provide training slots for JTPA;
> - Might not provide training slots for The Emergency Veterans Job Training Act (EVJTA);
> - Might not list jobs with the employment service;
> - Might not take advantage of the Targeted Jobs Tax Credit (TJTC); and
> - Might not serve on Private Industry Councils (PICs) and State Job Training Coordinating Councils (SJTCCs) ...
>
> In sum, (because S. 2568 would "discourage employers' participation" in training and employment services, it would) condemn such activities to futility.1/

Although Under Secretary Ford's concerns were about the effect of The Civil Rights Act of 1984, we are convinced that The Civil Rights Restoration Act of 1985 would have the same "chilling" effect on employers' willingness to participate in federal employment and training programs. The result would be decreased job opportunities for those in our society whose need for such opportunities is greatest.

Ironically, if enacted, H.R. 700 would have the unintended negative effect of being counterproductive to the goals of a host of worthwhile federal programs.

1/ Letter from the Honorable Ford B. Ford, Under Secretary of Labor to Senator Orrin Hatch, Chairman of the Labor and Human Resources Committee dated June 25, 1984, p. 2 (emphasis added).

IV. H.R. 700's Scope: A Major Problem Area

The Civil Rights Restoration Act of 1985, like its predecessor legislation, The Civil Rights Act of 1984, is unclear in just how far its coverage extends. However, what is clear is that coverage extends far beyond any parameters previously imagined or suggested.

A major problem with last year's legislation was the broad definition of "recipient." This year's legislation does not solve that problem, it merely transfers it to another definition. While H.R. 700 fails to define "recipient" -- appropriately or inappropriately -- it does define "program or activity" for the purposes of determining coverage of the four affected statutes.

The bill defines "program or activity" in such a broad fashion that it is questionable whether any parameters at all have been set to delineate the reach of these laws. Through tracing the flow of federal dollars through "trickle down," "trickle up," and "trickle across," this legislation has the potential of radically altering any previous concept or application of federal authority.

The "strings" attached to federal funds would thus become chains -- chains of an almost indeterminable length.

The definition of "program or activity" in The Civil Rights Restoration Act of 1985 is:

> For the purposes of this title, the term "program or activity" means all of the operations of --
>
> (1)(A) a department or agency of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a university or a system of higher education; or

(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965) or other school system;

(3) a corporation, partnership, or other private organization; or

(4) any other entity determined in a manner consistent with the coverage provided with respect to entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.[8/]

The bill extends these four civil rights statutes to corporations and partnerships, as well as to "other private organizations ... or any other entity," which is "determined in a manner consistent" with the other provisions. This represents a "catchall" provision which truly "catches all."

8/ The Civil Rights Restoration Act of 1985, Sections 3 through 6 (emphasis added).

Furthermore, there is no "consistent" manner of determination because there have been no determinations. Paragraph (4) is ambiguous and confusing and clearly would require extensive litigation to give it meaning.

More importantly, coverage is extended by this section to "all of the operations ... any part of which is extended Federal financial assistance." Can there be any doubt that all of a corporation's operations -- including its parent companies, holding companies, subsidiaries, and franchises -- would be covered if "any part" of that business received any federal assistance?

Under a "trickle down" application, "extended Federal financial assistance" could be interpreted to mean direct or indirect extension, further fueling the engine of government intervention.

Is it the intention of the proponents of the Civil Rights Restoration Act of 1985 to subject --

- Grocery stores which accept food stamps;
- Pharmacies which fill Medicare prescriptions;
- Ranches which participate in federal irrigation projects;
- Farms which receive federal price supports or disaster loans;
- Insurance offices administering Medicare or Medicaid programs;
- Apartment owners accepting rental vouchers; and
- Other small businesses

--to extensive government requirements, inspections, and intrusions by unknown regulators on unknown regulations because there is that nexus, however tenuous, to "federal financial assistance"?

Is it the intention of the proponents of this bill to subject such small businesses to:

- Numerous complex new affirmative action rules and regulations;
- On-site compliance inspections;
- Overlapping and contradictory enforcement structures;
- Duplicative recordkeeping requirements; and
- New private rights of action?

Could a corner grocery store, because it is an "entity" which by virtue of its acceptance of food stamps is "extended Federal financial assistance" under this bill,[9/] be brought to court to hire the handicapped or elderly, or because it failed to provide access ramps for the handicapped, or widened aisles, lowered shelves, or home delivery for the disabled?

H.R. 700 raises significant coverage questions in other respects: there appears to be no cutoff of coverage -- up or down the corporate ladder -- to "all of the operations of ... a corporation ... (if) any part (is) extended Federal financial assistance."

9/ Under paragraph (3) of Sections 3, 4, and 6, and paragraph (4)(c) of Section 5, a grocery store may be considered a "corporation, partnership, or other private organization," either unto itself or as a subsidiary of a corporate entity which receives federal dollars in some other capacity; or it may be covered under the catchall provision as "any other entity determined in a manner consistent with the coverage provided with respect to entities described in paragraph (1), (2), or (3)" because the "manner consistent" could be considered analogous to the Grove City College situation whereby enrollment of a single student receiving federal student loans triggers coverage of the college itself, despite the fact Grove City College accepts no federal funding directly.

This may well mean that if one plant of an automobile manufacturer participates in a federal jobs program, the entire organization in all its plants and subsidiaries is extended first-time coverage of the four affected civil rights statutes. How is a plant manager or supervisor at one plant in one state expected to know of, much less to comply with, four statutes, the application of which is based on another plant manager's participation in good faith in a federal jobs program at a plant on the other side of the country? Moreover, is H.R. 700 intended to trigger coverage from the parent company of a retail chain to all its franchisees or from one franchisee up the corporate system to the parent company and then to all other franchisees? H.R. 700's "all the operations ... any part of which" language suggests that the answer to these questions should be "yes."

Is this fair to those employers -- or their employees, stockholders, creditors, and customers? Extension of coverage could force sizeable economic expenditures and create significant disruption of operations or current personnel practices.

The precise scope of coverage of H.R. 700 is unclear. However, what is clear is that H.R. 700 is far too broad in the range of coverage which is possible and would be, if enacted, fundamentally unfair to businesses and many other affected parties.

V. H.R. 700's Funding Termination Provision: The Wrong Approach

The Civil Rights Restoration Act of 1985 would expand greatly the federal government's power to deny or terminate financial assistance. Such funding termination, as provided for in H.R. 700, is too broad in application and would penalize too wide a spectrum of employers and other beneficiaries of federal programs.

H.R. 700 not only extends substantially the reach of the four civil rights statutes, but it also increases dramatically the sanctions for noncompliance under these laws. Currently, noncompliance is penalized by withdrawal of federal funding from "the particular program, or part thereof, in which such noncompliance has been found."[10/]

H.R. 700 eliminates this "pinpoint provision" and allows the various enforcing agencies to withdraw all federal assistance to the entire entity in noncompliance. Such broad stroke funding termination would penalize the innocent, cutting off federal assistance to a much wider range of entities, and, correspondingly, to a much wider range of individuals benefiting from these federal programs.

H.R. 700 provides for fund termination "to the particular assistance which supports such noncompliance,"[11/] a novel and elastic concept requiring no primary nexus between the entities in noncompliance[12/] and entities cut off from federal assistance. Funding cut off ceases to be an equitable or appropriate remedy when such termination is stretched farther and farther to include unrelated or remote activities of distant affiliates.

10/ For example, see Title IX, 20 U.S.C. Sec. 1682.

11/ Sections 3(b)(1) and 5(b) of The Civil Rights Restoration Act of 1985.

12/ "Noncompliance" is used rather than the term "discrimination" because an entity can be cited for noncompliance without ever having been found to have discriminated or, in fact, without discrimination having been alleged. Grove City College is an example.

The "which supports" language of the bill's funding termination provision is consistent with several other provisions of the bill in its ethereal, ambiguous, and undefined nature. However, because any federal assistance to part of an organization presumably enables that organization to shift resources to nonassisted programs, any federal funding could be viewed as "supporting" noncompliance, regardless of whether the discriminating operation received federal aid directly.

VI. The Law: Pre-Grove City

H.R. 700, in its "Findings of Congress" opening, states:

> legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.13/

However, the interpretations by the 28 federal executive agencies which extend federal financial assistance have neither been "consistent" nor "long-standing." Interpretations have, in fact, been highly inconsistent and irregular, and the nature of these interpretations are in such a state of flux, that no principle is "long-standing."

13/ The Civil Rights Restoration Act of 1985, Section 2(2) (emphasis added).

The assertion that executive branch interpretations have been "broad, institution-wide" is similarly misleading. Although some interpretations have been construed by the courts to provide for institution-wide coverage, the clear majority of court decisions can be characterized as program-specific in their interpretation of coverage and fund termination. Numerous federal courts have held that the nondiscrimination provisions of statutes covering federally-funded programs are not institution-wide in their application.[14/]

Clearly, therefore, The Civil Rights Restoration Act of 1985 does not restore previous law at all but, in fact, goes far beyond: (1) the current law; (2) the consensus interpretation of the law prior to the Grove City decision; and, (3) the majority judicial determinations of congressional intent.

If the intent of Congress is to return the law to where it was pre-Grove City, H.R. 700 does not do it.

14/ See North Haven Board of Education v. Bell, 456 U.S. 512 (1982); Hillsdale College v. Department of Health Education and Welfare, 696 F.2d 418 (6th Cir., 1982), vacated and remanded 104 S.Ct. 1673 (1984); Dougherty County School System v. Bell, 694 F.2d 78 (5th Cir., 1982); Rice v. President and 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., 1981), affirmed on other grounds, 699 F.2d 309 (6th Cir., 1983); Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226 (7th Cir., 1980); Brown v. Sibley, 650 F.2d 260 (5th Cir., 1981); and Bachman v. American Society of Clinical Pathologists, 577 F.Supp. 1257 (D. N.J., 1983). Of course, the U.S. Supreme Court's pronouncement on this issue in the Grove City decision was to interpret such statutes' coverage and fund termination provisions program-specific.

VII. Other Major Business Concerns Regarding H.R. 700

(A) Policy Concerns Regarding "Big" Government

Although this statement has focused largely on the negative impacts of The Civil Rights Restoration Act of 1985 on the business community, the Chamber also is very cognizant of the bill's negative potential to impact on educational institutions, state and local governments, and private institutions of all types.

This bill represents a major leap in the wrong direction. It raises fundamental questions about the appropriate reach of the federal government, and whether federal financial power should be wielded as a coercive bludgeon in the name of "civil rights."

H.R. 700 is a big government response to a somewhat parochial and highly technical legal problem. Whatever the appropriate response the U.S. Supreme Court should have had to the Grove City case, this response is legislative overkill, an overreaction which conforms to the premise of those advocates whose solution to every perceived problem is more government, more regulation, more litigation, and more taxpayer dollars.

H.R. 700 represents a vehicle for massive government intrusion in private and public institutions.

