Civil Rights

Federal Employment Discrimination

*By Roger Clegg**

There is an astonishing amount of hiring and promotion discrimination on the basis of race, ethnicity, and sex in the federal government. As discussed below, it is (a) legally indefensible, but (b) ubiquitous.

Little Evidence of Antiminority Discrimination or Imbalance in the Federal Workforce

The only legally established way to defend the use of preferences based on race, ethnicity, and sex is to argue that they are needed as a remedial measure. But this defense is almost certainly unavailable to most of the federal government, which has long had a policy of equal employment opportunity—and indeed has been cheerfully discriminating in favor of women and minorities for years.

According to the Office of Personnel Management's current annual report to Congress on the federal government's affirmative action policies, African Americans met or exceeded their "relevant civilian labor force" (RCLF) representation in 16 of the 17 executive-branch departments, and in all 23 independent agencies. The one executive-branch exception was the Interior Department, where blacks were 6.2 percent of workforce, when their RCLF representation was 7.8 percent—hardly a manifest imbalance. Overall, blacks make up 17.7 percent of the federal workforce, but only 11.3 percent of the nation's entire civilian workforce. According to the OPM report, Asians met or exceeded their RCLF representation in 15 of 17 executive-branch departments and 16 of 23 independent agencies. They were never less than 59 percent of their RCLF representation, and overall their percentage in the federal workforce exceeded their percentage in the civilian workforce.

Likewise, Native Americans met or exceeded their RCLF representation in 16 of 17 executive-branch departments, and 10 of 23 independent agencies. Their percentage in the federal workforce was more than double their percentage in the civilian workforce.

Although women met or exceeded their representation in only 7 of 17 executive-branch departments and 9 of 23 independent agencies, they were never less than 69 percent of their RCLF representation, so that overall they made up almost as much of the federal workforce as of the civilian workforce (44.0 percent versus 46.5 percent).

The only ethnic minority group for which a plausible case of "underrepresentation" can be made is Hispanics. According to OPM, even they met or exceeded their RCLF representation in 7 of 17 executive-branch agencies and 6 of 23 independent agencies. Overall, they made up 6.7 percent of the federal workforce and 11.9 percent of the civilian workforce.

But the trouble here is that one is generally ineligible for federal civilian employment unless one is a U.S. citizen. This makes the RCLF number for Hispanics a dubious benchmark for the OPM's comparison, since, relative to the rest of the population, a high percentage of Hispanics are immigrants and either unnaturalized or even undocumented. About 30 percent of all Hispanics in the United States are noncitizens.

And for Hispanics or any other group, "underrepresentation" does not necessarily mean discrimination. It might simply mean that members of certain demographic groups are, on average, less likely to seek federal employment than members of other groups. Or, it might mean that those members of the "underrepresented" group who do apply for federal jobs are, on average, less qualified than the average applicant from the "dominant group." Are these suggestions implausible and racist? Remember that whites are "underrepresented," too. OPM's annual report does not give us figures for whites, but other data supplied by OPM show that whites make up about 72 percent of the civilian workforce versus 69 percent of the federal workforce. Nor is this a recent phenomenon. Whites have been underrepresented every year since at least 1984, the earliest year for which OPM has provided figures.

To be sure, the figures reported by OPM are mostly aggregated data, so there may be particular enclaves in which, say, blacks are still underrepresented. It may also be the case that in some sectors the overrepresentation of minorities is at the bottom of the pay-scale. But the data remain quite damning, and in a lawsuit courts are likely to weigh the big picture at least as heavily as a tiny one. Moreover, one suspects that the proponents of affirmative action would not be happy if the government suddenly halted its practice of affirmative action hiring for low-level jobs, since this would hurt minorities there and would shrink the needed pool of minorities for promotions to the top.

It is simply not plausible, in light of its long history of affirmative action and its obvious willingness to hire minorities and women, for the federal government to claim a remedial justification for its discrimination.

"Diversity" Doesn't Justify Employment Discrimination

So perhaps it's not surprising that you don't hear much from the federal government these days about using affirmative action to remedy or prevent discrimination. Rather, the government—like the private sector and academia—defends preferences as part of a celebration of "diversity." Having a federal workforce that "looks like America" is asserted to serve some greater good, justifying it even without a connection to old discrimination and in spite of the new discrimination undertaken to achieve it.

