THE WHITE HOUSE

WASHINGTON

February 3, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: AFSCME v. Washington: Comparable Worth Case

I have reviewed Judge Tanner's opinion in AFSCME v. Washington, C82-465T (W.D. Wash 1983), the so-called "equal pay for work of comparable worth" case. The opinion granted back pay and injunctive relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), to the class of state employees in jobs primarily (defined as 70% or more) held by women. The theory of the plaintiffs, accepted by the court, was not the traditional Title VII theory that women were being paid less than men doing the same or substantially the same work. The theory was not "equal pay for equal work." Rather, plaintiffs argued and the court agreed that the state violated Title VII because workers in a class of jobs held primarily by women were paid less than workers in a class of jobs held primarly by men, even though the work in both classes of jobs was, according to sociological studies admitted as evidence, "worth" the same.

For example, most truck drivers are male and most laundry workers female. The sociologists, using a four-category "point" system with points for knowledge and skills, mental demands, accountability, and working conditions, determined that driving a truck and working in the laundry are jobs of comparable worth. The predominantly male truck drivers make more than the predominantly female laundry workers, however, and, according to Judge Tanner, that is sex discrimination in violation of Title VII.

In his opinion Tanner recognized that the case was one of first impression. He sought, however, to derive significant support from the 1981 Supreme Court decision in County of Washington v. Gunther, 452 U.S. 161 (1981). In that case a sharply divided Court ruled, 5-4, that female prison guards hired to guard female prisoners could sue under Title VII, alleging that they were discriminatorily paid less than male prison guards hired to guard male prisoners. Defendants had argued that no violation of Title VII could be established, since the female guards could not allege that they were paid

less than a man hired to do the same job -- i.e., a male guard hired to guard female prisoners (there was no such person). As noted, this argument was rejected by the narrowest of margins.

Judge Tanner's huge leap from Gunther to a comparison of totally dissimilar jobs such as those of truck drivers and laundry workers has no basis in the language or logic of Gunther. Justice Brennan's opinion for the Court in Gunther expressly noted that the claim in that case was "not based on the controversial concept of 'comparable worth,' under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community." 452 U.S., at 166. Justice Rehnquist's dissent, joined by the Chief Justice and Justices Stewart and Powell, pointed out the flaws in the Court's opinion, but concluded that "its narrow holding is perhaps its saving feature. The opinion does not endorse the so-called 'comparable worth' theory...." Id., at 203.

It is difficult to exaggerate the perniciousness of the "comparable worth" theory. It mandates nothing less than central planning of the economy by judges. Under the theory judges, not the marketplace, decide how much a particular job is worth, and restructure wage systems to reflect their determination. The marketplace places a higher value on the work of truck drivers than on that of laundry workers, but Judge Tanner, under the guise of remedying gender discrimination, concluded that both jobs are "worth" the same and ordered that workers in both groups be paid the same. This is a total reorientation of the law of gender discrimination. Under the accepted view, if a qualified woman wanted to become a truck driver, and was denied the opportunity, or was given a job but paid less than a male truck driver, she could seek relief under Title VII. The comparable worth theory, by contrast, offers relief to any group of workers (either predominantly female or male) that can convince a judge that their jobs are intrinsically "worth" more than what they can command in the marketplace. What this theory means in terms of judicial planning of our economy is demonstrated by the frequent references in Judge Tanner's opinion to the 1976-1977 Washington state budget surplus "that could have been used to pay Plaintiff's [sic] their evaluated worth." Slip op., at 22; see also id., at 33.

A good sense of the type of jurist with which we are dealing in this case is conveyed by the following quotation from the opinion:

> Perhaps Defendant adopted the practices and concepts of sex discrimination against women in employment as just another manifestation of centuries old discriminatory attitudes and practices of a male dominated society. The Declaration of Independence probably sheds some light on the practices and concepts of sex discrimination so rampant in this country. "...That all men are created equal; That they are endowed by their creator with certain inalienable rights; That among these are Life, Liberty, and the Pursuit of Happiness." The female gender is conspicuously absent in the Declaration of Independence. Slip op., at 41.

The decision is being appealed to the Ninth Circuit by the State of Washington. No briefing schedule has yet been set. The United States did not participate below; it can participate as amicus in the Ninth Circuit, wait until the almost inevitable petition for Supreme Court review of whatever the Ninth Circuit decides, or not participate at all. I am advised that the Civil Rights Division will send a recommendation to the Solicitor General in two-three weeks. I strongly suspect that recommendation will be that the Government participate on the side of the State before the Ninth Circuit. Whether this makes political sense, when there is the option of waiting until the case reaches the Supreme Court, will have to be addressed at some level above the Civil Rights Division.

As you doubtless know, the issue of possible participation by the United States has already attracted considerable media attention. There is no need for action by our office at this time, but we should be alert that the transition at Justice does not result in this decision receiving anything less than the most careful consideration, not only at Justice but over here as well.