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## Keep Your Eyes on EEOC

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KEEP YOUR EYES ON E.E.O.C.

By

J. Clay Smith, Jr.\*

After the 1980 presidential election, many transition teams were formed by the Administration to draw up policy plans for new leaders of government. At the time, I was a member of the EEOC. The President had not as yet appointed me as Acting Chairman.

The Republican Transition Team Captain for EEOC categories was Jay A. Parker. He was aided by a host of other people. Other names listed as members of the Transition Teams included Allan C. Brownfield and Jane Saxon. In the area of policy and programs review, Mr. Parker was aided by Jack Erickson, in personnel by Michelle Easton, in Legislative initiatives by William Keyes, in Regulations and Guidelines by Andrew W. Lester and Clarence Thomas, in Budget by W.K. Biddier, in Legal Affairs by Jonathan C. Rose and listed as advisors were Larry Brown, Hugh Joseph Beard, Jr., and Eddie Jackson, to name a few.

In a Transition Memorandum dated December 22, 1980 Clarence Thomas wrote a memorandum to Jay Parker in which he stated,

"The Civil Rights Act of 1964 does not authorize the Equal Employment Opportunity [sic] to require affirmative action. . . . There appears to have been little effort made to determine

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\*/Dr. Smith is a Professor of Law at Howard University School of Law. These remarks were made before the National Association for the Advancement of Colored People's Emergency Summit Meeting on Friday, May 17, 1985, at the Dupont Plaza Hotel in Washington, D.C. Dr. Smith was a member of the Equal Employment Opportunity Commission from 1978-1981. He served as Acting Chairman from 1981-1982.

whether disadvantage minorities and women have actually been helped as a result of affirmative action."

Thomas then concluded that "EEOC has extended its authority to include voluntary affirmative action in the private sector without constitutional or statutory basis. Moreover, the assumption that this approach would help minorities and women overcome disadvantages caused by past discrimination has not been verified or reassessed." Hopefully, Clarence Thomas, who in 1980, said that if he "ever went to work for the EEOC. . .my career would be irreparably ruined" now knows that his understanding of both the law and the facts about affirmative action were in error. Williams, Black Conservatives, Center Stage, Wash. Post, Dec. 16, 1980, at A21, col. 2.

We are here at this Summit not only to assess the extent of the assault of the Administration on labor, education and housing issues; we are also here to affirm the validy of the principles in which we believe and liberty for which we will contest.

The blueprint of what is the position of the Department of Justice on Affirmative Action was uttered in former Attorney General French Smith's first major address in Philadelphia on May 23, 1981 before the American Law Institute. It was French Smith, representing the views of the Administration who proclaimed that class based remedies in Title VII litigation should be tailored to allow relief to only identifiable victims.

It was from this point and based upon Attorney General Smith's theme that has given William Bradford Reynolds a free hand at attempting to

dismantle affirmative action, congressionally created or otherwise, and set-asides to increase the number of minority entrepreneurs.

This group need not tarry on the question of whether affirmative action is constitutionally permissible. The United States Supreme Court, in its decision in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), held that a properly tailored voluntary affirmative action plan and evidence of past discrimination fell within the test of reason. This decision and other lower court opinions upholding the constitutionality of affirmative action under Title VII of the Civil Rights Act of 1964 were on the books prior to the EEOC Transition Team's final report. This is why I question the basis of the statements of the current Chairman of the EEOC concerning the permissibility of affirmative action — voluntarily or judicially imposed. From the record, it appears that Chairman Thomas came to the position of the EEOC with a predisposition on questions of law and fact about the definition of discrimination and affirmative action. Hopefully, the full Commission will continue to fulfill their duties under Title VII as interpreted by the Courts.

Using Chairman Thomas' own words, let me pose this question: Have "dis-advantaged minorities and women . . . actually been helped as a result of affirmative action"? If a showing can be made that minorities and women have been helped, such a showing would seem to leave the Chairman without any publically stated reason to continue to speak out against affirmative action or to otherwise bow to the unjust policies of the Department of Justice.

What are the facts? In a recent study of the Potomac Institute, a Washington research center covering the period of 1970-1980 using statistics published by federal agencies, it found:

American women and minorities made unprecedented employment gains during the 1970's.

Minorities and women received more jobs and substantially better jobs during the last decade.

