

Memorandum

AMC003:Williams: memo0612.wp



COOPER
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READING
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Subject

Fair Housing Act

JUN 15 1988

To

Mark R. Disler
Deputy Assistant
Attorney General
Civil Rights Division

From

Michael Carvin
Deputy Assistant
Attorney General
Office of Legal Counsel

This responds to your request for our views on whether the most recent proposed amendment to the Fair Housing Amendments Act of 1988 (Act), the so-called Fish II amendment, raises any constitutional problems. We believe that it does.

Proposed section 812(o) would provide that "the Secretary shall, not later than 20 days after the election is made, commence and maintain a civil action on behalf of the aggrieved person." We understand that the drafters of this proposal intend for "shall" to be read in a mandatory fashion -- that is, the Secretary will be required to file suit whenever a complaint has been filed under the Act and one of the parties has opted out of the administrative proceeding. See Proposed section 812(a). That being so, the Secretary will therefore not be able to exercise any discretion in deciding whether a suit is meritorious.

The courts and the Department of Justice have consistently hewed to the position that the power to litigate, including the power to bring civil actions, is part of the President's constitutional power to take care that the laws are faithfully executed. U.S. Const., Art. II, sec. 3; Buckley v. Valeo, 424 U.S. 1, 138 (1976).¹ The decision whether to exercise that power

¹ The Court said:

The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts
(continued...)

cannot be controlled by either the legislative or the judicial branch. The "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case. . . ." United States v. Nixon, 418 U.S. 683, 693 (1974). This rule applies to the decision to prosecute both criminal, id., and civil matters. United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 125 n.14 (5th Cir. 1973); United States v. University Oaks Civic Club, 653 F. Supp. 1469, 1474 (S.D. Tex. 1987).

Therefore, proposed section 812(o) is an unconstitutional effort to interfere with the President's power to take care that the laws are faithfully executed. He and his subordinates must retain the unfettered discretion to decide when, if ever, to file suit.

Please let us know if we can be of further assistance.

1(...continued)
the responsibility to "take Care that the Laws
be faithfully executed."

Buckley v. Valeo, supra, 424 U.S. at 138.