(B) Policy Concerns Regarding Civil Rights

In many respects, H.R. 700 also represents a threat to institutional and individual civil rights and liberties -- ironically in light of the intentions of its proponents to protect civil rights.

> Proponents may force promotion of the civil rights of some at the expense of intrusion into the civil rights of others. The interests at stake are compelling and multiple, and it is short-sighted to perceive a singular interest as controlling when to do so threatens the "rights" of those who wish to attend independent colleges, the integrity of private institutions,[15/] the autonomy of religious organizations, or the economic viability of small businesses.

> The debate over Grove City has, at times, under the sacrosant and irresistable banner of "civil rights," featured a very real intolerance of the many interests involved. As Jeremy Rabkin, an Assistant Professor of Government at Cornell University recently noted, Grove City legislation has gone "a long way toward transforming federal education aid from an engine of opportunity to an instrument of regimentation ...[16/] (such legislation) poses grave dangers to tolerance and diversity."[17/]

H.R. 700 would trample the rights of many in the name of preserving the rights of some.

15/ Grove City College's "transgression," after all, was a desire to maintain its independence, not discrimination.

16/ "A 'Civil Rights' Snare," Jeremy Rabkin, New Perspectives, The U.S. Commission on Civil Rights, Winter, 1985, p.7.

17/ Ibid, p. 6.

(C) Businesses' Concern For Coverage of Educational Institutions

While the Chamber is especially concerned about the scope of application of these statutes to the business community, it also is concerned about how broad an impact Grove City legislation would have on educational entities. This concern is magnified by the fact that:

- Businesses are Educators -- Many employers are in the education "business" directly or indirectly, or have extensive educational or training programs for their employees, or share with academia funding, faculty, or facilities for such programs as management seminars or apprenticeship training;
- Schools are Businesses -- Many educational institutions are "businesses" in the full sense of the term. Furthermore, they may engage in noneducational "businesses" on campus, providing housing, book store, restaurant, laundry and other such services, or may run off-campus businesses as a function of their financial diversification; and
- Schools are Investors in Business -- Finally, many colleges and universities have sizeable endowments, monies from which are invested commonly in the private sector. Such investments might be considered a sufficient nexus to trigger additional civil rights coverage to the outside firms under H.R. 700.

To the extent that coverage of any or all of these relationships between business and educational institutions is not specifically delineated, the Chamber remains deeply concerned. Beyond direct coverage of businesses and coverage achieved through the catchall provisions of H.R. 700, the Chamber also is troubled by the potential for indirect coverage through H.R. 700's inclusion of educational institutions under its definition of "program or activity."

(D) Special Concerns about H.R. 700's Impact on Small Businesses

The Chamber is particularly concerned about what the implications of The Civil Rights Restoration Act of 1985 would be for small business. Nearly 90 percent of the Chamber's more than 180,000 members are small businesses employing 100 or fewer employees. To the extent that H.R. 700 has a catchy title, is superficially very appealing, and addresses very real -- and legitimate -- concerns with the Supreme Court's Grove City decision, its potential impact on business, particularly small business, may have been obscured. To subject small businesses to the regulatory excesses of such extensive requirements would be especially burdensome and unfair.

VIII. The Civil Rights Amendments of 1985

While the Chamber is convinced that The Civil Rights Restoration Act of 1985 is the wrong response to the Grove City decision, we are sympathetic to the premise that the Supreme Court's decision may have created potential inequities.

The Chamber therefore supports S. 272, The Civil Rights Amendments of 1985, introduced in January by Senators Robert Dole and Orrin Hatch and supported by the Reagan Administration. We feel S. 272 is an appropriate response to the Grove City decision. S. 272 would affect all four civil rights statutes addressed in H.R. 700 and would ensure that anti-discrimination coverage of educational institutions receiving federal funding would be institution-wide, not program-specific as is currently the law in the wake of the Grove City decision. S. 272 sets such limitations in a realistic and appropriate manner, so as not to overextend coverage, even under an institution-wide application.

The Chamber believes that S. 272 effectively reverses the Grove City decision without the overreach inherent in alternative "civil rights" proposals.

IX. Conclusion

The Supreme Court's Grove City College v. Bell decision could have inequitable ramifications. Toward this end, the U.S. Chamber of Commerce supports legislation which would provide for a simple reversal of this decision. We believe S. 272, the Dole-Administration bill, accomplishes this goal in a fair and appropriate manner.

The Civil Rights Restoration Act of 1985, however, is an inappropriate and unacceptable response to the Grove City decision.

The U.S. Chamber opposes H.R. 700/S. 431, The Civil Rights Restoration Act of 1985, and urges Congress not to enact this legislation.

The CHAIRMAN. The next witness is Mr. William Taylor, on behalf of the Center for National Policy Review and the Leadership Conference on Civil Rights.

Mr. Taylor.

STATEMENT OF WILLIAM TAYLOR, ON BEHALF OF THE CENTER FOR NATIONAL POLICY REVIEW AND THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. TAYLOR. Thank you, Mr. Chairman.

As the Chairman said, I am here basically to respond to questions that may not have been covered fully in my testimony last week, and I don't wish to tread on the good will of this committee by making a lengthy opening statement.

I am not going to respond to the veritable blizzard of objections that we have heard from some of the witnesses over the past hour, but I would like to make three brief points about the types of criticisms that have been leveled against H.R. 700 and how I think they ought to be evaluated by the committee.

First, some of the criticisms that you have heard are based on a failure to understand the basic policy reasons underlying the distinction that has been made between broad coverage, on the one hand, and narrow or pinpointed termination, on the other hand, distinctions that were made until the *Grove City* case.

In the *Taylor County* v. *Finch* case, whose importance, I might say, is acknowledged by everybody on every side of this debate but which is misconstrued by the opponents, the Fifth Circuit said that the reason for pinpointing any termination of funds—and here I am quoting—"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 prior discriminatory practices."

Now, these reasons for limiting fund termination in no way support a limitation on coverage.

Institution-wide coverage permits other remedies—for example, negotiated settlements, injunctions in suits that are brought either by private parties representing victims of discrimination or by the Justice Department—and those settlements or suits that result in injunctions terminate the discriminatory practice and not the flow of Federal funds.

In the case of those remedies there is no possible harm to an innocent beneficiary, since all that happens is a termination of the discrimination.

Now, Congress understood this, the agencies understood this, the courts understood it up until the *North Haven* and *Grove City* cases.

And what H.R. 700 does is to restore this and point this important distinction retaining, I might say, pinpointed termination of funds.

Now, second, some of the criticism is based either on a misunderstanding of how the four laws have operated over the years or on a failure to read carefully either those laws or H.R. 700 itself.

An example of the first kind of problem is in the suggestion that was made here by representatives of the Civil Rights Commission that in defining "program or activity"——

Ms. BERRY. That is some representatives.

Mr. TAYLOR. Some representatives. I apologize to Ms. Berry. I will try to be more specific in my references in the future.

That H.R. 700 in some way alters the definition of the recipient.

Now, if you read these statutes, it is clear that there are two determinations to be made.

First, is someone, some entity a recipient of federal funds?

Second, if the answer to that question is yes, what is the scope of coverage of the recipient's operations?

The definition of "program or activity" in H.R. 700 relates only to the latter. If someone is not a recipient in the first place, then the second inquiry is not triggered.

In short, by way of example, a corporate farmer that received price supports is not a recipient now under the law and could not be made a recipient under the program or activity definition of H.R. 700.

An example of the latter kind of problem, of the failure to read the bill carefully, is, I think, illustrated by the discussion we have heard from Ms. Chavez about any other entities, which she said, if my notes are correct, was vague, open-ended and limitless in its application.

Well, it is clear, if you read the bill, that the definition of any other entities is limited by the principles established in the first three subsections. That is what it says precisely.

The alternative, we are not told what the alternative would be. I assume the alternative would be to try to list every type of entity that receives Federal funds, water districts, sewer districts, housing authorities, anything you could think of, and then to specify the coverage of each. That is not necessary. That is not really possible. If Congress undertook such an endeavor, it would inevitably leave out some kinds of entities and you would be faced with more questions of interpretation than you are faced with right now.

The notion that somehow this was put in here as a kind of sneak device to expand coverage is simply based on a misreading of the law.

Third, it is clear that some of the criticism is directed not at how well H.R. 700 restores coverage prior to *Grove City,* but at the failure of Congress in enacting these laws in the first place to carve out exemptions on behalf of special interests that would permit institutions to practice discrimination even while they were receiving Federal funds.

In this category is the claim by some fiercely independent colleges, as they style themselves, and the claim of Mr. Pendleton here today to exemption from nondiscrimination regulations when they receive only certain kinds of Federal assistance.

The fact of the matter is that the Congress was very careful in drawing exemptions in these laws, and it did so only when it thought that other values—for example, the interest in religious freedom—outweighed in that particular instance the national policy favoring equal opportunity and opposing discrimination that is subsidized with Federal funds.

And I would suggest to you, if you listen carefully to the testimony of some of the opponents of this legislation, you will hear very distinct echoes of the opposition to title VI in 1963 and to the statutes that succeeded it.

You will hear that the laws are an invasion of States' rights, that they are an invasion of rights of private property, and I would suggest to you that Congress has addressed these questions and ought not to address them again now.

By the same token, the real quarrel of some of the critics is not with the coverage of the law but with the substantive requirements of the laws themselves. And Mr. Jones was very frank in that statement.

This bill has nothing at all to do with the substantive requirements of the law, with affirmative action, with school desegregation remedies, with abortion, or with other matters.

And I might say parenthetically that the decision of the District Court here in the District of Columbia case this week was not a decision that invalidated race conscious action. In fact, the court specifically embraced the necessity for race conscious action. It merely said that one aspect of the plan, in the court's view, was an improper aspect of the plan.

But all of that to one side, this is not the forum for that. If people want to take on this issue, and obviously they do, we are ready to take it on in an appropriate forum, and this is not it.

I think, Mr. Chairman, that the proponents of this bill have an obligation to level with this committee and to say what their understanding of the bill is, what it would do, to answer your questions as fully and frankly as they can.

By the same token, I think the opponents have an obligation to level with this committee, as well, and I think if you listen to the testimony, what you have heard from Mr. Pendleton and Ms. Chavez is that they would not restore pre-*Grove City* coverage at all. Indeed, they would leave matters where they are, and then they would carve out some new exemptions to the law, exemptions that never existed before.

But I think people ought not, under the guise of saying this bill is overreaching, take on arguments in which they are saying that they don't like the laws themselves, but they are not acknowledging that very frankly.

In conclusion, Mr. Chairman, there is no doubt, I think, in anybody's mind that the simple justice that President Kennedy called for in asking for title VI's passage in 1963 has turned out to be quite complex.

I think the proponents, the sponsors of the bill and all of the members of the committee are to be commended for the way in which they have taken the matter seriously and grappled with the numerous technical issues with which you have been presented.

