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WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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☐ H - INTERNAL
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Name of Correspondent: David Monroe Marsh

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Subject: Civil Rights; supports the President

ROUTE TO:		ACTION			DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	TC	Type of Response	Code	Completion Date YY/MM/DD
CU OFC		ORIGINATOR	91/11/26			C	92/01/02 CS
		Referral Note:		TC			CS
CU AT 10		A	91/11/27		NL	C	92/01/06 CS
		Referral Note:	92/01/06 letter to Marsh				
CU GRAY		I	91/11/27			C	91/11/27 TC
		Referral Note:					
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ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
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DISPOSITION CODES:
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THE WHITE HOUSE

WASHINGTON

January 2, 1992

Dear Mr. Marsh:

Thank you for your recent letter to the Counsel to the President, expressing your support for him and for the President and commenting on the quota issue. I apologize for the delay in responding.

The President and the Administration are very pleased that it was possible to reach a compromise on the delicate and potentially divisive issues addressed by the new civil rights statute. Enclosed for your information is an op-ed by the Counsel to the President, which explains why the bill signed by the President is a major victory for equal opportunity and against quotas. I have also enclosed informative articles by two respected legal commentators, Stuart Taylor and Terry Eastland, which generally confirm the Administration's analysis.

Thank you again for writing.

Yours truly,

Nelson Lund
Associate Counsel to the President

Mr. David Monroe Marsh
P.O. Box 811
Lee, MA 02138-0811

289506cu

DAVID MONROE MARSH
P.O. BOX 811
LEE, MA 01238-0811
413-623-5330

11/22/91

E. Boyden Gray
Counsel to the President

Dear Boyden —

An oversimplification,
BUT: Quotas are bad
but affirmative action is
misnamed. I recall
for us, we dealt with
in this area when
I worked with you
up til 6 years ago &
I was with Business
Advisory Council (to
OMB etc.) on Federal
Reports.

I support you
as the one I'll trust best

over

DAVID MONROE MARSH
P.O. BOX 811
LEE, MA 01238-0811
413-623-5330

in the current White House staff. I also support the President.

But being a Republican in extreme Western Mass. (of unemployment 15-20%) is not easy. Few here, of course, ever worked in Washington or w/ state government.

Respectfully & the best for the Season and well beyond,

Lloyd

P.S. Got a good reply to my letter to you of last summer.
D.M.

THE WHITE HOUSE

WASHINGTON

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C. Boyden Gray

Civil Rights: We Won, They Capitulated

Contrary to a rapidly congealing press myth, President Bush did not "cave" or "surrender" on quotas in the new civil rights bill. Nor were any of the president's actions taken in response to the Clarence Thomas hearings or the David Duke campaign. On the contrary, the compromise bill the president will sign became possible only after the *Democrats* beat a total retreat on quotas, thereby paving the way for the president to make concessions on other, less fundamental, issues.

To understand what happened, the public needs to know the story of an extraordinary amendment that was adopted without debate or a vote. But first we must set the stage.

Under the Supreme Court's 1971 *Griggs* decision, employment practices having an adverse statistical impact on certain groups can lead to liability even if there was no hint of discriminatory intent. In 1989, the *Wards Cove* case summarized the rules under which such lawsuits would be conducted, noting that unfair rules would drive employers to use quotas to avoid any possibility of being dragged into such a lawsuit.

For the past two years, Democrats have insisted that *Wards Cove* overruled *Griggs* and that legislation was needed to "restore" pre-*Wards Cove* law. The changes they actually proposed, however, would have gone much further, exposing countless employers to ruinous litigation and liability any time their numbers were not "right."

Administration lawyers always believed that the Supreme Court was right to think that *Griggs* and *Wards Cove* were consistent with each other. More important, we knew that the Democrats' "restoration" was in fact a radical and destructive distortion of prior legal doctrine. If "bad numbers" alone became a sufficient basis for legal liability, employers would be foolish *not* to use quotas.

Last March, the president proposed a bill that made a symbolically important but practically insignificant concession to the Democrats on one issue involving the burden of proof. In other respects, the president's bill codified the law as it existed prior to *Wards Cove* (and which we believed was fully consistent with that decision). The Democrats in Congress never gave this bill the time of day.

Suddenly, on Thursday, Oct. 24, Sen. Edward Kennedy stunned administration negotiators by agreeing to a *Wards Cove* proposal developed by Sen. Robert Dole and transmitted through Sen. John Danforth. This option was virtually identical in substance to the president's bill and to other formulations that Kennedy and the private lobbyists for his bill had rejected time and again.

"The president won a clean victory for equal opportunity, and that victory will survive the current round of fictions."

On most issues, the Dole proposal used language drawn from the president's bill and the analytical memorandum that accompanied the bill. On the contentious issue of "business necessity," which defines the standard that employers must meet in justifying statistical disparities, the proposal used essentially meaningless language from the Americans With Disabilities Act that left the term in question *undefined*. (Ironically, the negotiators of the disability law had settled on this empty language because they expected the issue to be addressed and resolved in the context of the upcoming civil rights bill.)

In its most critical component, the Dole proposal included *exclusive legislative history* that would supply the definition of "business necessity" by referencing the case law as it stood immediately prior to the *Wards Cove* decision. In two carefully negotiated explanatory sentences, the proposal indirectly accomplished what the president's bill had done in so many words: codifying the law of disparate impact as it stood at the time of *Wards Cove* (except on the burden of proof). Because the statutory language provided no definition, the definition referenced in the legislative history would necessarily be dispositive in the courts; for that reason, 90 percent of the negotiations centered on the legislative history rather than on the statute itself.

In return for Sen. Kennedy's complete capitulation on quotas, the administration agreed to several compromises proposed by Sen. Danforth on other issues. The question on which the administration was most reluctant was the application of jury trials and punitive damages to employment cases under the Civil Rights Act. Although the Danforth proposal includes caps on such awards, thereby setting an important precedent for tort reform, such remedies are undeniably a dangerous experiment (as is suggested by the senators' 54-42 vote *against* a proposal to apply to themselves the same remedies they are imposing on the private sector).

Despite our strong misgivings about jury trials and damages, the agreement was sealed, and our startling success on *Wards Cove* remained the most salient component of the package. Imagine, then, how disturbed we were to learn that Sen. Kennedy went to the floor of the Senate the very next day to create legislative history, inconsistent with Thursday night's agreement, attempting to resuscitate one of the most radically objectionable features of the original Democratic bill. Had we been sandbagged? Had the agreement so laboriously negotiated ever been meant to stick?

The following Monday, the administration proposed an innovative statutory provisions specially designed to enforce the Thursday night agreement. This provision directed the courts to ignore any legislative history (such as the description of the agreement given by Kennedy on Friday) apart from the two sentences originally agreed to. Sens. Kennedy and Danforth objected to this proposal, while administration negotiators felt they had to insist. Tense meetings ensued, and it seemed at points that there might be no civil rights bill after all.

On Tuesday, Sens. Dole and Orrin Hatch engaged in heroic efforts to hold Sen. Kennedy and his allies to the agreement. Republican Leader Dole's arguments were particularly effective—that night, without any debate or a recorded vote, the Senate accepted a slightly modified version of the administration proposal enforcing the deal.

Heroic efforts to enforce the agreement would not have been required unless there had been something very significant were at stake. And there was. Buried in this dispute, as in earlier arcane debates over legal terminology, was the difference between preserving the essence of current law and creating a new quota monster. It also meant the difference between a system that will encourage kids to stay in school and a novel system of legal threats against those who reward hard work and achievement. On these fundamental issues the president won a clean victory for equal opportunity, and that victory will survive the current round of fictions about some supposed political surrender.

The writer is counsel to the president.

TAKING ISSUE

BY STUART TAYLOR JR.

The Civil-Rights Bill: Punt to the Courts

The conventional wisdom about the civil-rights bill compromise is that President Bush, afraid he was looking more and more like KKK-alumnus David Duke, simply caved in.

Liberals exult that the president abandoned a morally and politically indefensible position by embracing belatedly the same salutary reforms that they had been seeking all along.

Meanwhile, conservatives like columnist Patrick Buchanan bash the president for capitulating to a "quota bill."

Wrong, wrong, wrong.