The general public and even some government officials may assume that the diversity rationale in hiring and promotions will stand or fall with the legality of such preferences in

university admissions, but this is not true. The fact is that the legal justifications for employment discrimination are much weaker. Even if the Supreme Court were to allow admissions preferences under the diversity rationale—and it probably won't—it would be unlikely to allow preferences in employment. Current statutory and case law weigh even more strongly against the latter than the former, and for a number of reasons agencies that employ such preferences are asking for legal trouble.

The primary reason for agencies' heightened vulnerability is that the legality of racial and ethnic preferences in student admission decisions is, for the most part, governed by Title VI of the Civil Rights Act of 1964, while hiring and promotion decisions are more directly addressed by Title VII of that law. The courts have interpreted the two statutes differently, so that what is permissible under Title VI is not necessarily permissible under Title VII.

Title VI prohibits "discrimination" on the basis of "race, color, or national origin" in "any program or activity receiving Federal financial assistance." While the statute's text admits to no exceptions, the Supreme Court has interpreted it as coextensive with the ban on discrimination under the less sharply worded Equal Protection Clause of the Constitution's Fourteenth Amendment.

Title VII also contains a categorical ban, forbidding any employer to "discriminate" on the basis of "race, color, religion, sex, or national origin" in hiring, firing, or "otherwise … with respect to [an employee's] compensation, terms, conditions, or privileges of employment." But the Court has not conflated Title VII with the Equal Protection Clause, and, thus, the diversity rationale, articulated by Justice Powell in his *Bakke* opinion—joined, in any event by no other justice—is inapplicable in employment cases.

Will other courts nonetheless create a "diversity" exception to Title VII's prohibition of racial and ethnic discrimination? That is very unlikely.

The statute, again, admits to no exceptions. To be sure, the Court did allow racial preferences in *United Steelworkers v. Weber*, handed down in 1979, and preferences on the basis of sex in *Johnson v. Santa Clara Transportation Agency*, a 1987 decision. But the rationale the Court approved in these two cases was not based on "diversity" but on "remedying" or "redressing" past employment practices. It is one thing to say that an antidiscrimination statute allows preferences in order to remedy discrimination; it is very different to say that such a statute allows discrimination so long as the employer and the courts think there is a good reason for it. There is simply no way to reconcile the latter "interpretation" with the words of the statute.[1]

If courts in fact create a "diversity" exception to Title VII , it is hard to see why other exceptions might not also apply. Yet Congress explicitly declined to create even a "bona fide occupational qualification" exception to the statute for race, even as it did so for sex, religion, and national origin. Furthermore, the diversity rationale could be—and frequently is—used to support discrimination *against* members of racial, religious, and ethnic minority groups and women. If the federal government's aim is greater "diversity" and less "underrepresentation" in its workforce, this means that any group that is "overrepresented" will be on the short end of any preferential hiring or promotion. That means that, in general, African Americans, Asian Americans, and Native Americans will all lose out, since the only underrepresented groups in the government are whites and (maybe) Hispanics.

It is not surprising that the two federal appellate courts to be presented with the diversity rationale in Title VII cases have refused to accept it. In *Taxman v. Piscataway Township Board of Education* (1996), the en banc U.S. Court of Appeals for the Third Circuit ruled in favor of a white schoolteacher who was laid off because of her race and the desire of a high school to have a more "diverse" business-education department. In *Messer v. Meno* (1997), the U.S. Court of Appeals for the Fifth Circuit ruled against the Texas Education Agency, which "aspired to 'balance' its workforce according to the gender and racial balance of the state." The court stated that diversity programs are not permissible "absent a specific showing of prior discrimination."

The Supreme Court itself has not yet ruled on the issue, but it is unlikely to carve out a "diversity" exception to Title VII. A majority of the Court takes statutory text very seriously; the same majority is especially unlikely to bend the words of a law in order to facilitate the use of racial and ethnic preferences, which it clearly has little use for. Conservatives are not alone in this prediction. In 1997, when the Court had granted review in the *Piscataway* case, the civil rights establishment was so afraid of losing on this issue that it raised enough money to pay off the claims of the plaintiff and the fees of her lawyer.