But at bottom, the issues remain one of simple justice, whether there is any set of values that overrides the national policy of equality of opportunity for all citizens and whether the Federal Government ought to be obstructed in the performance of its obligations to assure the taxpayers' money does not subsidize discrimi-

I think if viewed in those terms, the Congress will pass H.R. 700 without weakening amendments. We have come too far along the road to removing the debilitating effects of discrimination from the lives of people with the aid of these laws to turn back now.

Thank you very much.

The CHAIRMAN. Thank you.

[Prepared statement of William L. Taylor follows:]

PREPARED STATEMENT OF WILLIAM L. TAYLOR, ON BEHALF OF THE CENTER FOR NATIONAL POLICY REVIEW, CATHOLIC UNIVERSITY SCHOOL OF LAW AND THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. Chairman and members of the Committees:

My name is William L. Taylor and I serve as director of the Center for National Policy Review, a civil rights research and advocacy group affiliated with Catholic University Law School. I appear here today on behalf of the Center and the Leadership Conference on Civil Rights, the coalition of 165 civil rights, labor, religious and civic organizations that has made enactment of the Civil Rights Restoration Act of 1985 (H.R. 700) its primary legislative objective this year.

In my testimony, I will draw on experience I have had over almost a quarter of a century with laws and policies designed to prevent discrimination in the use of federal funds. As General Counsel and Staff Director of the U. S. Commission on Civil Rights in the 1960s, I helped to document discriminatory practices by institutions that received federal funds and later worked with federal agencies charged with implementation of Title VI of the Civil Rights Act of 1964 in the development of their policies and regulations.

I appreciate both the opportunity to testify and the leadership that has been provided over the years by the chairmen and members of both committees in the protection of constitutional and civil rights.

My testimony today is for a limited purpose--responding to criticisms of H.R. 700 that have arisen since its introduction in the House on January 24, 1985. While I am prepared to state the positive case of H.R. 700, I know that in the course of your

hearing here and around the country you have heard
mony about why the legislation is so vitally need
the protections of law to people who still suffer
No, for purposes of this testimony, I will assume
case and go directly to the criticisms.

1. The distinction between coverage and terminati

Much of the criticism of H.R. 700 stems from t
the critics to make a crucial distinction between t
stitution-wide coverage provided for in Section 601
Rights Act of 1964 and its counterpart statutes and t
reach of the termination of funds sanction provided fo
Section 602 of the Act and other statutes.

Until (and in some cases after) the Supreme Court fi
dressed the question of program specificity in North Haven
of Education v. Bell, 456 U.S. 512, in 1982, and then decided
in the Grove City case in 1984, the distinction was clear both
in the administrative practice of federal departments and agencies charged with implementing the laws and in the decisions of those federal courts that considered the issue. See, e.g., Iron Arrow Society v. Heckler, 702 F.2d 549, 561 (5th Cir. 1983); Haffer v. Temple University, 688 F.2d 14 (3rd Cir. 1982); Wright v. Columbia University, 520 F.Supp. 789 (E.D. Pa. 1981); Yakin v. University of Illinois, 508 F.Supp. 848, 850 (N.D. Ill. 1981); Flanagan v. President of Georgetown College, 417 F.Supp. 377, 383 (D. D.C. 1976). In other cases, broad institution-wide

coverage was simply assumed. For example, when the Supreme Court held in 1974, that the Department of Health, Education and Welfare had authority under Title VI to require school districts to address the language needs of foreign speaking students, the Court did not suggest in any way that these language needs must be addressed only in those "programs" of a school system that received federal assistance. See, Lau v. Nichols, 414 U.S. 563.

It was only after the Court suggested in dicta in North Haven an identity of construction between the coverage and termination sections of Title IX that some federal courts began narrowly construing the coverage provisions of the statutes. See, e.g., Hillsdale College v. HEW, 696 F.2d 418 (6th Cir. 1982). It is of course the confusion created by North Haven which led to the restrictive Grove City result that H.R. 700 is designed to dispel.

That this confusion still exists in the minds of some critics of H.R. 700 is evident by their reliance on Board of Public Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969) as a case supporting the concept of narrow coverage. Taylor County most definitely stands for the proposition that fund termination must be narrow and pinpointed to the funds which support discrimination. Equally as definitely, Taylor County stands for the proposition that coverage under the laws is broad. In explaining the reasons for this distinction, the Court noted that the limitation on fund termination in Section

602 "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." 414 F.2d 1075.

These reasons for limiting fund termination in no way support a limitation in coverage. Institution-wide coverage permits other remedies such as negotiated settlements or injunctions (in suits brought by victims of discrimination or the Department of Justice) that would terminate the discriminatory practice, not the flow of federal funds. In the case of such remedies, there is no possible harm to "innocent beneficiaries." Accordingly, the distinction made between broad coverage and narrow termination is supported not simply by legislative history and prior administrative and judicial practice, but by sound reasoning and sensible policy as well. As the Third Circuit concluded in NAACP v. Wilmington Medical Center:

> ...[T]o the extent that these procedures [§602] stand as a limitation, they limit only the power of agencies [to defund], and they in no way undermine the breadth of the underlying principle of non-discrimination. (Citing Senators Case and Kuchel, 110 Cong. Rec. at 5254, 6562). To read [§602] as a limitation on the very rights that are protected by the previous section would violate this principle [of complementary and harmonious interpretation of statutory provisions], and would also traduce elementary canons of logic (citation omitted). 559 F.2d 1247, 1254 and n. 27 (1979).

The question remains whether H.R. 700 is drafted precisely enough to retain pinpointed fund termination while restoring institution-wide coverage. Some critics have claimed that the substitution in H.R. 700 of the words "assistance which supports" for the language about "program or part thereof" in the termination sections of the original statutes would somehow broaden the reach of the termination sanction. To the contrary, the effect of this change is to avoid confusion about the meaning of the term "program" which could lead to a more expansive definition of fund termination. The language in H.R. 700 is almost identical to that used in H.R. 5490 last year, language which received a narrow interpretation in the House report and in statements made by Senate sponsors. It is language taken directly from Taylor County v. Finch. (414 F.2d at 1078).

So, in the words of Senator Cranston on S. 431 (the Senate counterpart to H.R. 700) "[t]he statutory scheme would thus 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." Cong. Rec., Feb. 7, 1985 at S. 1307.

2. Corporate coverage under H.R. 700.

Other criticisms of H.R. 700 have been leveled at the bill's definitions of the concept of "institution-wide" coverage. Whereas last year, it was said by some that H.R. 5490 was not specific enough, this year some of the same critics are saying

that H.R. 700 is too specific, and in ways they do not like.

In this connection, particular attention has been focused on Section 3(a) and other sections which state that "the term 'program or activity' means all of the operations of - (3) a corporation, partnership, or other private organization...any part of which is extended federal financial assistance."

Critics of this provision say variously that this does not conform to their understanding of prior law, that coverage of corporations does not appear to be limited in the same way that coverage of state and local governments is (to the department or agency receiving funds), that some corporations receive very limited federal assistance (e.g., only grants under the Job Training and Partnership Act) and would be prepared to give up those grants rather than conform to onerous civil rights requirements.

First, as to prior coverage, it is true that the question of corporate coverage has not received the extensive attention in case law that has been given to other types of institutions, e.g., public school systems. The reason for this is that, by and large, problems of discrimination in the corporate area are employment problems rather than discrimination in the extension of services. In employment, both limitations in the provisions of some of the federal funding statutes (e.g., §604 which limits Title VI coverage of employment to federal programs where employment is a "primary objective") and the availability of other

remedies such as Title VII of the 1964 Act and Executive Order 11246 dealing with government contractors, has meant that there has not been extensive application of the federal funding statutes.

Nevertheless, cases that have addressed the issue directly or indirectly support the concept of corporate-wide coverage. See Organization of Minority Vendors v. Illinois Gulf Central Railroad, 579 F.Supp. 574 (N.D. Ill. 1983); Marable v. Alabama Mental Health Board, 297 F.Supp. 291, 298 (M.D. Ala. 1969). Conversely, cases that appear to go the other way are predicated on a view that Section 504 of the Rehabilitation Act of 1973 does not cover employment at all, a view repudiated by the Supreme Court in Consolidated Rail Corporation v. Darrone, 104 S.Ct. 1248 (1984).

Further, in one area where there have been significant problems of service discrimination--hospitals and health facilities--it is my understanding that prior administrative practice has not made any distinction between public and private corporate bodies. In both situations, corporations are covered in their entirety. See NAACP v. Wilmington Medical Center, supra.

Second, I believe that the provision for corporate-wide coverage is supported by experience in analogous areas of law as well as by sound policy considerations.

As this Committee knows, Executive Order 11246 is corporate-wide in its coverage. Even if only one plant or facility

of a corporation with operations all over the nation receives a federal contrast, all of the operations of the corporation are subject to the requirements of the Order.

Similarly, if a private hospital corporation owns health facilities around the nation it is very difficult to understand why only the facility that receives federal assistance should be required to meet the basic requirement of treating patients in a nondiscriminatory manner.

In fact, I do not know of any well-run corporation that would want to have two sets of policies--one which requires equal opportunity at its facilities that receive federal assistance and another which permits discrimination at its facilities which do not receive such assistance.

If it is proposed that a distinction be made not between physically separate plants or facilities but between the varying functions of a single corporaiton, the arguments against parsing corporate-wide coverage seem to me to be at least equally compelling. Just as a private college that receives student assistance in its finance office should not be free to discriminate in its math department, so a private corporation that receives aid in its geriatrics department should not be free to discriminate in its operating rooms or its pediatrics department.

Third, while analogies in this area are necessarily imprecise, it is <u>not</u> correct to say that private businesses are being subjected to broader or more onerous regulation than state or local governments.

It should be noted that many major business enterprises in this country are conducted through a multiplicity of corporations. H.R. 700 is no way seeks to treat such an enterprise as a unity. Even where a corporation is a wholly-owned subsidiary of another corporation, or has interlocking boards of directors or other indicia of control, H.R. 700 does not reach beyond the formal boundaries of the corporation that is receiving federal assistance.

Nor to my knowledge has anyone made a persuasive argument about why, when a public school system or a large university with multiple sites and facilities should be treated as a unity, a corporation with multiple sites and facilities should not.

Fourth, the claim that some corporations would forego federal assistance rather than subject themselves to additional civil rights requirements is not a new one. Even since Title VI was first proposed in the early 1960s it has been said that insistence on attaching civil rights requirements to federal grants would resultin harm to the very people whom the law was intended to benefit--the poor and disadvantaged. Experience has proved this contention wrong. The progress we have seen in education, health, housing and many other areas over the past twenty years has come because in the end recipients of federal funds have accepted both the funds and the obligation to treat people fairly. It is hard for me to believe that in 1985, corporations concerned abut the need for fuller devlopment of human resources

or ways to improve productivity would refuse to participate in programs designed to achieve such goals because they are required to treat people fairly and without discrimination. It is also incorrect to say that the bureaucratic obligations under Title VI, Title IX, Section 504 and the Age Discrimination Act are onerous. The assurances of compliance and periodic reports that are called for under agency regulations are far less burdensome than those of other statutes or executive policies, e.g., the goals and timetable requirements of Executive Order 11246 which call for corporate self-analyses and the preparation of very detailed affirmative action plans.