These figments of Democratic spin-controllers and right-wing hardliners, uncritically adopted by much of the national press as the bill sped toward final passage last week, are egregious oversimplifications.

Not as egregious, to be sure, as the president's own transparently absurd position that what he had been denouncing for 20 months as a "quota bill" had been transubstantiated, by a few strokes of the pen, overnight, into a good and upright "source of pride for all Americans . . . a non-quota civil-rights bill."

Oversimplified rhetoric begets oversimplified rebuttal. President Bush and his aides may deserve a dose of their own medicine.

Irreconcilable Differences

But the truth is that this was a classic, convoluted legislative deal, with both sides giving significant ground, inch by inch, while papering over irreconcilable differences and leaving the hardest policy decisions unresolved:

- The White House won more than it lost on the "quota" front, by holding out for crucial last-minute changes in language regarding statistically based "disparate impact" lawsuits. The compromise bill is far less likely than the original Democratic proposals to increase pressure on employers to use racial hiring preferences and significantly less likely to do so than the revisions advanced last summer by Sen. John Danforth (R-Mo.).
- The White House did cave in on the "lawyers' bonanza" front, by accepting almost verbatim all the Danforth proposals for jury trials and damage awards it had previously denounced as "radical" measures to "promote excessive litigation."
- The president and Congress agreed to disagree on the meaning of the most controversial provisions, such as the vague, undefined language on what an employer must prove to justify as "job related" any selection criteria that screen out disproportionate numbers of minorities or women.

In doing so, the deal makers punted the most difficult and important policy issues to the federal judiciary—which happens to be a bastion of Reagan and Bush appointees that is even more conservative now than in 1989, when the Supreme Court laid down the five decisions that civil-rights groups have been clamoring to overrule.

Should employers be free to require that applicants for secretarial jobs have high-school diplomas? Should they be free to use standardized intelligence tests to screen applicants for positions as firefighters? As auto mechanics? Should law firms be free to reject all applicants with mediocre law-school grades?

Blank Check

Congress has not clearly answered questions like these. The answers will be supplied, in due course, by the Court of Rehnquist, Scalia, Thomas, Kennedy, Souter, O'Connor, White et al.

White House lawyers may not like giving judges a blank legislative check to resolve such glaring statutory ambiguities. But they have reason to anticipate they will like the way the blanks are filled in by the Reagan-Bush courts.

"The press is all wet in saying that the president caved," says Glen Nager, who represents employers as a partner with Jones, Day, Reavis & Pogue's Washington office and knows the legal issues as well as anyone.

"What's mind-boggling to me," adds Nager, who as an assistant solicitor general helped write the Reagan administration's briefs in key civil-rights cases, "is that the administration's opponents would think that they could win the battle by going to the courts, when throughout the debate they've been saying that Congress needed to legislate very subtle rules of employment litigation with detail and particularity, because the courts could not be trusted."

So the gonzo-conservative *Wall Street Journal* editorialists have been short-sighted in announcing that "this remains very much a quota bill"—just as their liberal *New York Times* counterparts have been disingenuous in Mau-Mauing the quota issue as no more than an "ugly slogan" from the start.

Media Blunders

News coverage of the civil-rights battle has been marred by glaring inaccuracies as well as tendentious oversimplifications.

One example: Andrea Mitchell's flagrantly biased report on the NBC Nightly News of October 24, which unqualifiedly branded as "false" (in bold red graphics, no less) four of the points in summary critiques of the then-pending Danforth proposal that were prepared by White House and Justice Department lawyers.

In fact, all four points, such as a claim that the Danforth bill could be read as authorizing compensatory and punitive damages even in disparate-impact cases involving no discriminatory intent, were arguably correct and within the realm of fair advocacy, if perhaps a bit overdrawn.

The significance of the compromise legislation's retreat into ambiguity on key issues is that, as Nager argues, the Rehnquist Court is not likely to back off from its own interpretations of the civil-rights laws except to the extent that Congress explicitly overrules those decisions, in whole or in part.

The compromise legislation does indeed overrule portions of the five 1989 decisions and three others. But it leaves intact key aspects of the most important one, *Wards Cove Packing Co. v. Atonio*, and leaves key terms undefined.

It is speculative at best to predict the impact of legislation as murky as this on a world of litigation jointly ruled by the Reagan-Bush judiciary and the ancient law of unanticipated consequences.

Shadow on Affirmative Action

One contrarian possibility is that the compromise bill—far from pushing more employers to use hiring quotas—may drive many *away from* even the milder form of affirmative action that both sides say they want: reaching out to give women and minorities—even when they lack paper credentials, references, and job experience—a chance to show what they can do.

Far-fetched? Consider: The vague new language shifting to employers part of the burden of proof in disparate-impact suits is probably too weak to overcome the formidable hurdles that have long faced suits based on failure to *hire* enough minorities and women. If so, employers will feel little new pressure to use affirmative action at the hiring stage.

Meanwhile, employers will henceforth find it more risky to *fire* employees, whether for subpar work or otherwise.

That's because fired employees, who have always been far more likely to go to court than those not hired, will have new incentives to litigate: the availability of jury trials and limited compensatory and punitive damages for discrimination claims based on sex, national origin, religion, or disability. (Such remedies are already available for racial-discrimination claims.)

The net result could be to make employers more risk averse about hiring employees who would be hard to fire if they don't work out—especially those without the traditional badges of qualification, and those most likely to raise discrimination claims.

Then again, maybe the threat of more damage suits will give some marginal new impetus to hiring quotas. Nobody really knows. It could depend on questions that hardly anyone (except Nager and a few other litigators) is even thinking about now, such as whether courts will sustain employer efforts to require employees to submit to arbitration of discrimination claims.

The *Griggs* Legacy

How, exactly, does the compromise bill change the law in the most controversial area—disparate-impact suits, quotas, preferences, and all that?

First, a little history: In 1971, in *Griggs v. Duke Power Co.*, a unanimous Supreme Court implausibly gleaned from between the lines of the 1964 Civil Rights Act a congressional intent to expose employers to liability for racial discrimination—even if they had no discriminatory intent—for using selection criteria (such as standardized intelligence tests) that have the effect of excluding disproportionate numbers of black applicants.

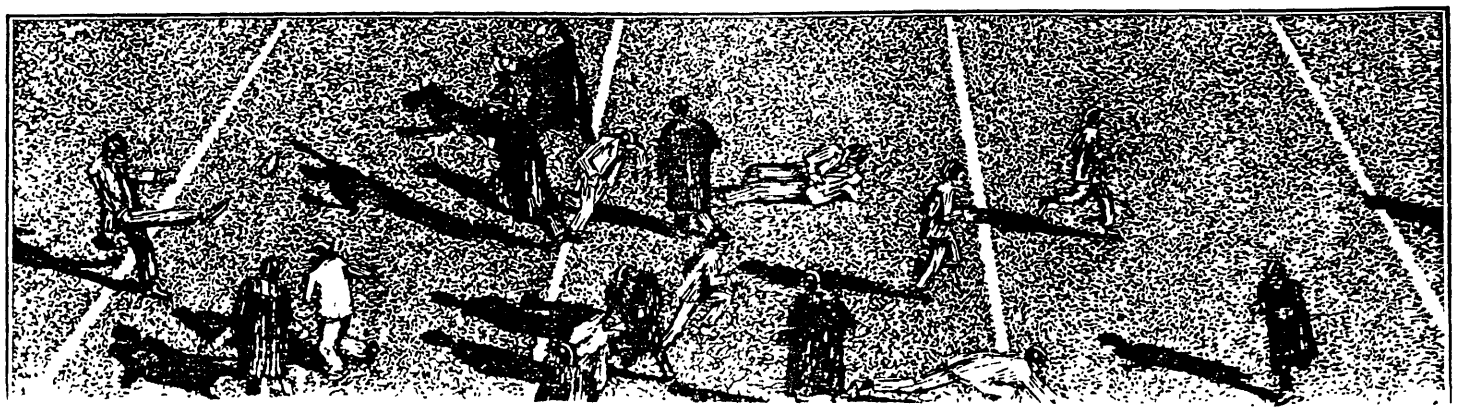
Griggs imposed on employers the burden of proving the "business necessity" of any selection criteria that had such a disparate impact.