Finally, the U.S. Court of Appeals for the District of Columbia Circuit—the most relevant circuit for the federal government as employer—has rejected the diversity justification as insufficiently compelling *as a constitutional matter* in the employment context. This decision, *Lutheran Church–Missouri Synod v. FCC* (1998), was recently followed by a D.C. federal trial court that struck down the Army's affirmative-action promotion policy. And remember that Justice Powell's opinion recognizing diversity in *Bakke* as a compelling interest hinged on the medical school's First Amendment claims to academic freedom, so that it was asserting a "countervailing constitutional interest" of its own against the white applicant's. But that countervailing interest is unavailable in the federal employment context.

Although Illegal, Preferences Are Still Ubiquitous

If the legal justifications for preferences based on race, ethnicity, and sex are so shaky, then we wouldn't expect our federal government to be using them, right? Yet, preferential hiring and promotion are everywhere. Consider just a few examples.

The NASA "Diversity Management Plan" declares: "If underrepresentation exists, the goal is to annually fill at least 50 percent of the vacancies in key management positions with individuals from Targeted and Diverse Groups until parity is reached based on relevant civilian labor force data."

In July, 2002, the *Chicago Sun-Times* published a story about a federal "suit claim[ing] that 26 of 29 promotions at the Department of Energy's Argonne, Illinois, office went to women or minorities during a four-year period" and that "managers' pay was structured to encourage that pattern of promotion," since "Managers who exceeded their 'diversity goals' got $10,000 to $20,000 annual bonuses on top of their $120,000 salaries." The DOE spokesman, in a subsequent *Washington Times* story, was not exactly reassuring. He said that the department had only "goals," not "quotas," and that the annual diversity bonuses are now for only $2000 to $3000. "We have goals to hire, train, and promote minorities," he said. "To my dismay, those $10,000 superbonuses lasted only three years."

The "Affirmative Employment Program Manager" of the Department of Health and Human Services recently sent around an e-mail announcing that HHS has "committed to selecting 92 interns from the HACU [Hispanic Association of Colleges and Universities] Internship program." He proudly continued, "With the addition of 7 Hispanic students from CMS [Centers for Medicare and Medicaid Services], it brings the HHS total to 99. There have been 402 interns selected Federal-wide."

The State Department's website declares, "The Foreign Service strives to *maintain* diversity in the representation of gender, geographic regions, race, and ethnicity," even though the Supreme Court stressed in its *Johnson* decision that "there is ample assurance that the Agency does not seek to use its Plan to *maintain* a permanent racial and sexual balance." (Emphasis added in both quotations.)

A recent report by the Federal Law Enforcement Training Center, a bureau of the Treasury Department, declared it to be "institutionally committed to creating and maintaining a workforce reflective of the race, the gender and the ethnic diversity of the Nation and the public we serve"; bragged about its "bottom-line representational progress of racial/ethnic minorities and women," touting various percentage increases; and urged senior managers to "pointedly discuss" and ask "probing questions" and "refrain from giving high performance ratings on this factor unless the high ratings have been legitimately earned by such deeds as actively identifying highly-qualified, diverse candidates …."

Secretary of Labor Elaine Chao told the National Association of Hispanic Federal Executives earlier this year that she had a "commitment … to bring more Hispanic Americans into the federal workforce"—that, despite "significant gains" in the number of Hispanic employees at the Department of Labor, "you have my commitment that we can and will do better."

The Environmental Protection Agency's 2002 "Workforce Diversity and Analysis Team" states that, as a result of Title VII, "the Federal Government is required to take affirmative employment (action taken to provide equal opportunity to minorities and women) to remedy the effects of past discrimination and ensure that its work force reflects the composition of the United States labor force as a whole." This is wrong. Title VII requires equal opportunity for everyone, not just "minorities and women," contains no requirement that all "effects of past discrimination" be erased (they cannot be), and is completely at odds with a requirement that any workforce reflect a predetermined racial, ethnic, and gender balance.

Earlier this year, the Justice Department, "Per the Deputy Attorney General," "initiated a comprehensive review of the diversity of its attorney workforce with respect to race, sex, and national origin." The department "asked KPMG Consulting in partnership with Taylor Cox Associates to conduct this analysis," according to a KPMG e-mail that solicited department employees to participate in focus groups. KPMG has finished its analysis and sent it back to the Deputy Attorney General's office, according to an official in the latter, which has the question of what the Justice Department will do next "under review."