If, as has been suggested, the problem lies in multiple investigations by different federal agencies of a corporation based on the same underlying complaint, it seems to me that the answer lies not in restricting coverage but in clamping down on bureaucratic malpractice. Civil rights groups do not want to see corporations harrassed or scarce federal resources for civil rights enforcement wasted. We would be glad to cooperate with members of this Committee and representatives of the business community in seeking an end to any duplication in enforcement that can be identified.

Finally, one largely unarticulated area of concern on the part of corporations is the obligation they would have under Section 504 not to discriminate throughout their operations on the basis of handicap. Here, the concern is not about

duplication since there are few other laws barring discrimination against disabled people, and corporations are not forbidden under federal statutes from discriminating against disabled people unless the corporations are federal contractors or receive federal assistance. Rather, the problem is that some businesses are concerned about the costs that would be entailed in coming into compliance with the law, costs they have not assumed so far if they believe themselves to be exempt in part of their operations. This Committee has heard and will hear testimony from people far more expert than I on legal issues affecting disabled people. I would say only that in requiring only that "reasonable accommodation" be made in providing employment and accessible services, Congress and the Executive Branch have been sensitive to the need to avoid undue costs in the extension of rights. There have been few complaints on the part of institutions such as colleges that acknowledge they are fully covered that the law has been administered in a draconian way. If there are such problems, I would suggest that the way to resolve them is in revisions of substantive regulations regarding reasonable accommodation, rather than arbitrary exemptions from coverage. Ultimately, the nation will benefit by policies which permit disabled people, as well as minorities, women and older Americans to develop their talents and contribute to their full potential.

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3. Other objections to H.R. 700.

Several witnesses in these hearings have addressed or will address their testimony to other objections that have been raised to H.R. 700. So I will not deal with these issues unless requested by the Committee to do so. I would observe, however, that if the Committee reviews these criticisms it will find that many of them are directed not to the amendments designed to restore the four statutes to pre-Grove City status but to the very basis of the laws themselves.

In the arguments against department or agency-wide coverage of assistance to state and local governments can be heard echoes of the "states' rights" claims that were made against passage of Title VI in 1964.[1] In arguments that exemptions not currently

1. One example is the testimony of Assistant Attorney General Reynolds that such coverage:

> [O]pens the way for the first time for a nonfunded activity of a state agency in Northern California, for example, to be subject to federal compliance reviews of some other, unknown and wholly unrelated, funded activity of that same state agency that is going on in Southern California. Reynolds testimony at 9-10.

This statement is factually incorrect and exhibits a peculiar understanding of the role of states in our federal system. Indeed it appears to go beyond an assertion of states' rights to plead for "bureau" or "office rights." Or perhaps Mr. Reynolds is merely reviving the old proposal that California be split into two states.

contained in any of the four laws should be carved out for "fiercely independent colleges" or other private institutions can be heard echoes of the "private property" rights claims that were made against the 1964 Act. The short answer should be that institutions that so value their independence should abstain from any reliance on federal funds. In a real sense, some opponents are seeking to convert the debate about the Civil Rights Restoration Act into a referendum about the desirability of the laws themselves. While civil rights groups have not sought such a referendum, we are confident that Congress if called upon will ratify the wisdom of the decisions it has made since 1964 in passing the laws.

Conclusion

Mr. Chairman, there can be no doubt that the "simple justice" that President Kennedy asked in 1963 in calling for passage of Title VI has become quite complex. The Committees are to be commended for grappling with the numerous technical issues presented to them. But, at bottom the issue remains one of simple justice--whether any other set of values overrides the national policy of equality of opportunity for all citizens and whether the federal government should be obstructed in the performance of its obligation to assure that taxpayers' money does not subsidize discrimination.

If viewed in these terms, I am optimistic that Congress will pass H.R. 700 without weakening amendments. We have come too far along the road toward removing the debilitating effects of discrimination from the lives of people to turn back now.

The CHAIRMAN. The final witness is Mr. Lowell Johnston, of the NAACP Legal Defense Fund.

STATEMENT OF LOWELL JOHNSTON, NAACP LEGAL DEFENSE FUND, INC.

Mr. JOHNSTON. Thank you very much, Mr. Chairman. I am going to be very brief.

We have not submitted written comments, in part because we are fully in accord with the statements that have been prepared by the Leadership Conference and by Mr. Taylor of the Center at Catholic University, and we join in those comments, and we understand that they will be supplemented within the next few days.

It is hard for me—this is my first opportunity to appear before a committee such as this, and it is really hard for me to understand the kinds of extremes in the statements that are being made about this particular bill and about things in general.

I had particular trouble understanding the threat that has been described by Mr. de Bernardo to the business community.

But in any event, what I would like to emphasize, and I will be very brief, is that I think what is at stake here is not so much the right that is guaranteed by title VI, for example, in this legislation, although there is no gainsaying the importance of it, what we are talking about here is an essential enforcement tool that was designed early in the days of the civil rights movement to accomplish the rights that were described in the Constitution.

That is, there is really a three part system to the enforcement of these rights.

You have the private sector that can enforce title VII, title VI to a certain extent, although that is still in dispute, the Civil Rights Act of 1866, numerous private rights. Private rights of actions exist under the Constitution to enforce those rights.

Second, you have the systems with the 1964 act that authorizes action by the Attorney General, and up until the present administration there is no estimating the real impact that those efforts had.

The third part, and this is what is most critical of all, is the enforcement machinery that was set up under title VI that is sought to be restored through this legislation.

It would have been impossible, it would have been impossible for the extensive, for example, school desegregation or desegregation at the level of higher education to have been accomplished without the efforts of the Federal bureaucracy in that effort.

The Justice Department could not have done it, the private sector could not have done it, groups like ours, private attorneys working the area could not have accomplished it. Those things would not have been accomplished.

There is a whole new generation of issues that have to be addressed in education, in housing, which has not really been addressed at all over the pa[illegible] 20 years, and numerous other areas.

Taking an example, there was recently an article, a series of articles in the Dallas newspapers about the extent of federally subsidized housing segregation throughout the country.

Now, if this legislation does not pass, for example, if we identify a problem of segregation in public housing in Albuquerque, NM, and file a complaint under title VI, with the restrictive interpretation we are talking about here only that complaint would be investigated. Only the particular facility that you are trying to address, that the individual is trying to address in that complaint would be reviewed by the agency.

There would not be the across-the-board investigation into housing discrimination which was identified as being important by Edith Green at the time this title VI was first passed.

That essentially eviscerates the effectiveness of the statute. It removes an essential remedy to something like housing discrimination. It makes it impossible to make that kind of a dream come true for an individual in New Mexico.

There can be countless examples of things like that that would happen in the absense of some across-the-board approach involving the Federal Government in trying to address these problems.

Thank you very much.

The CHAIRMAN. Thank you.

This hearing is the concluding one in a series of hearings that we have had, both here in Washington and across the country, and it would seem to the Chair that after listening to all of the testimony that what is actually involved here is the 1964 Civil Rights Act. Some individuals accuse the sponsors of H.R. 700 of overextending the reach of the law beyond pre-*Grove City*, when in actuality they seem to be appearing in opposition to the 1964 Civil Rights Act which they apparently objected to, then and now, and rather would like to preserve the right to discriminate by those entities receiving Federal assistance, which after all, is what H.R. 700, is designed to prevent.

I would think that their support of the Dole bill is one of the most dangerous situations in which they could find themselves. This Congress, if it sought merely to confine the interpretation to educational activities, would undercut completely all of the other statutes contained in H.R. 700, and perhaps even in the educational field itself.

I can perhaps understand the chamber of commerce, because I think they are forthright in their position in that they also opposed the 1964 act, and all of the acts subsequent to that, including the 1972 amendment; which I recall rather vividly because I was heavily involved in that particular activity as a member of the Education and Labor Committee.

So, their opposition has been consistent, and perhaps from the point of view of doing everything possible to protect against additional paperwork, I suppose on that basis alone you might say that there is some rationalization.

However, I find the rationalizations of the Civil Rights Commission, and its members, who pledge to uphold the civil rights policies of the Nation as conceived under both Republican and Democratic administrations, very hard to understand, and it is frightening that such an agency would object to this simple restoration and use, in my opinion, the most horrible examples that are clearly very difficult to even conceive of, used to rationalize their opposition.

Mr. Pendleton, in your statement, on page 4, you refer to several examples where you suggest that, for example, enrolling students in educational institutions who themselves receive Federal student aid should not, in a sense, taint the university in such a way as to invoke coverage of these laws. You also refer to coverage of supermarkets.

Now, in both instances, current law and regulations, do cover them. Let's take the example of student aid to a university, or even the *Grove City* case, itself. The court in *Grove City* was not troubled by this initial coverage question, whereas you seem to be troubled, by the fact, that enrolling those students in those institutions would trigger coverage under H.R. 700.

Is that the position that you take in behalf of the Civil Rights Commission?

Mr. PENDLETON. Well, I understand from your preliminary remarks how you could grab that position, remarks about us upholding the civil rights laws. I just want to say in the beginning, we are upholding the civil rights laws and will do so.

The CHAIRMAN. Now, I am talking about a statement from your statement.

Mr. PENDLETON. I am coming now to the statement. The point I am making here is that we have no problem with the broad coverage. What we are talking about is if you don't receive any money—I think since *Grove City* has been decided, institutions have given up on Pell grants and given up, for that matter, on guaranteed student loans.

So, in a sense, *Grove City* really isn't a problem anymore. They have decided to just abdicate out of the whole arena.

And what we are saying here is that there is broad coverage of the institutions, as we have said before, and to keep the laws as they are to pinpoint the coverage.

Where we did have some discussion in our statement with respect to the indirect aid that a school gets, and we were talking about the fact if someone gets indirect aid and gets that from someone else and uses that for a particular purpose, then we have some problem with that, and I think that is what we are talking about in that statement on page 4.

The CHAIRMAN. What distinction do you make between direct and indirect, and what is the explanation for your statement that enrolling students who receive Federal student aid should not federalize the institution? That seems to be the issue that you are dealing with.

Mr. PENDLETON. What I am saying is that if the student gets a guaranteed student loan that is not supplied by the institution, we don't really see the need to cover that—

The CHAIRMAN. Well, let's say the student receives a Pell grant or BEOG aid, which was precisely the *Grove City* situation. Do you believe the institution should be covered institution-wide?

Mr. PENDLETON. No.

The CHAIRMAN. Well, I thought that was your impression.