This was dubious statutory interpretation but pretty good policy, because it gave employers a needed incentive not to use selection criteria that tend to screen out minorities unless these criteria indeed help them choose better workers.

But Chief Justice Warren Burger, the

SEE TAKING ISSUE, PAGE 26

Stuart Taylor Jr. is a senior writer with American Lawyer Media, L.P., and The American Lawyer *magazine. "Taking Issue" appears every other week in* Legal Times.



OPINION AND COMMENTARY

Anatomy of a Messy Compromise

TAKING ISSUE FROM PAGE 25

titular author of *Griggs*, probably hadn't the slightest idea where it would lead: Many lower courts proceeded to make the burden of proving "business necessity" so onerous that few employers could meet it. This prompted many employers to stop using standardized tests and spurred an indeterminate number to use quotas covertly, so as to avoid liability.

The Supreme Court, while providing no very clear definition of business necessity in *Griggs* or its progeny, did outline a more flexible approach than that used by most lower courts. Its 1979 decision in *New York Transit Authority v. Beazer* suggested in a key footnote that a disparate impact could be justified whenever an employer's "legitimate employment goals . . . are significantly served by—even if they do not require"—the selection criterion at issue.

Striking a Blow

This was the somewhat uncertain state of the law when the newly conservative Court accepted the Reagan administration's invitation to strike a blow against quotas, in 1989.

The 5-4 *Wards Cove* decision did three important things that alarmed civil-rights lawyers: It implicitly overruled one aspect of *Griggs* by shifting to plaintiffs the ultimate burden of proof on the business-necessity issue; it opted for a flexible definition of business necessity by holding (in language lifted almost verbatim from *Beazer*) that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer"; and it held that, to establish disparate impact in the first place, plaintiffs must not merely prove a bottom-line racial imbalance in the work force, but must also trace a "significantly disparate impact" to each challenged employment practice.

In the wake of *Wards Cove* and other 1989 decisions making it harder to win job discrimination suits, civil-rights groups and Democrats, led by Sen. Edward Kennedy (D-Mass.), proposed the far-reaching Civil Rights Act of 1990.

It was a plaintiffs lawyer's wish list, which would have overruled not only each of the three holdings of *Wards Cove* and four other 1989 decisions but also a total of more than 20 Supreme Court decisions, including some joined by the Court's most liberal members.

Among other things, the original Democratic bill would have required employers to use any means necessary to achieve racially balanced work forces unless they could meet the insuperable burden of proving that *all* their selection criteria are "essential to effective job performance."

It was no great exaggeration for the White House to call this a quota bill. The angry denials of civil-rights groups, liberals, and editorialists, who claimed the bill had nothing to do with racial preferences or affirmative action, were at best misinformed and at worst deeply cynical.

There ensued 20 months of angry and misleading rhetoric, jockeying for position, and groping for compromise on both sides.

President Bush soon backed off his original position that no legislation was necessary. The Democrats gave ground, inch by grudging inch, in search of a compromise formula that could gain the president's signature or win enough votes to override his veto.

With the gap narrowing and Danforth straining mightily to bridge it, the president kept simplistically attacking each new proposal as a "quota bill," while his lawyers kept making, and winning, new concessions.

> Is this a great victory for civil rights? Not really.

The final, compromise package on *Wards Cove* puts back on employers the burden of proving business necessity—as the president had agreed to do more than a year ago.

But the bill conspicuously fails to define business necessity. It states merely that employers must show their selection criteria "job related for the position in question and consistent with business necessity."

And the legislative history agreed to by Senate leaders says these terms are intended to reflect the concept of business necessity as used both in *Griggs* "and in the other Supreme Court decisions prior to *Wards Cove*."

That would include *Beazer*, as Nager stresses—and would apparently leave the Court free to come up with a new definition very much like the one in *Wards Cove*, which the compromise bill does not explicitly overrule on this point.

The compromise bill also ends up in much the same place as the third *Wards Cove* holding on proof of disparate impact: It specifies that plaintiffs must show "that each particular challenged employment practice causes a disparate impact," unless the employer's practices "are not capable of separation for analysis."

This third, least understood holding of *Wards Cove* may have been the most important. That's because it makes it difficult for plaintiffs to prove disparate impact—which must be established *before* employers incur any obligation to show business necessity—and releases employers from any obligation to show the job relatedness of *all* their selection criteria whenever a racial imbalance exists in their work force.

The bottom line is that plaintiffs will have a better shot at winning disparate-impact suits under the compromise legislation than under *Wards Cove*—but not much better.

And the bill's provisions on damages and jury trials will no doubt spur more lawsuits, some of which will be eminently justified, and some of which will be efforts to shake down employers who have done nothing wrong.

Is all this a great victory for civil rights? Not really. Will it promote rampant use of quotas? Not likely. Will it change the world? Not much.

Will it leach some of the poison of racial politics from our body politic, by toning down overblown Democratic complaints of civil rights being raped and ugly Republican appeals to white racial fears?

Let's hope so. □

Andrea's Abomination

by Terry Eastland

On October 24, "NBC Nightly News" ran the year's most disgraceful bit of breaking-news journalism: Andrea Mitchell's "coverage" of the last political round before compromise civil rights legislation was reached (hours after her piece ran). So egregious was her reporting that it drew the wrath of *Legal Times*'s Stuart Taylor, not normally a presswatcher. "Flagrantly biased," he wrote, citing Mitchell's piece as an example of news coverage that had been "marred by glaring inaccuracies as well as tendentious oversimplifications." Since he lacked the space for a full critique of the NBC broadcast, Taylor has left it to this presswatcher to report the details of this abomination.

To the tape and Tom Brokaw: "Good evening. It is the most sweeping civil rights bill in years and it is sponsored by one of the most senior Republican senators [Sen. John Danforth, we soon learn] and yet, President Bush has repeatedly rejected it, making a variety of claims many thought were more political than factual."

It's hard to imagine a more biased lead-in. Brokaw's grammar and syntax are revealing. Note the superlatives that immediately spin the story in favor of the Danforth bill: *the most sweeping civil rights bill in years*; *one of the most senior Republican senators*. Note the careful placement of the conjunction *yet* to contrast Bush with the now sainted senior Republican senator. Note the clause indicating that Bush cannot possibly have substantive objections over which reasonable people might disagree; *many* folks (including those who work at NBC) think Bush's *claims* are *more* political *than* factual.

Brokaw continues: "Well, tonight NBC's Andrea Mitchell has come up with a source of those presidential objections." This, of course, sows confusion. Mitchell has not really come up with "a source"—it was planted with her by her actual sources, Republican and presumably Democratic senators (and staffers), hoping to influence the negotiations. If the "source of those presidential objections" can be discredited, then the President must reject the advice it provided and accept the most sweeping civil rights bill in years.

Discrediting, then, we go. Mitchell: "Republican senators say George Bush has been misinformed by his own staff about key features of the [Danforth] bill he's been opposing. When the President tried to persuade Republican senators to support his civil rights bill yesterday, this two-page White House memo was on the table. Obtained by NBC News, it compares the White House bill with . . . Danforth's compromise measure. The only problem, most of its claims are dead wrong."

Mitchell thus sides with her sources and proceeds to buttress her conclusion with some sound-bites from Danforth. The administration memo, he says, is a "mischaracterization" containing "serious flaws" about "what the bill does." It has "examples that purport to say what the bill would do and the examples are just wrong." Dead wrong, in other words.

What's so wrong? Mitchell: "The memo says Danforth's bill would allow compensatory damages even if the discrimination is unintentional. False, it wouldn't. To support the President's claim, the White House lists a number of worst case examples. It claims state police forces would have no defense for refusing to hire ex-convicts. Trucking companies would be forced to hire drivers with drunk driving convictions. The American Cancer Society would not be able to refuse jobs to cigarette smokers. But none of these situations would arise under Danforth's bill. It permits employers to set legitimate job-related qualifications."

Since when did Andrea Mitchell become such an authority on Title VII of the Civil Rights Act of 1964? Since her anonymous sources told her what to say. But every one of the four "claims" had some basis in fact and was well within the realm of political advocacy—which, after all, is the context in which legislation is ham-

Terry Eastland is resident fellow at the Ethics and Public Policy Center.

mered out, but which context Mitchell manages to leave out of her piece entirely.