OPM's annual report to Congress includes an "overview" of agency affirmative action initiatives, listing by agency some of their triumphs. For instance, the Department of Health and Human Services "supports a variety of minority-focused fellowships and internships"; the Department of Agriculture "has established and trained a Hispanic Recruitment Cadre"; the Department of Housing and Urban Development has taken steps to "ensure the broadest practical spectrum of participants, with emphasis on minorities and women"; the Department of Transportation, while acknowledging restructuring and budgetary constraints, is "targeting minorities for temporary promotions, details, and special assignments"; for the Department of the Interior, "job performance of all Senior Executives is measured against a workforce diversity critical element"; the National Science Foundation plans "to hold supervisors accountable for making meaningful efforts to increase diversity in the workforce"; and so on and so on. Agency by agency, the focus on numbers is relentless, and the concept of nondiscrimination is totally absent.

But none of this should come as too great a surprise, since the guidance elsewhere provided by OPM clearly suggests that agencies push employees to put a thumb on the scale when race, ethnicity, and sex are involved. It urges them to "Regularly monitor the agency workforce profile" and to "Monitor the number and diversity of applicants." More pointedly, it says that "agency heads should hold their executives, managers, and supervisors accountable for achieving results." Agencies should "Identify and reward" those who succeed and should "Consider establishing an agencywide diversity award." They should, in particular, "Consider nominating senior executives for Presidential Rank Awards"—which provide for lump-sum cash awards of 20 or 35 percent of the executive's base salary.

Nor is OPM alone in exhorting federal agencies to engage in affirmative discrimination. The Equal Employment Opportunity Commission also helps coordinate the violation of civil-rights law among the various parts of the executive branch and the independent agencies, pursuant to its oversight and enforcement authority under Section 717 of the Civil Rights Act, 42 U.S.C. sec. 2000e-17. A class action recently filed by the Center for Individual Rights against the Commission and HUD, *Worth v. Martinez*, alleges that the EEOC "continues to require, cajole and induce federal departments and agencies, such as HUD, to discriminate on the basis of race and gender in em-

ployment." The lawsuit alleges that, pursuant to its "affirmative employment plan," HUD "establishes certain racial and gender goals in employment, coupled with deadlines and target dates," and that "Managers who fail to perform [i.e., meet these goals] may receive lower evaluation ratings, a reduced or eliminated bonus, may be reassigned or lose a grade, and ultimately may be terminated." CIR notes that "HUD sets preferential hiring goals in two-thirds of the cells where minorities are overrepresented" and that the EEOC has never reevaluated its polices in light of the Supreme Court's 1995 ruling in *Adarand Constructors Inc. v. Pena*, holding that racial discrimination by the federal government is subject to strict scrutiny.

OPM devotes a whole separate section of its annual report to the "Hispanic Employment Initiative Nine-Point Plan," with each agency reporting on its efforts and accomplishments (e.g., the Department of Health and Human Services "reports that Hispanic representation has increased each quarter since the introduction of the Hispanic Agenda for Action in FY 1996").

And Executive Order No. 13,171—signed by President Clinton October 2000 and left in place by the Bush Administration—has the purpose and effect of encouraging federal managers to hire and promote with an eye on the racial and ethnic bottom line, so that Hispanics will be hired and promoted in greater proportions. As E.O. 13,171 itself says, its purpose is to "improve the representation of Hispanics in Federal employment" and, conversely, help "eliminate the underrepresentation of Hispanics in the federal work force." This will be done by, for instance, "ensur[ing] that performance plans for senior executives, managers, and supervisors include specific language related to significant accomplishments on diversity recruitment and career development and that accountability is predicated on those plans," and that each agency shall "reflect a continuing priority for eliminating Hispanic underrepresentation in the Federal workforce and incorporate actions under this order as strategies for achieving workforce diversity goals …."