The percentage of women and minorities in professional, managerial and other top white-collar jobs increased markedly between 1970 and 1980 in both government work and private industry.

The proportion of blacks who were managers or officials doubled to four (4%) percent of the work force, while the number of women in those top jobs increased from ten (10%) percent to work force of eighteen point five (18.5%) percent.

See A Decade of New Opportunity: Affirmative Action In The 1970's (Oct. 1984); Kaufman, Affirmative Action called Effective, The Philadelphia Inquirer, March 24, 1985, at 1, col. 6.

According to the Philadelphia Inquirer, EEOC's own records indicate that between 1970-1980, the percentage of both women and minorities in the private work force increased -- a 15% increase for Blacks, from 10.0% to 11.6% of the work force and a 19% increase for women, 34.4% of the work force to 41%.

The finding of the Potomac Institute Study authored principally by Herbert Hammerman is that the job increases came primarily in the managerial professional, skilled and technical categories even though there is evidence

that in other work categories mostly associated with minorities and women, the percentage of their participation remained stable or declined.

There is no question, again using the words of Chairman Thomas that "disadvantaged minorities and women have actually been helped as a result of affirmative action." The fact that discrimination still exist in the work place may be verified by the records within the possession of the EEOC itself. Smith, Review: Affirmative Action, 27 How. L.J. 495, 511 (1983); Report On Affirmative Action And the Federal Enforcement of Equal Employment Opportunity Laws, 97 Cong. 2d Sess. (published by the Subcommittee On Employment Opportunities Committee On Education and Labor, House of Representatives, 1982).

I ask Chairman Thomas, and each member of the Equal Employment Opportunity Commission: Do you want to be known as the Commission whose policies placed a chain of stone around the necks of minorities and women? The answer to this question must surely be no. This Summit calls for an attentive Commission; it calls for a Commission to take charge of its congressional mandate. It calls upon each member of the Commission to accept the fact that voluntary affirmative action (as set forth in EEOC's own guidelines) is consistent with our cherished notions of liberty, and the window of opportunity.

Finally, let me address the efforts on the part of some staff at EEOC and one or two members of the Commission to gut the definition of discrimination. During the year that I was Acting Chairman of EEOC, it was clear to me that some personnel in OMB, Justice, Labor and even in GAO had a mission

more important than the reversal of affirmative action. The objective of the foes of Title VII was to eliminate all class based relief. See General Accounting Report, FPCD-82-26, July 30, 1982. (This report failed to include the Commission's formal reply to the GAO draft which is the usual courtesy afforded to agencies disagreeing with a GAO draft.) There are two targets which at this very moment are subject to serious scrutiny: EEOC's Uniform Selection In Employment Guidelines and the Griggs v. Duke Power Company, 401 U.S. 424 (1971) case decided in 1971. Griggs held that though an employment practice of an employer may be unintentional, it may still be discriminatory as it affects a particular group(s). This principle is embodied in the EEOC's Uniform Selection and Employment Guidelines. In fact, EEOC, may enforce Title VII against employers whose labor practices are neutral on their face but are discriminatory.

OMB, Justice and certain recent staff appointees at EEOC have been quietly working to undermine the Employment Selection Guidelines and erode -- by oratory -- the Griggs Doctrine. One policy has been to attempt to reduce the record-keeping requirements so that neither the government or a private litigant can prove discrimination.

If the Griggs Doctrine is reversed, the legal blueprint of Attorney General French Smith and the Administration's regressive civil rights policies in employment will have been achieved. The burden of proving discrimination on any basis covered by Title VII could require the proof of specific intent. Such a burden would substantially undermine Title VII enforcement by EEOC, and would impose an awesome burden of proof of discrimination on even identifiable victims.

This Summit calls upon the Commissioners of EEOC to exercise their independent judgment: do not revise the Employment Selection Guidelines. This Summit calls upon the Commission not to succumb to political expediency to gut the Selection Guidelines.

This Summit asks the Commissioners of EEOC, to seriously consider the undesirable consequences of the current moves within the agency to gut the Griggs Doctrine.

As we leave this Summit, we intend to pay close attention to EEOC as well as the Department of Justice, and the Department of Labor.

This fight is not over. We've come to far to retreat. Keep your Eyes on EEOC.