Allow me to digress to consider the merits of the White House claims. As for the first, the Danforth bill was drafted in a way that permitted the reading Bush's lawyers gave it. While it was advertised as aimed only at making damages available in Title VII cases of intentional discrimination, the bill's actual wording left the door open for damage claims in cases where an employer intentionally adopted certain practices that, even without any intent to discriminate, had a discriminatory impact in statistical terms. The administration's objection to what it regarded as poor wording was well known to Danforth staffers, if not to Danforth himself.

As for the other three claims, they may be lumped together because they were about the same thing: the kind of case that could arise if the Danforth bill became law. To understand whether the scenarios were plausible requires attention to technical aspects of Title VII law. (Mitchell does not go into these, asking viewers in effect to trust NBC for legal analysis. Not a good idea.) At issue was the way "disparate impact" cases under Title VII should be litigated. These are the cases in which a company (or a public employer) uses some seemingly neutral employment practice that a plaintiff challenges as a violation of Title VII because it has a significantly adverse impact upon some minority group or women. The defendant can counter that the challenged practice is a "business necessity." The Danforth bill defined that term so narrowly that employers would have to hire people capable of doing only the job at issue—and little more. Thus, it was fair enough for the Bush Administration to argue that under the Danforth bill a trucking company would have to hire dock workers with drunk-driving convictions, even if it wanted dock workers who could be promoted as drivers. After all, someone once caught for drunk-driving might do fine as a dock worker only. The other two Bush claims legitimately spoke to the same issue.

Back to the tape: Having brushed near the thicket of Title VII law without entering it, Mitchell has Republican senators finger the culprits feeding the President this "misinformation": White House lawyer Boyden Gray, whom she calls "a hardliner," and chief of staff John Sununu. She states that one Republican says the purveyor of "false information" should be fired. And, redundantly, she presents Sen. William Cohen, who says Bush's advisers are either "inept" or "intentionally distorting the product . . . to achieve a political agenda." Neither Gray nor Sununu makes an appearance in Mitchell's piece. In this kind of reporting, there's no need to confront the accused.

In their October 28 account of the events that led to compromise legislation, the *Wall Street Journal*'s Michel McQueen and Jeffrey H. Birnbaum cited the NBC story in writing that the memo opposing the Danforth bill "contained glaring inaccuracies." Thus do journalists incorporate the mistakes of their brethren into their own work. I wonder whether McQueen or Birnbaum or Mitchell have any idea of how the Bush Administration fared in the compromise legislation on the substance of those "dead wrong" claims containing "glaring inaccuracies."

On the first claim—that the Danforth bill would allow compensatory damages even if the discrimination were unintentional—the White House prevailed. At the administration's insistence, new, unambiguous language was written: Compensatory damages are available *only* in cases of intentional discrimination.

On the other three claims, which involved the definition of "business necessity," the White House got more than it gave. The compromise does not define business necessity; instead, it simply states that employers must show their selection criteria are "job related for the position in question and consistent with business necessity." The legislative history agreed to by all parties directs the federal courts to interpret these terms in accordance with Supreme Court decisions prior to *Wards Cove* v. *Atonio* (1989). The Court could well give the country *Wards Cove* all over again, without citing it. Part of *Wards Cove* has been overturned, but not its most important parts.

Let me explain: The first Title VII disparate impact case, *Griggs* v. *Duke Power Co.* (1971), introduced the idea of "business necessity," defining it in various ways, including "manifest relationship to the employment in question." *Wards Cove* defined business necessity by saying that a challenged practice must serve, "in a significant way, the legitimate employment goals of the employer." This definition allowed more flexibility than some lower courts, in their elaborations of *Griggs*, had been willing to accept. Of course, it was also too flexible for many in Congress; hence the effort to write a new definition. But the non-definition in the compromise legislation, together with the exclusive legislative history that advises the courts to follow *Griggs* and "the other Supreme Court decisions prior to *Wards Cove*," very well could resurrect the 1979 case *New York Transit Authority* v. *Beazer*. For it was in *Beazer* that the Court said that a practice having a disparate impact could be justified whenever an employer's "legitimate employment goals . . . are significantly served by—even if they do not require"—the practice. Note that the Danforth bill contained language that would have overruled *Wards Cove* on this issue; the compro-

mise legislation eliminated this provision.

"Business necessity," then, was sent back to the same judges who decided *Wards Cove* with instructions that could easily allow them to do on this issue what they did in that case. From Bush's perspective, this was a far better deal than any previously offered him. But don't hold your breath waiting for the press to herald Hardliner Gray as a skilled negotiator.

Danforth does get off easy with the press. Consider his effort back in September to incorporate language from the 1990 Americans with Disabilities Act (ADA) into his civil rights bill. At that time the Danforth bill required that "employment practices that are used as job qualifications or used to measure the ability to perform the job" must "bear a manifest relationship to the employment in question." The administration had objected to this definition of business necessity. So Danforth lifted eight words from the ADA—"qualification standards, employment tests or other selection criteria"—in order to rewrite the definition as follows: "Employment practices that are used as qualification standards, employment tests or other selection criteria" must meet this same test. Because administration officials had recently praised the ADA, signed by Bush into law, Danforth argued that using its language should allay White House concerns about quotas.

If the press had examined Danforth's use of the ADA language, it would have found that the eight words couldn't have been used to define business necessity in the civil rights bill, for the simple reason that they don't really define it in the ADA. They merely describe which practices might be covered in a disparate impact case. (Accordingly, the administration offered to put the eight words in the President's bill—if that would make everyone happy.) Evan Kemp, who succeeded Clarence Thomas as chairman of the Equal Employment Opportunity Commission, pointed out in a September press release (largely unreported) that discrimination on the basis of disability is so different from discrimination on the basis of race or gender as not to be comparable.

For the most part, the press reflected the view of the civil rights lobby that Bush, in supporting the compromise bill, had caved in on the quota issue. There is both a case to be made that Bush did not cave and that he did cave—but don't expect nuanced coverage from the press.

Did not cave: What Bush managed on business necessity can hardly be called a cave. As important, Bush also managed to stop the effort led by Democrats and embraced by Danforth that would have enabled plaintiffs to complain about an employer's practices in general. Had the Democrats and Danforth prevailed, *Wards Cove*, which insisted that the plaintiff must specify *which* of the employer's practices was causing the disparate impact, would have been overruled on this point. And that would have enormously increased the pressure on employers to resort to quotas in order to avoid liability. The compromise bill states, in a clear victory for the administration, that plaintiffs must show "that each particular challenged employment practice causes a disparate impact."

Did cave: The most underreported aspect of the entire legislative effort to overrule *Wards Cove* was perhaps the biggest story: that in responding to *Wards Cove*, Congress for the first time would be codifying disparate impact theory, and that disparate impact, based as it is on statistics, will inevitably create some incentives for employers to use quotas in order to avoid liability. I missed the stories (other than those written by the knowledgeable Taylor of *Legal Times*) that pointed out the following: that Title VII of the Civil Rights Act of 1964 proscribed intentional discrimination only and rejected the disparate impact approach; that the Court in *Griggs* gave us the latter; and that the Court in *Wards Cove* was trying to place some sensible constraints upon an approach that was fostering quotas and perhaps even signaling its intention someday to do away with disparate impact in favor of the original theory of Title VII. (Of course, Bush could have made the press cover this larger perspective on the quota issue had he raised it.) To accept legislation of disparate impact is to accept a legal structure that to some extent encourages hiring and promoting by race and gender . . . quotas, if you like. Ergo, a cave.

In addition to the struggle between the President and Congress, there was a story about the Court. The conventional view, expressed by columnist Anthony Lewis, was that Congress had defeated the Court by overruling a series of decisions opposed by the civil rights establishment. The truth is far more complicated. Congress did overrule in whole or in part seven civil rights cases decided over the past two years. But the two most important holdings of *Wards Cove* were not overruled (and indeed one was accepted by Congress). And Congress—as Linda Greenhouse of the *New York Times* pointed out in one of the few sensible pieces on this subject—did not try to overrule the Court's most important civil rights ruling in 1989, the *Croson* case, which struck down as unconstitutional local and state "set-aside" programs based on race and ethnicity. Changing constitutional law is harder than changing statutory law.

