Viewpoint

Jeremy Rabkin The Stroke of a Pen

THE REAGAN ADMINISTRATION has boldly proclaimed its determination to reassert traditional American values and to reverse the regulatory excesses and moral abuses of the last twenty years. High on the administration's list of such excesses and abuses one would expect to find the twisting of equal opportunity law in order to impose racial quotas and encourage racial preference. In a recent speech to the American Law Institute, Attorney General William French Smith did indeed take a firm stand against hiring quotas, calling them "perilously close . . . to fostering discrimination." The attorney general went on to criticize forced busing and to describe at length the administration's elaborate scheme to remedy the effects of past school discrimination by rewarding, with free college tuition, those parents who volunteer to have their children bused. Significantly, however, Smith did not announce any action with respect to hiring quotas. Nor has the White House given any hint of its intentions in this area.

Yet the fact is—a fact unknown to the general public and certainly not widely advertised by administration spokesmen—the President has right at hand the means for taking prompt and effective action in the quota field. It would not require congressional assent and, unlike innovative busing schemes, would not require prior judicial approval. President Reagan could, with a stroke of his pen, eliminate the nation's principal quota hiring program, the contract compliance program run by the Department of Labor. Since that program was established, not by legislation, but by unilateral presidential order, it can be readily altered or abolished in the same fashion.

The confusing signals from the White House—tough words, but no action—are certainly what the public has come to expect in this field. When Congress passed the Civil Rights Act of 1964, it gave profuse assurances that its prohibitions against "discrimination" would not mean the imposition of arbitrary "racial balance" requirements. It even included, along with its ban on race and sex discrimination in employment, an explicit provision emphasizing that nondiscrimination should not be interpreted as requiring any employer "to grant preferential treatment to any individual or to any group" on the basis of any statistical "imbalances" in its work force. Yet only a few years later, the Equal Employment Opportunity Commission (EEOC), in the course of enforcing this discrimination ban, was indeed requiring employers to adopt precise minority hiring and promotion quotas when they had been found guilty of unlawful discrimination. The courts upheld such remedies as necessary correctives for the employer's past discrimination, rather than "preferential treatment" for the sake of statistical racial balance. But since the beneficiaries of those remedies were usually not the same individuals who had been victimized by the employer's past discrimination (but simply members of the same race) and since the scale of the quotas usually bore no established relation to the number or proportion of minority job applicants previously turned away, the remedies looked very much indeed like the imposition of racial preference for the sake of statistical balance. Nevertheless, neither Congress nor the courts have done anything to prevent the extension of such practices by the EEOC (nor the equally questionable practice of using statistical imbalance as primary proof of discrimination in itself).

Racial Allocations in Employment

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in some sense the institutionalization of a racial allocation system in employment. The program is based on Executive Order 11246, issued by President Johnson in 1965, and applies to all businesses and institutions having contracts from the federal government—a category now embracing some 300,000 firms. While the Civil Rights Act simply prohibited discrimination on the basis of race, sex, or national origin, the executive order went beyond this to require all contractors—whether guilty of past discrimination or not—to undertake "affirmative action" to ensure "equal opportunity" in employment. At the outset, the Labor Department interpreted this to require only that contractors actively publicize their nondiscrimination policy. But by 1971 the department was requiring each contractor to develop an elaborate "affirmative action plan" to "increase materially the utilization of minorities and women" in its work force. The plan had to establish minority employment "goals" at each level of the contractor's work force (based on the statistical "availability" of minority workers in the relevant local "labor pool") and "timetables" for achieving these "goals" (based on the contractor's average hiring and promotion rates).

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The Labor Department has always insisted that these "goals" are quite different from "rigid quotas" because contractors are only required to make "good faith efforts" to achieve them. But even the old-fashioned quotas used for restricting access to Jews and other minorities were not always "rigidly" observed. The evil in quotas, after all, is not that they reduce administrative flexibility, but that they make an individual's chances depend in some measure on the number of preassigned slots for those of his "group"—rather than strictly on his own personal qualifications, which is what respect for individual dignity and simple justice would dictate.