Mr. PENDLETON. Institution-wide in terms of coverage, we——

The CHAIRMAN. Do you think it should be confined specifically to that part of the institution that directly receives the grant, and, in that instance, only the Federal aid office?

Mr. PENDLETON. Yes.

The CHAIRMAN. Well, let me ask you another question, since you have been so candid. Your candor has really placed you on a path of a very restrictive interpretation, and also placed the Commission in a position of disagreeing with even the court in the *Grove City* case.

You would then, I assume, tolerate, discrimination against female athletes of an educational institution so long as the Federal assistance went only to the science department, or would sanction a hospital's policy of not treating blacks and Hispanics in its emergency facility so long as the aid went only to its cancer research activity?

Mr. PENDLETON. I think it is clear that there are other statutes that begin to cover that. I think——

The CHAIRMAN. That is not the question.

Mr. PENDLETON. Maybe I don't understand your question, sir.

The CHAIRMAN. I am asking you, and I will repeat it specifically: Would you tolerate discrimination against female athletes of an educational institution so long as the Federal assistance went only to the science department, or a hospital's policy of not treating blacks and Hispanics in its emergency facility so long as the aid went only to its cancer research activity?

Mr. PENDLETON. Well, certainly I don't tolerate discrimination, but I think the way you put the question limits, in a sense, the answer to this point, that there are other statutes that begin to cover that, and I think that if you don't receive the financial aid directly, I think I am being consistent about the coverage. But I don't tolerate discrimination in this case.

What I am really saying is that there are other ways to cover that, and I think we have said that in our testimony.

The CHAIRMAN. Well, you are not really answering the question. Let me ask another member of the Commission the same question with respect to whether or not the Civil Rights Commission's view is that of Mr. Pendleton or that of Ms. Berry? I think that is fair enough.

Ms. BERRY. Well, the majority view is that of Mr. Pendleton, since 5 to 3 they voted in favor of his position which, as you point out, is narrower than even the Supreme Court decision, which is why Commissioners Guess, Ramirez and I dissented.

But what I wanted to point out, Mr. Chairman, the Chairman of the Commission said that there is another statute that covers the situation involving students.

Commissioners Guess, Ramirez and I are not aware of any statute and I am not aware, based on my enforcement in these agencies, I am not aware of any other study, which is why I think the Congress passed the statute which passed this particular one.

But I would be interested in knowing what that statute is, Mr. Chairman.

The CHAIRMAN. Well, whether there is one or not, the question before us is, does the Civil Rights Commission favor the law post-*Grove City*, or whether it upholds the pre-*Grove City* view of the Civil Rights Act of 1964? I think that goes to the heart of the problem before us; whether they believe that an entity which receives

Federal assistance in only one of its parts, should permit the rest of the entity to discriminate.

Now, if that is the position of the Civil Rights Commission today, then God save the country. I cannot really get to the bottom of this question because there seems to be some indecision.

However, the same Commission members are quick to say that H.R. 700 overreaches and attempts to do something which is contrary to what the law and the regulations were pre-*Grove City*.

Mr. TAYLOR. Mr. Chairman.

The CHAIRMAN. Mr. Taylor.

Mr. TAYLOR. If I might just add, there is no other statute that prevents discrimination on the basis of sex in athletic programs in colleges and universities that receive Federal funds. There is no other statute that prevents discrimination against disabled people by corporations that receive Federal assistance unless those corporations happen to be Federal contractors.

So, I don't think that witnesses can stand here and tell you today that you don't need to reform these laws because there are other statutes that take care of the problem.

The CHAIRMAN. Well, I was hoping that Mr. Pendleton might reveal those other statutes.

Mr. PENDLETON. Let me be clear, what we are saying in our statement, and I understand why there is so much confusion—when you mentioned about hospitals and hospitals receiving research grants, surely they have some statutes that cover that research grant. There is no problem with that. You mentioned about cancer research.

What we are saying in this statement is that the institutions should receive broad coverage but pinpoint the cutoff of the money. We never said there shouldn't be broad coverage. Isn't that what I said?

Ms. BERRY. Mr. Chairman, the——

The CHAIRMAN. That is not what your statement says, Mr. Pendleton.

Mr. PENDLETON. Unless it was indirect aid, Mr. Chairman, I am sorry.

The CHAIRMAN. We will let your statement stand the way it is, because I think it shows really what the problem is all about

Mr. PENDLETON. Mr. Chairman, I have been very unclear here. Let me be as clear as I possibly can with this statement and try to get myself out of this hole that I put myself in, because I am really in it.

What the——

The CHAIRMAN. Well, just tell us the truth about the Civil Rights Commission.

Mr. PENDLETON. We believe what we said. We believe there should be broad coverage in this instance, as we talked about before, but there should be pinpointing of the remedy.

Ms. BERRY. No, it says coverage.

The CHAIRMAN. Well, that part is OK.

Mr. PENDLETON. Except for the indirect aid, that is all we really said.

The CHAIRMAN. Now, what do you mean by indirect aid? Will you describe what you mean by indirect aid? Do you mean a Pell grant, for example? Is that covered?

Mr. PENDLETON. That is not indirect aid, sir.

The CHAIRMAN. Is a BEOG grant?

Mr. PENDLETON. No, sir.

The CHAIRMAN. That is not indirect? That is direct aid?

Mr. PENDLETON. That is direct aid.

The CHAIRMAN. So that your statement, then, was misleading when you said——

Mr. PENDLETON. The indirect aid we are talking about like the guaranteed student——

The CHAIRMAN. That entities should not be federalized by enrolling students who themselves have received Federal student aid, that exempts all these other——

Mr. PENDLETON. We are really talking, sir, about private institutions, we are talking about the broad coverage, we are talking about pinpointing the remedy, and we are talking about indirect aid in this case, that that should not be a part of this. That is all we are really saying.

The CHAIRMAN. Well, you are almost agreeing with H.R. 700, then.

Mr. PENDLETON. Well, I am not so sure that I am, sir.

Ms. BERRY. Mr. Chairman, may I say that Commissioners Ramirez and Guess and I dissented from the Commission's statement which was voted on and approved on March 5, 1985, and which has been entered here for the record, and which was the subject of the Chairman's testimony that you have just been reading from, and that statement, passed by the majority of the Commission, and we dissented from it, says, in our view a private institution seeking and receiving direct Federal financial assistance should be covered only in the program or activity that actually receives and uses such assistance. That is what it says.

We hold this view for the same reason we object to any coverage of so-called indirect Federal aid. Now, that statement is there and we, in fact—and then it goes on to say, therefore, those parts of a private entity not receiving Federal aid should not be federalized by broad coverage under these Federal civil rights statutes.

Now, that is a statement that we dissented from, and on the plain language of the statement, Mr. Chairman, which has been entered in the record, what you see is an acknowledgement that receiving Federal funds in one program or activity does not provide for coverage, which is less than what the Supreme Court said in *Grove City*. That is what I dissented from.

The CHAIRMAN. Well, that statement seems to be in conflict with what Mr. Pendleton has said this afternoon, and that is the reason why I was trying to clarify it for the record.

Mr. PENDLETON. I think, Mr. Chairman, you have done a good job of clarifying it for the record. I am only saying that when we talk on page 5 about the Commission believes that there should be differentiation between a public and private entity with respect to scope of coverage issues, we were very clear about that, and I stand by that statement, sir.

The CHAIRMAN. Well, do you deny the statements you made this afternoon and stand by this statement?

Mr. PENDLETON. I stand by this statement, sir, that I read this afternoon.

The CHAIRMAN. All right. Mr. Bartlett.

Mr. BARTLETT. Thank you, Mr. Chairman.

I have questions for several of you. First, for the Chamber of Commerce.

I wonder if you could tell us precisely, in the area of coverage of a corporation, partnership or similar entity that would be covered by this, which was the subject of some of your testimony. Do you support a law, whether it is this one or existing law or a change in the law, in which that particular program would be covered by these four statutes, the program that is the recipient of that Federal aid? Is that what you are telling us that you support, that that recipient would be subject to the pinpoint remedy, so that recipients are covered by this and would have those funds eliminated if they discriminate? And the dispute is where you would draw the line around the termination?

Mr. DE BERNARDO. That is absolutely right.

Mr. BARTLETT. How would you construct a change to H.R. 700 in drawing that line?

Mr. DE BERNARDO. Well, our concern in terms of the scope of coverage is exactly how broad this is. We don't think that there are parameters set at all.

In terms of "recipient", which is something that some of the sponsors of this legislation have talked about, that recipient, the definition of "recipient" goes unaltered, we feel that the issue of what recipient is would be moot in lieu of section 909 of H.R. 700.

And, in fact, when you talk about all of the operations of, any part of which is extended Federal financial assistance within section 909, that in fact is the definition of "program or activity." In fact, what you have is the definition of "recipient" that goes through paragraph 1 through 4.

Now, there are several ways that corporations can be brought in. One is under paragraph 3. Another is under what we consider to be a very broad catchall paragraph, paragraph 4.

I am not sure exactly where to draw the lines on——

Mr. BARTLETT. Let me ask you in layman's terms.

Mr. DE BERNARDO. OK.

Mr. BARTLETT. And then I believe I will probably ask Mr. Taylor this same question, as to his opinion.

If a corporation—and let's take a large one, General Motors—has a plant somewhere in the country and that plant has a JTPA, a Job Training Partnership Act contract with the Department of Labor, you are contending that this bill, the way it is drafted, H.R. 700, would trigger corporationwide coverage for the entirety of the corporation, and you are opposed to that. Is that——

Mr. DE BERNARDO. That is absolutely right, and I think that is certainly an interpretation that this provision lends itself to.

Mr. BARTLETT. Would you be in favor of drafting a bill that would cover that plant, then, so if that plant were to discriminate, then the remedy would be the elimination of the JTPA funds from that plant?

Mr. DE BERNARDO. That is correct. In fact, I think that in terms of a program-specific application, that is what we are looking at getting at.

Mr. BARTLETT. So, the Chamber would favor a pinpoint remedy, to use the terms that are in the existing law?

Mr. DE BERNARDO. That is correct.

Mr. BARTLETT. So, you are not urging us to eliminate the antidiscrimination laws from coverage or from remedy, but merely to make them apply to the unit that is receiving the funds. I don't want to characterize you, but that is what I hear you saying.

Mr. DE BERNARDO. That is correct.

Mr. BARTLETT. Mr. Taylor, where would you draw that line? Would you leave it as corporatewide coverage and therefore remedy, or would you draw it more narrowly than that?

Mr. TAYLOR. Well, Mr. Bartlett, first of all, I think at the risk of sounding stuck on a small point, really what we are talking about is not pinpointing remedy, what we are talking about here is pinpointing coverage rather than remedy, because the remedy is always pinpointed, if you talk about termination of funds.

I think that it is appropriate in terms of past practice and analogous experience to cover the corporation in its entirety.