More fundamentally, to say Congress or the Court "wins" or "loses" is to misconceive legislative and judicial functions. The job of Congress is to make law, that of the Court to interpret the law. If the Court interprets a statute in a way Congress does not like, that does not necessarily mean its interpretation is wrong. After all, the Court's interpretation may precisely reflect what the *enacting* Congress intended. Or it may reflect the Court's effort to make sense of judge-made law (as in the case of *Wards Cove*).

It is only proper that Congress and the Court converse about the law, and that Congress is the institution making the law, whatever one might think of the law it makes. Effectively forcing Congress to think more about the law it makes—indeed, forcing it to legislate—is part of what it means to have a conservative Court. Watch for more conversations between Congress and the Court during this decade. It's a story line the press—even NBC—might eventually notice. ❐

CS

ID # 289508 CU

HU010 R: 11/29 5:30

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Thomas Harrison

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Civil Rights - Please take a stand for true equal opportunity; NO more quotas; no more racial preference rules

ROUTE TO:		ACTION			DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOFC		ORIGINATOR	91/11/26 TC		C	91/12/05 CS
		Referral Note:				
CUATO		A	91/11/27 TC		C	91/12/05 CS
		Referral Note:	see comments			
		_	1 1		_	1 1
		Referral Note:				
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		Referral Note:				
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		Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: No further action required per N. Lynn CS 12-5-91

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Send all routing updates to Central Reference (Room 75, OEOB).
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5/81

28190Sm

RUSS REID
COMPANY

November 22, 1991

President George Bush
The White House
Washington, DC 20500

Dear President Bush:

Please do not allow your staff to buckle under to the media and special interest pressures to keep minority hiring preference rules.

Equal opportunity means equal opportunity for all Americans. Favoring blacks over whites because of their skin color is harmful to all of us. It discriminates against whites. It weakens our nation's ability to compete. And it perpetuates the immoral notion that blacks are inferior to whites and need an unfair preference rule to compensate for their inferiority.

Please, take a stand for true equal opportunity. No more quotas. No more racial preference rules.

Cordially,

Thomas A. Harrison
Senior Vice President

cc: C. Boyden Gray

Two North Lake Avenue · 6th Floor · Pasadena · California 91101-1868 · 818-449-6100

CS

ID # 289551 CU

R: 11.27
5:20p

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

HU010

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- ☐ I - INCOMING

Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Harold O. Cope

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Civil Rights - Urges mandated preferential treatment for white anglo males

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOFC	ORIGINATOR	91/11/26		C	91/12/1 CS
	Referral Note:				
CUAT 10	A	91/11/27		B	91/12/06
	Referral Note:	see comments			
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Comments: No further action required per N. Lund CS
12-6-91

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5/81

28955Icu

COUNSEL'S OFFICE
RECEIVED
NOV 26 1991

HAROLD D. COPE
8225 E. PLAZA AV.
SCOTTSDALE, AZ. 85250
NOVEMBER 22, 1991

MR. C. BOYDEN GRAY
WHITE HOUSE COUNSEL
WHITE HOUSE
PENN. AVENUE
WASHINGTON, D.C. 20510

DEAR MR. GRAY:

IF YOU CANNOT END PREFERENTIAL PACTICES FOR MINORITIES + WOMEN MAYBE YOU COULD AT LEAST RE-WRITE REGULATIONS TO MANDATE PREFERENTIAL TREATMENT ALSO FOR WHITE ANGLO MALES. A GOOD EXAMPLE OF AFFIRMATIVE ACTION GONE WRONG IS THE SOCIAL SECURITY ADMINISTRACTION WHERE THE WHITE ANGLO MALE HAS ALL BUT BEEN ELIMINATED UNDER THE GUISE OF E.E.O. + AFFIRMATIVE ACTION. Sincerely Harold Cope

ID# 289634

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

HU010

INCOMING

DATE RECEIVED: NOVEMBER 27, 1991

NAME OF CORRESPONDENT: THE HONORABLE JUSTIN W. DART JR.

SUBJECT: CONGRATULATIONS ON PASSAGE OF THE CIVIL RIGHTS BILL

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
JOHN SUNUNU	ORG	91/11/27	NAN	C	91/12/02 TC
REFERRAL NOTE:					
		__/__/__			__/__/__
REFERRAL NOTE:					
		__/__/__			__/__/__
REFERRAL NOTE:					
		__/__/__			__/__/__
REFERRAL NOTE:					
		__/__/__			__/__/__
REFERRAL NOTE:					

COMMENTS: _____

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: ____ ____ ____

CS MAIL USER CODES: (A)_____ (B)_____ (C)_____

*ACTION CODES:	*DISPOSITION	*OUTGOING CORRESPONDENCE:
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS OF SIGNER
*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	* CODE = A
*D-DRAFT RESPONSE	*C-COMPLETED	*COMPLETED = DATE OF
*F-FURNISH FACT SHEET	*S-SUSPENDED	* OUTGOING
*I-INFO COPY/NO ACT NEC		
*R-DIRECT REPLY W/COPY		
*S-FOR-SIGNATURE		
*X-INTERIM REPLY		

REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE (ROOM 75,OEOB) EXT-2590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

289634

THE CHIEF of STAFF
has seen

President's Committee on Employment
of People with Disabilities

Justin W. Dart, Jr.
907 6th St. S.W.
Apt. 516C
Washington, D.C. 20024
202/488-7684

November 23, 1991

Dear Governor Sununu -

Congratulations on your leadership for the passage of the Civil Rights Act of 1991. I know that you were instrumental in overcoming great political and attitudinal difficulties.

I feel that a rational compromise was made, and that the law will benefit citizens with disabilities and all Americans.

I am working hard to

achieve harmonious compliance with ADA and the new law, with minimal hostility, litigation and expense. I am about half way through a tour to many states on this subject. Please let me know if there is any way I can cooperate with you or the President.

Sincerely

John Ray

CS

ID # 289701 CU
H0010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) __/__/__

Name of Correspondent: JOHN E. KENEALY

☐ **MI Mail Report** **User Codes: (A)** ____ **(B)** ____ **(C)** ____

Subject: Congratulates CBG for standing up for the protection of equal rights and against effect of reverse discrimination

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOFC		ORIGINATOR DJ	91/11/27	DJ	C	91/12/06 CS
CUAT 10		Referral Note: A DJ	91/11/28		C	91/12/06
CUGray		Referral Note: see comments I DJ	91/11/28		C	91/11/28 CS
		Referral Note:	/ /			/ /
		Referral Note:	/ /			/ /
		Referral Note:				

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- Code = "A"
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Comments: No further action required per N. Luna 12-6-91 CS

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JOHN E. KENEALY
888 ELLAIR PLACE
GROSSE POINTE PARK, MICHIGAN 48230
(313) 882-4921

28970/cu

11/22/90

Dear Counsel Gray:

I am a Nature Retorter. My daughter was foreclosed from acceptance to a private school in Detroit in the 1980's because she was white and the school had its quota for whites filled up.

I was a small business supplier to GM, Ford, etc in the 1970's until 1980. In 1980 minorities had less than $200mm/yr business with GM as example. In 1989 minorities small business had over $1.5 Billion/yr business with GM* This was a period when GM produced less product, took much business in-house, and downsized their supplier base. Is it any wonder then, that I was unable to get a job as a small business automotive supplier to GM or Ford during the 1980's (or even today)? Our nation's business grew and flourished with equal treatment. You have seen where it gone in domestic and global respect and growth with preferential treatment.

Congratulations on your courage to stand up for the principal of the Constitution protection of equal rights for all and against even the smallest effort of reverse discrimination.

It's nice to know you are listening to America even if others in the White House are not.

Sincerely,
John E. Kenealy

*MINORITIES INVENTED NOTHING DURING THIS PERIOD. THE BUSINESS FLOWED BY FORCLOSURING SOURCING TO SUPPLIERS BECAUSE THE SUPPLIERS WERE WHITE

THE WHITE HOUSE

WASHINGTON

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____ Hardcopy pages are in poor condition (too light or too dark).