To be sure, the Labor Department has also piously denied from the outset that this scheme is intended to encourage "preferential treatment," since the "goals" are ostensibly calculated to reflect the "results" that an entirely nondiscriminatory employment pattern would achieve of itself. But no one can really know what the "results" of a truly nondiscriminatory employment policy would be for any particular employer: workers do not distribute themselves among firms in a perfectly random manner, and there is no reason to suppose that job qualifications (education, experience, talent, proven integrity, or ambition) are distributed in precise, statistically even proportions across every ethnic group at every level of employment. For all the Labor Department's protestations, at any rate, no one has ever lost a federal contract for practicing reverse discrimination. The conclusion is inescapable that the department's program is designed to ensure, not the nondiscriminatory treatment of individuals, but the employment "utilization" or "representation" of different groups in what Washington bureaucrats have decided are fair or appropriate proportions—and all this without even the EEOC's pretense that it is necessary to "remedy" proven instances of past discrimination, but simply as a worthy aim in itself.

Despite the brutal simplicity of its conception, implementation of the executive order program has been mired in endless complexity and frustration. Contractors complained from the beginning that relevant availability figures for local minority workers were unobtainable or unreliable, that hiring goals projected from these figures were bound to be unrealistic or unachievable, and that the entire process of formulating detailed goals and timetables for each different job category involved amounts of paperwork and administrative strain vastly disproportionate to the meager practical benefits that could actually be expected to result. The Labor Department scarcely helped matters either by continually revising and refining its requirements throughout the 1970s, or by its early decision to require minority employment goals, not only for blacks, but for the separate categories of Asian-Americans, "Spanish-surnamed Americans," and American Indians (identifications that have proved remarkably difficult to define or to attach to particular workers).

And what has been achieved after a decade of enforcement? No doubt, some minority individuals do owe their jobs or promotions to the insinuating pressures of the executive order program—and no doubt many others, who would have advanced on their own merits, can thank the Labor Department for the suspicions of their fellow workers (and of prospective employers) that they are privileged beneficiaries of the company quota. Meanwhile, a variety of economic studies has revealed that the gap between average incomes for black and white workers is the smallest in those industries that are least likely to include federal contractors, that is, least subject to the complex requirements of the executive order program.

A Different Approach?

Thus, the Reagan administration has cause enough to reconsider the executive order program if only for the sake of honoring its promise to reduce excessive regulatory burdens on business. And business groups are already pressing it to do so. They were provoked into action because, in the last weeks of the Carter term, the Labor Department issued still another set of affirmative action regulations, which would make the program even more burdensome in some respects and would aggravate the redundancies and double burdens of the program's overlap with EEOC's antidiscrimination enforcement. Upon taking office, the new administration promptly postponed the effective date of these regulations and then, in mid-April, postponed the date for yet another two months. Business groups, however, have been urging the administration not to toy with the latest regulations but to ensure wider reforms by redrafting the executive order itself.

A redrafting of the order would, of course, be the easiest way to eliminate the hateful apparatus of goals and timetables. And it is worth noting that this could be done without absolving contractors from all affirmative action obligations. Contractors could still be required to publicize job offerings in minority communities or to establish training programs that would help minority employees (as well as others) advance to higher positions—without being forced into the degrading ritual of formulating precise minority employment goals. Interestingly enough, the Labor Department has never thought it necessary to demand that goals and timetables be established under statutes requiring government contractors to extend "affirmative action" to Vietnam veterans and to the physically handicapped (even though these are the only areas where Congress has directly mandated affirmative action). Yet no one has charged that the department's implementing regulations for those programs—involving "outreach" recruitment and some readiness to accommodate the special needs of these groups—are worthless because they avoid quotas.