I want to make clear that some of the interpretations we have heard, which suggest that if you have a business enterprise that has multi corporations it could be covered under the "any other entity" section, that is simply wrong.

The boundary of coverage would be the corporation itself.

And I would suggest that it would be very difficult to draw distinctions based on plant or facility or the differing kinds of operations within a corporation.

For example, and I have used this—I know this may not be the one you have in mind—but if you are talking about a private hospital corporation, for example, how is it appropriate to say that if the funds go into the emergency room or let's say they go into the geriatrics department, that somehow the pediatrics department or the emergency room should be exempt from coverage?

If you are talking about a corporation which we have seen the growth of recently, which provides hospital care and has facilities around the country, why is it appropriate to say that that corporation is covered if in Louisville it accepts funds but it is not covered in its New York or Boston operation?

I don't know of any well regulated company that would have two sets of practices, one of allowing discrimination in facilities that are not receiving Federal funds——

Mr. BARTLETT. Well, Mr. Taylor, I understand the coverage. Then where would you place the remedy? Under the old statute or the existing statute, as I read it, it uses the words, "the remedy shall be limited in its effect to the particular program or part thereof."

Now, that is changed, as I read page 4 of H.R. 700, line 4, by striking "program or part thereof" and inserting in lieu, "assistance which supports."

What is your understanding of what that change does? Does that mean that then the remedy is corporatewide?

Mr. TAYLOR. No, no, not at all.

Mr. BARTLETT. How would you define where the remedy should be?

Mr. TAYLOR. That retains the pinpointed remedy. And I am sorry, I thought you were addressing yourself to questions of coverage, rather than remedy.

Mr. BARTLETT. I was and I shifted over at your suggestion.

Mr. TAYLOR. The reason for that language is that it is necessary to—now having given a definition to "program or activity" in the first section of the bill, it is necessary to make sure that the remedy will be—that the termination remedy will be pinpointed.

And the language, "assistance which supports," is drawn directly from the *Taylor County* v. *Finch* case, which says that under the law as it has been that any termination of funds must be limited to the assistance which supports discrimination.

So, I think that this language is useful, indeed necessary to retain pinpointed termination.

Mr. BARTLETT. So, you advocate and you believe H.R. 700 advocates codification of *Taylor* v. *Finch* with regard to pinpoint remedy?

Mr. TAYLOR. That is absolutely correct, sir. And in the example that you gave, the only funding that would be at risk—let's say there were two kinds of funding—would be the JTPA funds in the plant that was supporting—where there were discriminatory activities found.

That would be the only funding at risk.

Mr. BARTLETT. Under H.R. 700, the way you read it, if the rest of the company discriminates somewhere else, then the funding at that plant would not be allowed to be terminated. Is that your interpretation?

Mr. TAYLOR. That is correct.

Mr. BARTLETT. Ms. Berry, is that your interpretation?

Ms. BERRY. That is absolutely my interpretation. That is the policy that was followed in enforcing these laws while I was in the agency that enforced them. I understand the pinpoint termination remedy entirely, and the only funds that would be cut off under the example you gave is at that plant.

Mr. BARTLETT. I am not sure if I read it precisely that way and I may want to hear some more. Ms. Chavez, do you read it that way? It seems to me that that comes down to the heart of what the dispute is about. It is over words and what the words mean. Ms. Chavez?

Ms. CHAVEZ. No; I do not read it that way, and as a matter of fact that is one of the ways in which I believe this bill does expand coverage, is in the expansion of the former pinpointing of fund termination.

The pinpointing of fund termination was not affected by the *Grove City* decision. It was not part of that decision nor was it affected.

Once the Congress changes the language in the statute and no longer specifically mentions program or activity and fund termination based on pinpointing that to the program or activity, I think you will leave the door open for future courts to decide that Congress did indeed intend to expand coverage.

If Congress does not intend to expand coverage, then the language in the fund termination section should remain unchanged, since it was unaffected by the court decision.

Mr. TAYLOR. May I point out, Mr. Bartlett, the issue we are discussing, the issue on which you asked the question was not about coverage. It was about termination sanctions specifically. And my answer was directed to that, it retains pinpointing.

Ms. BERRY. And might I just add, Mr. Bartlett, that the language which is in the bill which circumscribes the termination to pinpointing is taken exactly from the case, *Taylor County* v. *Finch*, which is the case which defined what pinpoint termination is.

It doesn't seem to me that—I don't see how one needs to be clearer about that, unless you want to write in the bill, this language is taken from *Taylor County* v. *Finch*.

Mr. BARTLETT. Maybe we will have to do that, Ms. Berry.

Ms. BERRY. Perhaps that will be necessary.

Mr. BARTLETT. Thank you. Mr. Chairman.

Mr. EDWARDS. I would like to make it clear that the report will be very specific about that rule, that we all understand very clearly, and there is no doubt that that is what the intention of the writers of this legislation is.

We will recess for 10 minutes because there is a vote on the floor of the House.

[Recess.]

The CHAIRMAN. Mr. Armey, we will yield to you.

Mr. ARMEY. Thank you, Mr. Chairman.

I would like to preface my question with a brief statement, because it is indeed a pleasure today to see this panel of witnesses. I have worked with a great many people regarding this act and I want to say up front that these are people like myself who believe that, indeed, all Americans are entitled to the protection of the law, and that a fundamental tenet of human justice in the United States is that a person is considered innocent until proven guilty. They are concerned about this law because the law extends the scope of meddlesome bureaucracy to have an open license to meddle into their life and ask them, first, to fill out compliance forms that testify to their innocence before they are even charged, and second, to be subject to the fear and the threat of harassment by bureaucratic agencies if indeed somebody in some related agency or program or activity, sometimes clear across the Nation or across the State, should fail to fill out compliance agreements.

They often see this as what I call the Comprehensive Government Intrusion Act of 1985, and in defense of their own individual liberty do in fact rise in opposition against it.

It is not that they are mean spirited, not that they intend to discriminate nor would tolerate discrimination.

Now, what I would like to point out is that as we look at this, we see a law that would extend the right of the Government to make a certain violation of everybody's rights in defense of the possible violation of somebody's rights, and we quite rightly oppose this.

Now, I would like to ask the members of the panel, beginning with you, Ms. Berry, do you agree that civil rights legislation is written to protect the rights of all Americans?

Ms. BERRY. Mr. Armey, I am glad you asked me that question. I suppose you are referring or you may be, and if you are not, I will refer you to, a statement that was made by Commissioner Ramirez and myself in connection with the commission's statement on the Memphis firefighters case in which we said that civil rights laws—just one second, Mr. Armey—that civil rights laws were not passed to give civil rights protection to all Americans as the majority of this commission seems to believe.

Instead, they were passed out of a recognition that some Americans already had protection because they belonged to a favored group and others, including blacks, hispanics, and women of all races did not because they belonged to disfavored groups.

What I meant, Mr. Armey, is two kinds of things. First, the set of civil rights laws, why they were passed, what their purpose was, passed during the Civil War and Reconstruction; and the second set passed most recently in the 1960's.

What I meant by it, if you will bear with me, since you asked the question——

Mr. ARMEY. Well, please make it quick, because you are using up my time.

Ms. BERRY. Well, Mr. Chairman, may I have enough time to answer this question, even if Mr. Armey has to have additional time?

The CHAIRMAN. Well, the Chair will be lenient with Mr. Armey.

Mr. ARMEY. Thank you, Mr. Chairman.

The CHAIRMAN. And allow him to follow up.

Ms. BERRY. Right. And I will be as brief as I can, but this is important.

The first set of civil rights laws, we are referring to beginning with the Civil Rights Act of 1866, which is cited at 14 U.S. Statutes-at-Large, pages 27 ff, in which it says that citizens, without regard to race, shall have—that blacks shall have the same rights to full and equal benefit of all laws and proceedings for security of persons and property as is enjoyed by white citizens.

The clear intent of that statute was to give—the purpose of it was to give what whites already had, and it says it right in the statute by white citizens, to blacks.

The second point that I was making is that in the Slaughterhouse cases, which are cited at 16 Wallace 36, 1873, of the Supreme Court Reports, Mr. Justice Miller in the majority opinion—this concerns the Fourteenth Amendment, 13, 14, 15—said that, "We repeat, in the light of our recapitulation of events and the history, legislative history," and he says, "these historical events are too recent, really, to be called history." He is talking about the Civil War, "which are familiar to us all. No one can fail to be impressed about these amendments with the one pervading purpose found in them all, lying at the foundation of each and without which none of them would ever have been suggested. We mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freedman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

"It is true," he says, "that only the Fifteenth Amendment in terms mentions the Negro by speaking of his color and his slavery,

but it is just as true that each of the other articles was addressed to the grievances of that race and designed to remedy them.

"Now," he says, "we do not say that no one else but the Negro can share in this protection. We do not say that," he says, "but what we do say and what we wish to be understood is that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy and the process of continued addition to the Constitution."

In the 1960's what I am referring to when I say that civil rights laws were passed to benefit some people who had been left out in the past and that they had this pervading purpose, whether it is the civil rights law of 1964 concerning race or title IX concerning sex discrimination, which while as it talks about it, focuses on women who are the victims, or whether it is section 504, section 504 of the Rehabilitation Act of 1973—I am talking fast, Mr. Chairman—related to discrimination against people based solely on handicap, or the age discrimination statute of 1978.

They all had a pervading purpose which is attested to in the legislative history.

On the Civil Rights Act of 1964, more particularly, you will find in volume 110, Congressional Record, numerous citations from the legislative history, and some of them repeated as citations in the case of United Steel Workers of America, *AFL–CIO–CLC* v. *Brian Weber*, which is cited at, Mr. Armey, 99 Supreme Court 2721, 1979.

You will find that in the Congressional Record remarks like the following concerning title VII:

> The crux of the problem we are addressing is to open employment opportunities for Negroes in occupations which have been traditionally closed to them.

And elsewhere you will find in the discussion statements which say this does not mean that no one else can sue under these laws, and clearly I would not accept that interpretation either, but if you are talking about the pervading purpose of the civil rights laws, it is clear to anyone, even in this day and age when history is sometimes poorly or not taught in our schools, that the history of these laws will show a pervading purpose and that that is why they were passed.

Thank you very much, Mr. Chairman.

Mr. ARMEY. Of course, that is a very good history lesson, and I appreciate it. But we are talking here about a law that addresses the future. We are talking here about a law that will give no one an escape from the government agency coming in and compelling them to prove their innocence without even a charge of guilt being addressed.

The point is, and again I speak here for many, many people, good and true people who are well mannered, very considerate who wouldn't think of discriminating, who are saying enough is enough and too much of a good thing is dangerous.

What I am suggesting to you is you are putting in jeopardy here a certain violation of all people's rights in this country, to be assumed innocent until proven guilty with no opportunity for them to take any action.

I am further suggesting to you that it isn't programs or activities that discriminate, it is people that discriminate.