____ Remainder of case not scanned.

____ Oversize attachment not scanned.

____ Report not scanned.

____ Enclosure(s) not scanned.

____ Proclamation not scanned.

____ Incoming letters(s) not scanned.

____ Proposal not scanned.

____ Statement not scanned.

____ Duplicate letters attached - not scanned.

____ Only table of contents scanned.

____ No incoming letter attached.

____ Only tracking sheet scanned.

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Comments:

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11/21/91

Bush order would end all hiring preferences

■ **Policy change:** New interpretation would scrap 'use of quotas.'

By Ann Devroy and Sharon LaFraniere
WASHINGTON POST

WASHINGTON — The White House late Wednesday sent federal agencies and departments a sweeping directive that would eliminate all guidelines giving preferences to women or minorities in hiring or promotion.

The directive appeared to be designed to enforce the administration's interpretation of the Civil Rights Act that President Bush is to sign today.

It says any regulation or practice "involving the use of quotas, preferences, set-asides, or other similar devices . . is to be terminated."

Civil rights leaders immediately condemned the move, saying it would ban affirmative action programs long in effect throughout the government. The guidelines also are used by private employers to determine how to comply with laws banning job discrimination.

But White House spokesman Marlin Fitzwater already was backpedaling Wednesday night, saying that the directive from White House Counsel C. Boyden Gray, "may be open to misinterpretation."

Some officials, Fitzwater said, already had expressed their "concerns" about the document to Gray. "We are going to review it overnight to see if it needs to be altered," he said, adding that Bush "supports affirmative action and set-aside programs."

Ralph Neas, executive director of the Leadership Conference on Civil Rights, had attacked the White House for "declaring open war on civil rights." Neas said the directive would amount to Bush "eliminating with one hand what he is signing into law with another."

The new bill, to be signed today in the presence of civil rights and congressional leaders, is aimed at expanding job protections for women and minorities and overturning a series of 1989 Supreme Court rulings that made it harder to prove bias in the workplace.

The law was the subject of months of bitter negotiations, with Bush arguing that he would sign no bill that endorsed hiring and promotion "quotas." Compromise finally was reached last month, with Bush saying the quota issue had been eliminated from the bill. The measure was passed this month.

The directive sent out

Please see Jobs, 4A

11/21/91

President to limit affirmative action

Bush directive to affect hiring, promotions

BY STEVEN A. HOLMES
New York Times

WASHINGTON — President George Bush is expected today to direct all federal agencies to phase out regulations authorizing racial preferences and quotas in hiring and promotions, when he signs the civil rights bill. The regulations affect all private companies as well as federal agencies.

An administration official said Wednesday night that the action is intended to underscore Bush's opposition to affirmative action programs that give "unfair preferences" to minorities or women.

The action, which reverses federal regulatory policies that date from 1965, is to come as Bush signs a bill in which he seemed to have compromised with Congress on the issue.

According to a copy of the expected statement, the president will direct all agencies to review their rules involving employment discrimination.

A copy of the statement was provided by someone outside government who asked for anonymity. The administration confirmed its authenticity.

The statement says "any regulation, rule, enforcement practice or other aspects of these programs that mandates, encourages or otherwise involves the use of quotas, preferences, set-asides" or other devices on the basis of race, sex, religion or national origin are "to be terminated as soon as is legally feasible."

Despite efforts by Reagan administration officials to narrow the scope of civil rights protections, federal courts and federal agencies continue to enforce antidiscrimination laws for the benefit of women, blacks, Hispanic-Americans and Asian-Americans.

Lawyers in government and civil rights groups said Wednesday night that Bush's action could have profound implications for the future of affirmative-action programs operated by the government and private employers.

Bush had opposed the civil rights bill for more than 20 months, saying it would force employers to adopt quotas to avoid suits. But on Oct. 24, the White House said it reached a compromise with sponsors of the bill, disappointing Republican conservatives.

See BUSH, Page 8A

Jobs: Bush directive would end quotas

From page 1A

Wednesday was distributed as a "signing statement" to be attached to the legislation and giving the administration interpretation of the law.

Gray frequently has authored such statements of White House interpretation often at odds with congressional sentiment — as attachments to controversial legislation. He has been consistently more averse than Bush to affirmative action and preferences for minorities.

Many administration officials, including Fitzwater, were caught off guard by the directive, and it was unclear whether Bush knew about it. Senior White House officials normally prepared to describe major policy changes said they had not been given advance warning of the directive.

If it stands, civil rights lawyers and some administration officials said the directive could alter or end a wide variety of employment policies and affirmative action programs. The guidelines that the directive orders terminated are a complex set of regulations that govern the use of hiring and promotion tests by public and private employers, such as the use of strength tests for applicants for firefighting jobs.

The directive says federal officials should begin work immediately on new guidelines that will "protect fully against the risk of quota hiring and other unfair preferences."

Although the order appears to address only employment policies, lawyers for businesses and civil rights groups said it also could affect federal contracting programs.

CS

ID # 289717 CU

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

HUOFO

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: DAVID LOVE

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Student requests details of 1990 Civil Rights Bill and the official government reaction to this -- especially with regard to affirmative action and quotas

ROUTE TO: | **ACTION** | **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOFC	ORIGINATOR DJ	91/11/27		C	91/12/19 CS
	Referral Note:				DJ CS
CUAT 10	A	91/11/28	NL	A	91/12/19
	Referral Note: DJ 91/12/19 Letter To Love from Mk				
		1 1			1 1
	Referral Note:				
		1 1			1 1
	Referral Note:				
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	Referral Note:				

ACTION CODES:
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THE WHITE HOUSE

WASHINGTON

December 19, 1991

Dear Mr. Love:

Thank you for your letter of November 8 to Governor Sununu. In response to your request, please find enclosed copies of the Civil Rights Act of 1991 and of the statement issued by President Bush upon signing the bill.

Yours truly,

Nelson Lund
Associate Counsel to the President

Mr. David Love
3 St. John's Drive
DUNFERMLINE
Fife
Scotland, United Kingdom KY127TB

Enclosures

28971Cu

3 St. John's Drive ,
DUNFERMLINE ,
Fife ,
Scotland ,
United Kingdom ,
KY12 7TB ,
8th November 1991

CBGray

Dear Mr. Sununu ,

I am a senior doing a dissertation on The Black Man in America since 1980 and in the course of my research , I have found several pieces of information that I need which I cannot locate here . I would be extremely grateful if you would be able to provide me with information on the following topics :

(i) Details of the 1990 Civil Rights Bill
(ii) Official Government reaction to this - especially with regard to affirmative action and quotas.

As I only have until January 1992 to complete this investigation , I would appreciate an early reply . Thank you very much for your help .

Yours sincerely ,

David Love

David Love

CS

ID # 290402 CU

HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Andy Card

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Materials from Art Fletcher re U.S. Commission on Civil Rights Endorsement of the 2991 Civil Rights Act

ROUTE TO: Office/Agency (Staff Name)	ACTION Action Code	Tracking Date YY/MM/DD	DISPOSITION Type of Response	Code	Completion Date YY/MM/DD
Cuoc	ORIGINATOR	91,12,02		C	91,12,05 CS
Cuat10	Referral Note: D	91,1202		C	91,12,04 CS
Cuat02	Referral Note: I	12/04/91 NL Memo to Gray 91,12,02		C	91,12,02 CS
Cugray	Referral Note: A	91,12,04 CG	A		91,12,05 CS
Cuat07	Referral Note: I	Letter to Fletcher 91,12,02		C	91,12,02
	Referral Note:				

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CBG:NL
CBGray
NLund
Chron.

THE WHITE HOUSE

WASHINGTON

December 5, 1991

Dear Art:

I've been asked to respond to your recent memorandum to the President, in which you suggested that he consider issuing an Executive Order assigning the Civil Rights Commission the responsibility for reviewing Executive branch interpretations of Title I of the new Civil Rights Act.

Because the Commission is not an agency within the Executive branch, I don't think the process you suggest would be feasible. Offering to take on this difficult task, however, is a wonderful example of your generosity, and that of your fellow Commissioners.