But it is not at all certain that the Reagan administration is prepared to break so sharply from the quota pattern of the past decade. True, candidate Reagan directly condemned quotas in the fall campaign, as did the Republican Party platform. But so at various times have the NAACP and other civil rights groups (along with Presidents Nixon, Ford, and Carter) —while insisting that the Labor Department's goals and timetables had no taint of the acknowledged evil in quotas. More to the point, perhaps, the U.S. Chamber of Commerce, which has been in the forefront of demands for an overhaul of the executive order program, has recently affirmed its support for "measurable methods to increase [minority] participation in the work force through the voluntary use of goals, timetables and good faith efforts." Indeed the business community as a whole has little reason to press for an end to race-conscious hiring policies: filling a preset number of job slots with candidates of the "right" race or sex is an easy way to avoid "discrimination" charges from EEOC, and most large corporations already have institutionalized "equal opportunity" units within their personnel offices (units with a stake in the continuation of the process).

Thus the White House may decide to play it safe. It could choose to reform the executive order program in such a way as to reduce paperwork costs and administrative vexations for contractors (by, for example, allowing each goal to cover a large number of separate job categories) without at all really addressing the moral problem of government-mandated quotas. Regulatory reformers in the adminis-

tration might conclude—as many business leaders seem to have already concluded—that renewed controversy over the quota issue would jeopardize the chances for such badly needed operational reforms in the program. Even those in the new administration with stronger feelings of principle may decide that there is no point in President Reagan's sticking his neck out on this one program, when Congress will still have to act to eliminate the quota aspects of EEOC enforcement and of other statutory programs. And they may even console themselves with the hope that such congressional action may not be too far off: in every one of the last four years the House of Representatives has approved legislative riders that would have prohibited the Department of Labor from enforcing any rule or order "which includes any ratio, quota, or other numerical requirement related to race, creed, color, national origin, or sex." Such measures have always been derailed in the Senate up until now. Now, of course, the Senate is a very different body, one that presumably will be more likely to favor the idea.

Yet, however tempting it might be to leave the issue for Congress to work out, that would be a great mistake. There is no certainty, to begin with, that Congress will act decisively if left to itself. Thus, for example, while the House passed an anti-quota amendment this spring, it was promptly derailed by the Senate in conference committee on June 2, ostensibly on the grounds that the Senate does not like legislative riders on appropriations bills. Even if the full Senate proves amenable to the idea in some other form, many House members who voted for the quota ban in past years might shy away; for they are no longer able to predict with confidence that the Senate will "save" their votes from having any effect.

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They are much more apt to be pressed into action if the President exerts the strong leadership he displayed in the recent budget battles. President Kennedy nurtured the climate of opinion that ultimately led to the 1964 Civil Rights Act by issuing a strong executive order banning race discrimination by government contractors. President Reagan may have to take unilateral action in the same way to help crystallize a political consensus for a deeper reaffirmation of the principle of nondiscrimination today.

The Need for Leadership

And that, in the end, is the strongest argument for decisive presidential action. For it should be plain by now that new legislative restrictions, no matter how broadly cast or emphatically worded, cannot by themselves lay the quota issue to rest. Bureaucrats and judges have been only too ready to pervert clear congressional directives in this area in the past. They are unlikely to be drawn up short this time by anything less than major legislation representing an overpowering national consensus. For such legislation, clear presidential leadership is indispensable. It may well be that the forging of a new legislative consensus requires some compromise; and whether it does or not, some compromise will certainly be proposed. The President cannot play his crucial leadership role in that legislative process if he has not first acted to set his own house in order —that is, eliminated the scandalous quota scheme in his own executive domain.

Right now, to be sure, there is no clamor for President Reagan to take decisive action in this area, nor even much recognition of how much he can do on his own authority. That is all the more reason for him to act, and to act speedily. For while every opinion poll confirms that overwhelming majorities of both whites and blacks are opposed to quotas and racial preference schemes, the current passivity on this issue suggests that the public may now put these evils in the same category with tax loopholes and special interest subsidies—too entrenched to be seriously challenged. It is just the sort of cynicism and resignation President Reagan has urged us to overcome elsewhere. Let him continue here. ■