Ms. BERRY. Are you still asking me, sir?

Mr. ARMEY. Would you agree with me that it is people who perform acts of discrimination, or is it programs and activities?

Ms. BERRY. The idea of using programs and activities goes to your question about guilt, your point about people being innocent until they are proven guilty, which I certainly agree with.

The issue is not guilt. The issue is whether you should receive Federal taxpayers' money that all the taxpayers who don't avoid or evade taxes pay, and to continue to receive them while you are, in fact, engaging in excluding others.

Mr. ARMEY. Isn't the issue here really the issue of whether or not you can opt not to receive them if they are extended to you?

Mr. TAYLOR. Mr. Armey, I think that is a question that we talked about last week, and at the risk of repeating myself I will say that a person who does not receive Federal funds would not, under this statute, assume any obligations not to discriminate with the use of those Federal funds. There is no question about it.

You are seizing on some language that is in the bill that is adopted directly from the regulations that has never received the interpretation that you are giving to it in all the years of the statute.

Now, as to the question of presumptions of guilt or innocence, I guess I would just say, you know, if I apply for Social Security and I am asked to provide some assurance or proof that I am 65 years old and eligible to receive it, I think that is not presuming my guilt.

When I served as a staff director of the Civil Rights Commission, I took an oath to defend and uphold the Constitution, which all Members of Congress take as well.

I didn't read into that oath an assumption that I would otherwise violate the Constitution.

Mr. ARMEY. May I interrupt you long enough to make an observation, that you assume that there is a rational and fair bureaucracy.

When I was the chairman of the Economics Department, making hiring decisions, I was forbidden to ask anybody their race while considering people, and I agree with that. That is quite appropriate.

But later on I was asked by an agency of the Federal Government to report how many black people I had in my employ.

Now, how can I report how many black people I have in my employ if I am not allowed to ask their race?

The agencies to whom you will entrust this law's enforcement are not reasonable. They are overzealous, they are unfair, and they do indeed put people in jeopardy of their civil rights.

Mr. TAYLOR. I guess I would suggest to you that the 20 year history of Title VI and the shorter histories of these other three statutes do not reveal—they may reveal instances of bureaucratic inefficiency, I wouldn't deny that. We have all experienced that. But they do not reveal instances of overzealousness, unfair treatment, of placing obligations on people that they in no way should have.

And I would say to you that to say to a college or university or other recipient of Federal funds that you should provide some as-

surance that you will treat all people fairly and without discrimination is not overleaning bureaucracy nor is it an assumption of guilt rather than innocence. It is the same kind of thing that I mentioned before where in order to participate in Federal benefits you have to obey certain basic rules of fairness and honesty.

Mr. ARMEY. Mr. Jones.

Mr. JONES. Let me make a comment on that, because I think we are scurrying around, again. Every once in a while this happens, we get close to the core issues that we are dealing with here.

The *Grove City* case, Grove City does not think that they have ever received any Federal aid, and to this day, if you ask the administration of Grove City, they will tell you that they do not now, have never received any Federal aid.

What they do is enroll students who receive Federal aid, and to my mind that is a critical distinction. And I have no hesitation whatever in saying I think the Supreme Court was wrong in its decision in the first part of *Grove City*, even though it was a nine to nothing decision and even though apparently the Reagan administration disagrees with me. I think that decision was wrong, that that kind of indirect aid should not be found to be direct aid, and that if it is going to be held to be direct aid, you will have that kind of bureaucratic attention, to give the kindest characterization to it, not only in education but in many, many other areas of life, of our life in the country.

I think that is a critical point. I think if you apply for Federal aid, yes, you ought to be expected to abide by Federal requirements.

That is not the case in Grove City and that is not the case with a number of institutions.

Mr. ARMEY. Well, if I can make a final observation, Mr. Chairman, I believe that consideration and respect lies within the human heart and that there has been a tremendous growth of consideration, respect and acceptance in the human hearts of Americans in this country since 1964, and I am pleased for it.

If we pass this law, you very well will see that undone and indeed you will see a backlash that will hurt all minorities, because the government is going too far with this law and I think that would be the greatest travesty at all to the people who have struggled so long and hard to gain the equal right and consideration that they so rightly deserve in this country.

Thank you, Mr. Chairman.

The CHAIRMAN. Before yielding to Mr. Hayes, if I may, would you yield me the opportunity to ask Mr. Jones to clarification his statement?

Mr. OWENS. Mr. Owens will yield.

The CHAIRMAN. I am sorry. Mr. Owens is next. Yes, I am sorry.

Mr. Jones, you just said in answer to Mr. Armey that in the *Grove City* case that Grove City did not believe that it was actually receiving Federal aid.

Mr. JONES. Yes.

The CHAIRMAN. You said also that in your opinion they were not.

Mr. JONES. Yes, in my opinion, they are not, that is correct.

The CHAIRMAN. Then you disagree, I would assume, with the Supreme Court which said that they were actually receiving aid?

Mr. JONES. Yes.

The CHAIRMAN. And with Mr. Brad Reynolds, who testified before this committee that they were receiving aid, and the Reagan administration? So, you disagree with all of them?

Mr. JONES. Yes. I have already said that I disagree with the Reagan administration.

The CHAIRMAN. I just wanted to place your statement in its context.

Mr. JONES. The Heritage Foundation is so often charged, Mr. Chairman, with being the spear carrier of the Reagan administration, I want to seize this opportunity to indicate that is not always the case.

Mr. ARMEY. Mr. Chairman.

The CHAIRMAN. Yes, Mr. Armey.

Mr. ARMEY. If I might, I would like to take a moment to express my agreement with Mr. Jones.

The CHAIRMAN. Well, at least there are two of you who disagree with the rest of the groups that I enumerated.

Mr. TAYLOR. I would assume, Mr. Chairman, that Mr. Jones also agrees with the decision of the Supreme Court in the *Bob Jones* case, that tax exemption ought to be denied to Bob Jones University if it is pursuing a policy of racial discrimination.

Mr. JONES. I would prefer not to get into the *Bob Jones* case without more preparation.

The CHAIRMAN. That is your privilege, Mr. Jones. Thank you.

Now, Mr. Owens.

Mr. OWENS. Mr. Chairman, this has indeed been a very extraordinary hearing this afternoon, and I don't know where to begin, except to say that I think the threat of a backlash, if you proceed further to lay claim to those rights which are definitely due, exist and there will be a backlash. I think that the backlash smacks of the kind of thing that can take civilization down a dead-end road. It is the kind of thing that Hitler argued, of course, to justify his preparations for war and his making war. The reparations that they had to pay were unjust, and because they had to pay reparations to correct an evil or atone for an evil, they used that as an argument to justify new evils.

And we are talking about evils and the correction of evils, and civil rights law in this country is grounded on the foundation of making an attempt to correct an evil. The evil began with slavery.

And of course, when it is moved further to include women, you are talking about evil that existed since the dawn of mankind.

We are not only traveling in circles I think we are backing down a very treacherous road. And some [illegible] arguments that have been offered here should have been outgrown. I am happy to say I congratulate George Wallace on the fact that he has outgrown those arguments, and he doesn't stand in a schoolhouse door 20 years later offering up these same kinds of arguments.

Mr. Jones, who didn't really address H.R. 700 in his testimony directly, threw in a number of things which led me to conclude that he fundamentally questions the bedrock of civilization, what civilization is really all about, because of what you were saying, as you talked about the Holocaust and South Africa. The bedrock of civilization rests on the assumption that there is such a thing as

group responsibility and group guilt, that when a group has had certain evils perpetrated against them, it is the duty of the group that perpetrated those to make some atonement, to make some corrections.

Otherwise, how do we demand that present day Germany pay reparations to victims of the Holocaust? And how do we demand that countries that make war and lose pay reparations?

To say that every case has to be decided on some kind of individual basis is to say that the Nuremberg trials were illegal, that they should have brought each individual who had had atrocities perpetrated against them and set them forth to testify, otherwise there was no case.

I find your arguments and your fundamental premise to be outrageous in that they are not unusual. They appear from somewhere. This doublethink and doubletalk has originated and it has received widespread distribution. You talk the way a number of people are talking in the effort that they are putting forth to drown this bill in that kind of confusion.

But basically, I would like for you to address yourself for a moment to this basic question: Is there such a thing as group guilt and is there such a thing as group responsibility, is there such a thing as class actions and justification for people to be treated as classes?

Do you say to the Indians that they should not have been put on the reservations as a group, they should have been put on one by one? And to the blacks who endured slavery, do you say that it was an individual thing, each one was singled out and it was determined one by one which should be enslaved and which should be free?

You know, I really would like for you to elaborate on your thesis that, you know, it has to be an individual, we have to address ourselves to individual cases, otherwise we have no basis for attempting to construct law.

Mr. JONES. The short answer to your question, Mr. Owens, is that no, I don't believe that groups do have rights. I don't think Indians should have been put on reservations, either individually or as tribes, and that the fact that they were put there as groups is the basis of many of the troubles that they undergo today.

I think individuals——

Mr. OWENS. But do you think they should sue when they have a suit—they should sue one by one, sue the Government one by one when an injustice is committed against Indian treaties, et cetera?

Mr. JONES. That is right. When individuals—Indian treaties, the whole question of Indian treaties is a very troubling one, because nobody ever decided whether Indians were a separate nation. One nation can make treaty with another nation, certainly, and you don't sue an individual of another nation under a treaty. You are dealing with nations as entities in that case. So that the whole situation is entirely different.

But where an Indian is discriminated against, yes, an Indian ought to bring suit as an individual.

Mr. OWENS. Where an Indian is discriminated against?

Mr. JONES. Yes; nobody should say Indians are an x percentage of the population, therefore they are entitled to x percentage of the

jobs and x percentage of the wealth of the Nation, and that we will——

Mr. OWENS. That is not an argument I am making. I am talking about rights. The majority rules but the minority has rights. The Constitution was written to guarantee certain rights.

Mr. JONES. To individuals, that is correct.

Mr. OWENS. To individuals?

Mr. JONES. Yes.

Mr. OWENS. And when those individuals are in large groups, such as blacks who were enslaved for several hundred years, corrective action cannot be taken and that cannot be recognized in law? I mean, the answer Ms. Berry gave before should be put in bronze, because what she said is that it has been decided in this country by precedent that to correct an evil certain laws shall be written. We have proceeded from that base and that is the basis for civil rights laws which have been expanded to include other minorities.

In the case of women, it wasn't exactly the same. It went back and recognized that human rights and civil rights really rest on a larger human rights concern, and women have been discriminated against since the world began and it is seeking to correct that evil.

So, it is already pretty much fundamentally established in law, and you said we have made an error, American law has made an error.

Mr. JONES. I strongly support the 1964 civil rights law, which establishes the equality of all individuals before law in the United States.