When I wrote about this issue in the *Legal Times* (on August 5, 2002, in a shorter version), I received an interesting e-mail:

> "On the front page of *Legal Times* (in a prior issue, 7/29/02 I think), there were photographs of 3 female attorneys who had recently (and relatively easily/quickly) landed legal jobs with the Federal government (black female, Asian female, and white female). My (white male) colleagues and I read the article closely and objectively determined that these females had qualifications that were inferior to our quals. We have made several/numerous unsuccessful attempts to get Federal legal jobs; I personally have interviewed for at least 4 (and probably more) legal jobs with the Feds over the last 5 years and have had no offers. Won't bore you with my quals, but I now believe that I was mere "window dressing" in those interviews to ensure that white males were interviewed.
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> I had a friend (white, male, Jewish) who could not get a job with the Feds. Then he remembered that his birth certificate was from Brazil due to the mere happenstance of his parents being on a business trip there when he was born. My friend then identified himself as "Latino" and almost immediately got hired as a GS-14. If we "connect the dots," that story of the 3 females hired into the Federal government indirectly corroborates your article, and together they stand for the idea that the Feds have hired everyone but white males. As one colleague has said to me, "My ancestors had to live under the 'No Irish Need Apply' system, and I have to live under the 'No White Males Need Apply' system." ….

Here's another e-mail I got, also apparently prompted by the *Legal Times* column:

> When I worked at [NASA's Jet Propulsion Laboratory] we were required to show preferential treatment toward women or minority headed businesses. This was a guideline we were required to follow whether the business could deliver the goods or not. … I also knew a female engineer who when hiring college "fresh outs" would exclude anybody but females and minorities. When I asked her about it her reply was, "Well, everyone knows that white males have all the advantages, so it's only fair that we exclude them." ...

Not only does the federal government discriminate against its own employees with regard to race, ethnicity, and sex, but it encourages private employers to do so as well, most notoriously in the Department of Labor's regulations under Executive Order 11,246, which require "goals and timetables" when the "incumbent" percentage of "minorities or women" is less than their "availability percentage." This is precisely the situation in the *Lutheran Church* case—that is, a federal agency pushing private actors into using race-conscious goals—that the D.C. circuit there rejected as an equal-protection violation.

As indicated above, most federal agencies send their affirmative action plans to the Equal Employment Opportunity Commission, and so our organization, the Center for Equal Opportunity, has made a formal Freedom of Information Act request for copies of all these plans.

Conclusion

Does this mean that all employment affirmative action is illegal? It depends on how you define "affirmative action," a term that more and more means very different things to different people. Originally, it meant simply taking positive, proactive steps—that is, affirmative action—to ensure that discrimination did not occur. There is no problem with that kind of affirmative action. Nor is it illegal for agencies to ensure that they are casting as wide a net as possible, recruiting far and wide and eschewing old-boy networks and irrational job qualifications. But of course most agencies go beyond this, and are looking for candidates of a particular skin color and ancestry and giving them stronger—not just equal—consideration.

To mix two metaphors: A useful rule of thumb is to put the shoe on the other foot. If an agency is using blackness in a way that would be illegal if it did the same thing with white-

ness, then there's a problem. For instance, should the fact that a candidate is white be a plus factor? If the answer is no—and of course it is—then it is also no if the word in word "white" is changed to "minority." This is the approach that was taken by the D.C. Circuit in the *Lutheran Church* case. If there is a legal problem with an agency making special efforts to recruit and promote European Americans, if we wouldn't like it if managers were under pressure to increase the number of white employees, if we would be offended if the bean counters focused obsessively on making sure that there weren't too many minority employees—then there is a problem, too, when the shoe is on the other foot.

It is bad enough to make judicial and political appointments based on race, ethnicity, and sex, as—unfortunately—all administrations seem to. But it is even worse to inflict this on career employees.

It is disturbing and unsettling for the federal government, of all things, to be playing fast and loose with the law, and doing so in order to pick and choose among the country's citizens on the basis of their skin color, ancestors' countries of origin, and genitalia. The government is setting a poor example.

Since so many public and private employers feel pressured to celebrate diversity by using illegal preferences, they are unlikely to stop discriminating unless dragged into court. What is really needed in this area is a Supreme Court decision overturning *Weber* and *Johnson*, but any employer liberal enough to defend its system of preferences in court will probably not pursue the matter all the way to the Supreme Court, since a potentially adverse decision from the highest court in the land is the last thing the civil-rights lobby wants. The one employer stubborn enough to defend its preferences but large enough to ignore the civil-rights establishment is the federal government. So let's have some lawsuits.

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Footnotes

[1] In addition, Professor Nelson Lund has argued that Congress, in enacting the Civil Rights Act of 1991, implicitly rejected even the remedial justification for an exception to Title VII. Nelson Lund, "The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform," 6 *Geo. Mason L. Rev.* 87 (1997).]