Your strong words of support for the new statute are also gratifying. As you know, the President has been unjustly criticized for his decision to support this legislation, which makes it all the more important for us to work together to dispel the misimpressions that are going about. Although there may be questions about certain interpretive issues, there can be no doubt that the President was right when he emphasized at the signing ceremony that this is a very good bill.

Thanks for sharing your thoughts on these important issues. There is much that remains to be done, and I look forward to working with you as we address these matters in the future.

Yours truly,

Original signed by CBG

C. Boyden Gray

Honorable Arthur A. Fletcher
Chairman
United States Commission on Civil Rights
1121 Vermont Avenue, N.W.
Washington, DC 20425

THE WHITE HOUSE

WASHINGTON

December 4, 1991

MEMORANDUM FOR C. BOYDEN GRAY

FROM: NELSON LUND

SUBJECT: Response to Arthur Fletcher's Offer to Take Control of Interpreting the New Civil Rights Act for the Executive Branch

Attached, for your signature, as we discussed, is a draft response to Mr. Fletcher's offer.

Attachment

COUNSEL'S OFFICE
RECEIVED
NOV 29 1991

THE WHITE HOUSE
WASHINGTON

Date: 11/26/91

TO: Boyden Gray

FROM: ANDY CARD Andy

☒ Action, as appropriate

☐ Your Comment

☐ Let's Talk

☐ FYI

The attached was FAXed to the President on 11/23. Art Fletcher had called the President that day to discuss. (I spoke with Art when the President was unavailable.)

THE WHITE HOUSE

WASHINGTON

ORM OPTICAL DISK NETWORK

ID# 290402cu

____ Hardcopy pages are in poor condition (too light or too dark).

__√__ Remainder of case not scanned.

____ Oversize attachment not scanned.

____ Report not scanned.

____ Enclosure(s) not scanned.

____ Proclamation not scanned.

____ Incoming letters(s) not scanned.

____ Proposal not scanned.

____ Statement not scanned.

____ Duplicate letters attached - not scanned.

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____ No incoming letter attached.

____ Only tracking sheet scanned.

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Comments:

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Item 1 of 1
A

AC HAS SEEN

ITEMS INCLOSED

ITEM (1) MEMORANDUM TO PRESIDENT BUSH PAGES 2

" (2) PROPOSED STATEMENT BY THE PRESIDENT, AND 2 PARAGRAPH EXECUTIVE ORDER PAGES 1

" (3) EMPLOYMENT EQUITY FOR ALL.. A STATEMENT BY ARTHUR AT FLETCHER, CHAIRMAN, US COMMISSION ON CIVIL RIGHTS FOUR (4) PAGES

" (4) NEWS RELEASE.CHAIRMAN OF THE U.S. COMMISSION ON CIVIL RIGHTS STRONGLY ENDORSES HISTORIC 1991 CIVIL RIGHTS ACT.

TOTAL ITEMS 4

Total Pages 10

NOVEMBER 23, 1991

MEMORANDUM

TO HONORABLE GEORGE BUSH
PRESIDENT OF THE UNITED STATES OF AMERICA

FROM ARTHUR A. FLETCHER, CHAIRMAN
UNITED STATES COMMISSION ON CIVIL RIGHTS

SUBJECT THE ISSUANCE OF A PROPOSED EXECUTIVE ORDER CONCERNING 1991 CIVIL RIGHTS ACT.

ISSUING THE ENCLOSED PROPOSED EXECUTIVE ORDER, WILL SAVE THE NATION A LOT OF DIVISIVE STRIFE, ENDLESS STRUGGLE, AND NATIONAL HEART ACHE, IN THE IMMEDIATE, SHORT AND LONG TERM FUTURE. AND UPON DOING OUR WORK WELL, IT WILL SERVE TO HASTEN THE DAY THAT WE GET THIS HORRIBLE, BEDEVILING, DEBILITATING, LEGACY OF RACISM BEHINDS US. ONLY THEN, WILL WE BE ABLE TO TAKE THE OFFENSE AND COMPETE IN THE GLOBAL MARKET WITH THE LEVEL OF CONFIDENCE THAT IS VITAL TO SUCCESS THROUGHOUT THE 21st CENTURY. AS FOR THE RAGING CONFLICT OF THE MOMENT IT WILL DO THE FOLLOWING:

.....GET THIS DEBATE OUT OF THE WHITE HOUSE AND INTO THE HANDS OF A INDEPENDENT, NON-PARTISAN, AGENCY THAT HAS OVERSIGHT RESPONSIBILITY FOR THE FEDERAL GOVERNMENT'S ENTIRE CIVIL RIGHTS MANDATE

.....CHANGE THE BATTLE GROUND, BY MOVING THE DIVISIVE ISSUE OVER TO THE CIVIL RIGHTS COMMISSION, THE FEDERAL GOVERNMENT'S AND THE NATION'S MORAL CONSCIOUS, AND ACKNOWLEDGED EXPERTS ON THE SUBJECT

.....FREE THE WHITE HOUSE DOMESTIC COUNCIL STAFF, LEGAL EXPERTS AND POLITICAL OPERATIVES, TO FOCUS ON REMEDIES FOR OUR SLUGGISH ECONOMY, AND FINALLY

.....RESTORE THE RESPECT, CREDIBILITY, AND INTEGRITY OF THE CIVIL RIGHTS COMMISSION, DURING YOUR ADMINISTRATION, WHICH WAS DECIMATED DURING THE REAGAN ERA.

IN ADDITION TO THE PROPOSED EXECUTIVE ORDER, I AM SENDING A COPY OF MY STATEMENT ABOUT THE 1991 CIVIL RIGHTS ACT, PLUS THE PRESS RELEASE THAT ACCOMPANIED IT. ALTHOUGH IT WAS RELEASED THE DAY YOU SIGNED THE BILL, THE MEDIA IGNORED IT.

AS YOU KNOW MR. PRESIDENT, I WRITE MY OWN SPEECHES AND PRESS RELEASES. I SEEK EDITING ASSISTANCE ONLY. THE POINT IS, THIS IS MY THINKING ON THE MATTER. AS YOU WILL NOTE UPON READING IT, I HAVE SHIFTED THE FOCUS FROM AFFIRMATIVE ACTION, TO EMPLOYMENT ECONOMIC EQUITY. DURING THE PAST 12 MONTHS, I HAVE DELIVERED 47 SPEECHES TO A VARIETY A OF AUDIENCES ALL OVER THE COUNTRY. I HAVE BEEN TESTING THIS IDEA AND IT WORKS. I URGE YOU TO READ IT, I THINK YOU'LL FIND IT INTERESTING.

MR. PRESIDENT, I AM PREPARED TO COME TO CAMP DAVID AND DISCUSS THIS PROPOSAL IMMEDIATELY OR STAY IN D.C. OVER THE WEEK END, AND DISCUSS IT WITH YOU AT THE WHITE HOUSE ON MONDAY. I AM AWAITING YOUR RESPONSE. I CAN BE REACHED AT THE FOLLOWING (202) 554-0573, UNTIL 4:00 PM SUNDAY. AT THAT TIME I'LL DEPART FOR DULLAS AIR-PORT. I AM SCHEDULED TO LEAVE FOR DENVER AT 6:00 PM SUNDAY ON A UNITED AIR-LINE FLIGHT. IF WE FAIL TO MEET WHILE I AM HERE I CAN BE REACHED AT THE FOLLOWING NUMBERS. MY OFFICE NUMBER AT DENVER UNIVERSITY IS (303)-871-2441, AND MY RESIDENT NUMBER IS (303)-830-1000.

Item II

DRAFT EXECUTIVE ORDER
STATEMENT

AS I STATED ON NOVEMBER 21, I WAS MOST PLEASED TO SIGN THE CIVIL RIGHTS ACT OF 1991. WHICH CONTINUES THE SUPPORT OF THE PEOPLE AND THE CONGRESS FOR THE GREAT PRINCIPLE OF EQUAL OPPORTUNITY FOR ALL. IRRESPECTIVE OF WHAT A SMALL OPPOSING ELEMENT MIGHT CLAIM, THIS LAW, IF PROPERLY ADMINISTERED, ENFORCED AND COMPLIED WITH, WILL SIMPLY LEVEL THE JOB AND CAREER OPPORTUNITY PLAYING FIELD, WHILE, EXPANDING AND INCREASING BADDLY NEEDED NEW HUMAN CAPITAL SO THAT THE NATION'S FINANCIAL RESOURCES CAN BE APPLIED SUCCESSFULLY IN THE GLOBAL MARKET.