I disagree, respectfully and firmly, with interpretations of the 1964 law which have held that it requires or permits the aggregation of individuals into groups and that rights can be conferred on those groups, and I do so for the precise reasons that I indicated in my oral testimony, that when benefits are allocated on the basis of groups and not to individuals, among other things you will have the difficulty of deciding who belongs to those groups and who therefore qualifies for the benefits.

And if you don't think I am serious about that, you look at what is happening on Indian reservations right now, where benefits are paid to Native American individuals and people who, by most judgments of common sense, have no business on the reservation or belonging to an Indian tribe because they have Indian blood in their veins, whatever the heck that means, are asserting claims to benefits, to property and to monthly payments from the Federal Government on the basis of their membership in a racial group. And I think that is a prescription for disaster, whether it is for purposes of gaining benefit or for excluding people.

And I am thankful to the Lord that we no longer have that kind of classification in our law, and I would hate to see it assert its head again.

Mr. OWENS. No further questions, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Hayes.

Mr. HAYES. Mr. Chairman, I have one or two questions, I guess. I am just a little bit shocked, having participated, as you well know, in most of the field hearings throughout the country, where the

testimony has been overwhelmingly in support of H.R. 700, to come here to the seat of what is to be, I guess, the enforcement branch if this law is passed and hear the kind of testimony from a person who I have known and respected for years, because we have been—I am still a part of the Urban League and I understand, by background, that you, Mr. Pendleton, were formerly an executive director of that organization. I think I ran into you on occasions at conventions of the Urban League, an organization who is respected for its position in terms of fairness, and I am sure has stood up, as I had done as a member of the trade union movement, and supported the passage of some of these statutes, including the Civil Rights Act of 1964, which is now, according to the testimony that we have heard, with some substantiations of that position, is being threatened.

It is pretty tough to be here, a handicapped person, being told by a doctor who is a recipient of Medicare checks, and they are doing quite well at it, that I don't want to build a ramp to make my office accessible to a person who may be handicapped. He doesn't think he should be required to do that because of the cost involved.

He asked the question, I believe, and Chairman Edwards can attest to this because he had the hearing, as to where does this really end.

I asked him the question, where does it begin with you, because I think this is fundamental here.

I am bothered about whether or not we are going to be able to pass this kind of legislation given the direction we may be going now. It appears to me, and to a lot of other people concerned about this, are we going to run into the kind of opposition we ran into in the Senate if we pass it in the House? These are questions that I think have to bother me.

The thing that I want to say to you, Mr. Jones, and I want to say to Dr. Berry, you said—you used the statement, as a member or the head of the Heritage Foundation, you think that we ought to pull back from H.R. 700. Let me know if I misunderstood you. I want to know, pull back to where, first?

Mr. JONES. I think the enactment of H.R. 700 would be a mistake, yes. I would take my stand with the 1964 Civil Rights Act, which enacts the legal equality of all individuals before Federal law in the United States.

Mr. HAYES. You heard what Dr. Berry said, and I happen to share this opinion. Seeming to me the direction we are going now in this Commission is to justify our retreat on civil rights. Isn't that what you said?

Mr. JONES. I don't regard——

Mr. HAYES. Dr. Berry, didn't you say that?

Ms. BERRY. I think that is true, Mr. Hayes, and I wanted to say that Mr. Jones said that he thought we should go back to the meaning of the Civil Rights Act of 1964, which is what H.R. 700 tries to do.

Mr. HAYES. That is what I thought.

Ms. BERRY. And one of the curious things about this debate, I had thought on this issue and on the whole field of civil rights today, it is not just people saying that they would like to retreat and to weaken enforcement and to make arguments that they have

made before and refight old battles. In a sense, I am wrong about that. It is more than that. It is much more fundamental.

It is that people are really saying that we will interpret what happened before, we will change history, that is one thing we will do. We will rewrite history so that we can say that what happened in 1964, which people marched down the street for and went to jail and some died, that what they marched and died for, black folks, white folks, wasn't really what the record, the Congressional Record will show or the papers will show or all the things that they thought happened, that that really wasn't what happened. And that the enforcement record that has been made all these years, by Republicans and Democrats and Independents running these agencies, who have come up here and testified to say that all they did was enforce what H.R. 700 would require, that those people are all not telling the truth, or if they are, they shouldn't have been doing it in the first place because Congress never intended to do this.

So, it is sort of like—I guess I wou'dn't be so offended if people simply said they didn't like enforcing civil rights laws broadly and that they thought they had public opinion on their side to change that, and that they also felt that it was better to change it, for whatever reasons they have got in mind.

What I resent is trying to rewrite the reality of the past, and there are some people who are in their graves who can't stand up and cry out, you are wrong.

And then we are supposed to sit here and listen to that and agree with it, and then go on as if we take seriously what they say.

I just find that absolutely reprehensible and disingenuous.

I don't know if you asked me that, but that is how I feel, Mr. Hayes.

Mr. HAYES. I want to ask a pointblank question to Mr. Pendleton, so I can clearly understand your position.

As head of the Civil Rights Commission, is your position that an organization, an educational institution, be it that or some other organization that is a recipient or have people who use that facility are recipients of Federal funds, should they be able to continue to get Federal funds or be a recipient of Federal funds if they discriminate because of race, sex, the handicapped condition or the age of the person who uses that, who wants to attend or use that facility?

Mr. PENDLETON. At the risk of saying anything else, I might confuse—I just want to say no, I don't believe that is the case at all.

Mr. HAYES. Can you make the distinction?

Mr. PENDLETON. I think there is no distinction to be made. If you directly receive Federal money, you should not be allowed to discriminate.

What I said in my testimony was that we believe, the majority of the Commission believes that indirect aid in private institutions should not come under this expansive coverage, and that is all that we have said.

I think when the chairman asked me about cancer operations and the like, and I talked about the statutes, I was very unclear, and what I am really saying is that those laws, if you receive a research grant some place else, those laws certainly trigger off these

kinds of coverages in the four cross cutting statutes. I think that is clear.

But I do not believe that anyone who receives Federal money should discriminate or be allowed to discriminate. That is very clear with me.

In spite of what is being said here today, in spite of some of your shock, I am a supporter of the 1964 Civil Rights Act. Like many of you, I marched at that time, I did a lot of things at that time myself.

I think what has happened is that many people tend to confuse my pigment and my politics and that is regrettable, but I believe what I believe in a very, very sincere way.

There can be more than one way to interpret what is going on and I have a way of interpreting that I think is as correct as your way, or Dr. Berry's way or somebody else's way of interpreting where we go with these things.

And just to make clear the first answer, the answer to that question certainly, sir, is no.

Mr. HAYES. Do you think the doctor was right for taking a position, who is a recipient of Medicare checks and things of this sort, of saying he couldn't or didn't want to revise his office to make it accessible to handicapped people?

Mr. PENDLETON. No, I don't think he was right at all. He took the money, he should do what has to be done to comply with the law.

Mr. HAYES. No further questions.

Mr. TAYLOR. Mr. Chairman, may I make a brief comment on the questions that Mr. Hayes asked?

The history of the 1964 act has been invoked so many times that it is hard to resist talking about a little bit of history.

You know, after *Brown* v. *Board of Education* was decided in 1954, some Southern States came forward with the notion that despite the fact that it was State policy that segregated people in the public schools, that the way to deal with that was to set up something called pupil placement, and students one by one would apply to be made exceptions to the rule of segregated public schools. And if you persuaded the pupil placement board and then went through all the appeals, you could get into a school that was not segregated on the basis of race.

And, of course, they said that is treating people as individuals, not as members of a group.

I hear the same echoes in the testimony here today, that we must treat people as individuals rather than as groups, even if they have been subject to the most invidious kind of group discrimination.

Second, this is not such ancient history, because it is still with us. But we had all of these segregationist academies set up throughout the South. And eventually the Supreme Court ruled in interpreting not just the 1964 act but the 1866 Reconstruction Act, that even if those institutions didn't receive a dime in Federal assistance they were prohibited from discrimination.

And now I hear today suggestions that even if they do receive Federal assistance it is somehow an intrusion on their privacy and

private property rights for them to adhere to fundamental national policy against discrimination.

So, I agree wholeheartedly with Dr. Berry. What we are witnessing here is not just a debate about H.R. 700, but an effort to go back and undo the history of the last 20, 25 years.

Mr. PENDLETON. Mr. Hayes, if I could, I think that Mr. Taylor makes interesting comments. I think it is fair, he has fairly characterized what some of us believe about individual rights.

I see nothing wrong with that interpretation at all. To say that one wants to undo what has happened and retreat, I don't think that is the case at all.

I think there are those of us who do believe in individual rights and the individual rights concept and theory. To say that we believe in that is a throwback, I don't think is completely fair to the kinds of things that we have been saying and the kinds of things we believe.

What is very clear is that none of us believe in discrimination against anybody, anytime, for any reason, and I believe that those people who are discriminated against need to be made whole.

I do not subscribe to the theory that groups of people need to be made whole absent a finding of discrimination of each member of that group. That is very clear with me.

I went to the Commission with that position, I have testified that way, and that is where I am and where most of my commissioners are.

I think if you see anything about the Civil Rights Commission, you do see that there is a difference of opinion and people have the individual and independent right to express their own opinions.

What is also interesting here is that we don't tend to put people down for their opinions, and I think that we will not do that.

I am prepared to accept all the putting down one wants to give me. That does not dissuade me from believing what I believe. And putting one down for one's opinion does not provide a solution to the problem.

I still believe that this legislation is expansive and unwarranted, an intrusion of the Federal domain where it has never gone before, and I would just say that this should not happen, and I would agree with Mr. Jones in this case and much of what my colleague from the chamber of commerce has said. And I make no apologies for it.

The CHAIRMAN. If the gentleman would yield, in respect to the Commission's position, Mr. Pendleton, on support of the Dole bill, which I assume the Commission does support; does it?

Mr. PENDLETON. We have not supported anything at all. We just made a comment about this piece as it came about. I don't recall how we supported the Dole bill at all. I don't see reference to that in my statement.

But if you would, Mr. Chairman, I would like to include for the record, since we have a dissenting opinion, another affirming opinion from two of my colleagues, Commissioner Abram and Commissioner Bunzel.

The CHAIRMAN. You have made no mention or you have not——

Mr. PENDLETON. No; we have not made any mention about the Dole bill at all.

The CHAIRMAN. Any support to the Dole bill?

Mr. PENDLETON. No; we have not.

The CHAIRMAN. And you have no personal opinion on the Dole bill?

Mr. PENDLETON. No, sir.

The CHAIRMAN. Mr. Edwards.

Mr. EDWARDS. I have no questions.

The CHAIRMAN. If there are no further questions, again the Chair would like to thank the witnesses this afternoon. It has been a very exciting panel, and although there have been differing views, I certainly want to commend you on the manner in which you have conducted the presentations.

That concludes the hearing.

[Whereupon, at 4:58 p.m., the committee was adjourned.]

[Additional prepared statements, letters and supplementary material has been retained in committee files.]