HOWEVER, I HAVE BEEN DISTURBED BY EFFORTS TO IMPORT A PARTICULAR "SPIN" OR ADVANCE INTERPRETATION OF THE PROVISIONS OF THIS MOST IMPORTANT ACT. THEREFORE, IN ORDER TO ASSURE THAT THE STATUTE IS FAIRLY AND IMPARTIALLY INTERPRETED, I WILL DIRECT THE UNITED STATES COMMISSION OF CIVIL RIGHTS TO REVIEW ALL INTERPRETATIONS OF TITLE I OF THE CIVIL RIGHTS ACT OF 1991, BEFORE THOSE INTERPRETATIONS ARE ISSUED.

THE COMMISSION IS A BI-PARTISAN AGENCY WHICH INCLUDES REPRESENTATIVES SELECTED BY THE PRESIDENT AND THE CONGRESS. ACCORDINGLY, I AM ISSUING THE FOLLOWING EXECUTIVE ORDER, EFFECTIVE IMMEDIATELY.

EXECUTIVE ORDER NO._____

1. EVERY INTERPRETATION OF TITLE I OF THE CIVIL RIGHTS ACT OF 1991 BY ANY FEDERAL AGENCY SHALL, PRIOR TO ISSUANCE OR PROMULGATION, BE SUBMITTED FOR REVIEW TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS.

2. ALL FEDERAL AGENCIES SHALL COOPERATE WITH THE COMMISSION IN THE CONDUCT OF SUCH REVIEW.

Item III

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

407-26(...433
Greg Scholl

EMPLOYMENT EQUITY FOR ALL

A STATEMENT BY
ARTHUR A. FLETCHER, CHAIRMAN
U.S. COMMISSION ON CIVIL RIGHTS
CONCERNING THE PRESIDENT'S SIGNING OF THE CIVIL RIGHTS ACT OF 1991
NOVEMBER 21, 1991

THE 1991 CIVIL RIGHTS ACT IS ABOUT EMPLOYMENT EQUITY FOR ALL AMERICANS -- RACE, GENDER, PHYSICAL DISABILITY OR ETHNIC ORIGIN NOTWITHSTANDING. IT USHERS IN A NEW ERA FOR THE AMERICAN WORKER, EMPLOYER, AND WORKPLACE.

IN OTHER WORDS, THIS IS THE FIRST DAY OF UNENCUMBERED WORKPLACE EQUITY FOR ALL AMERICANS. THEREFORE, I CONSIDER IT AMERICA'S REAL BEGINNING.

I SAY THAT BECAUSE THIS WILL BE THE FIRST TIME IN THE NATION'S HISTORY THAT THE WORK PLACE WILL BE MANAGED SO THAT EVERY INDIVIDUAL WHO QUALIFIES TO BE THERE IS EXPECTED TO MAKE HIS OR HER CONTRIBUTION TO AN EMPLOYER'S ENTERPRISE MISSION AND BE REWARDED ACCORDINGLY. THAT'S THE CASE REGARDLESS OF WHETHER THE EMPLOYER IS A PRIVATE, PUBLIC, OR INDEPENDENT SECTOR ORGANIZATION.

IT IS ALSO A GREAT DAY FOR ME PERSONALLY. BY PASSAGE AND SIGNING OF THE 1991 CIVIL RIGHTS BILL INTO LAW, BOTH CONGRESS AND THE PRESIDENT VALIDATED MY CONVICTION WHEN, AS THE ASSISTANT SECRETARY FOR EMPLOYMENT IN THE U.S. DEPARTMENT OF LABOR, I SIGNED THE FIRST EVER AFFIRMATIVE ACTION PROGRAM. IT BECAME KNOWN AS THE "REVISED PHILADELPHIA PLAN," BECAUSE IT TARGETED PHILADELPHIA-AREA CONSTRUCTION INDUSTRY CONTRACTORS THAT WERE DOING BUSINESS WITH THE FEDERAL GOVERNMENT.

IT WAS THE FIRST SUCH PLAN EVER ISSUED BY ANY GOVERNMENT AGENCY SANCTIONED BY THE COURTS. IT WAS CALLED THE REVISED PHILADELPHIA PLAN BECAUSE THE ORIGINAL VOLUNTARY PLAN HAD NO ENFORCEMENT PROVISIONS. UNFORTUNATELY, THE PHILADELPHIA AREA CONTRACTORS REFUSED TO VOLUNTARILY COMPLY WITH A PLAN THAT HAD NO ENFORCEMENT STANDARDS AND DID NOT DEFINE EMPLOYMENT DISCRIMINATION.

WHEN I SIGNED AND ISSUED THE REVISED PHILADELPHIA PLAN ON JUNE 27, 1969, IT UNLEASHED A NATIONWIDE STORM ALLEGING "RACIAL QUOTAS" THAT HAS YET TO SUBSIDE. BUT, TODAY WE CONTINUE ON A SECOND JOURNEY BEGUN IN PHILADELPHIA.

<u>HIGH PERFORMANCE WORK PLACE</u>

IN KEEPING WITH OUR NATIONAL GOALS FOR THE NEW CENTURY,

- MORE -

SECRETARY OF LABOR LYNN MARTIN IS PROMOTING AND SUPPORTING THE IDEA OF A HIGH PERFORMANCE WORK PLACE. THAT MEANS THE NATION'S EMPLOYERS NEED AND MUST FIND AN ABUNDANT SUPPLY OF HIGH PERFORMANCE WORKERS. IT FURTHER MEANS THAT THE NATION MUST DEVELOP A HIGH PERFORMANCE WORK FORCE FOR EACH OF OUR BASIC INDUSTRIES. THIS HIGH PERFORMANCE WORKFORCE IS ESSENTIAL IF WE ARE TO REMAIN FIRST AMONG EQUALS IN THIS SUPER-COMPETITIVE, GLOBAL MARKET THAT IS ALREADY UPON US. INCIDENTALLY, A HIGH PERFORMANCE WORKER IS A SELF-DIRECTED, SELF STARTER WHO CAN THINK, READ, WRITE, CALCULATE AND COMMUNICATE INTELLIGENTLY WHILE EXERCISING SOUND JUDGMENT.

THIS IS A GREAT DAY FOR THE NATION, THE CIVIL RIGHTS MOVEMENT AND AMERICA'S FUTURE. THIS IS ESPECIALLY TRUE BECAUSE 381 MEMBERS OF THE HOUSE OF REPRESENTATIVES AND 95 MEMBERS OF THE SENATE REACHED A CONSENSUS AND VOTED TO PASS THE 1991 CIVIL RIGHTS BILL. AND TODAY, THE PRESIDENT HAS SIGNED IT. TO ME THIS SAYS THE COUNTRY IS FINALLY READY TO ADMIT THAT, BY AND LARGE, SO-CALLED "SOCIAL JUSTICE" CLEARLY DERIVES FROM ECONOMIC EQUITY. NOTWITHSTANDING DAVID DUKE'S APPEAL AND VOTE-GETTING CAPACITY, IN THE FINAL ANALYSIS, ECONOMIC EQUITY IS WHAT THE BATTLE FOR EQUALITY HAS BEEN ABOUT ALL ALONG.

TO BE MORE SPECIFIC, AFRICAN AMERICANS, HISPANICS, ASIANS, THE PHYSICALLY DISABLED AND FEMALE AMERICANS, LIKE ALL OTHER AMERICANS, HAVE LOOKED FORWARD TO THAT SPECIAL DAY WHEN THEY COULD FULLY ENJOY THE FREEDOM AND ABILITY TO CHOOSE. SOME MAY CHOOSE TO LIVE IN INTEGRATED NEIGHBORHOODS, ATTEND INTEGRATED SCHOOLS AND PARTICIPATE IN INTEGRATED RECREATION AND PUBLIC ACCOMMODATION FACILITIES.

OTHERS MAY DECIDE TO LIVE IN RACIALLY DOMINATED MINORITY NEIGHBORHOODS, AND ATTEND MINORITY-DOMINATED SCHOOLS AND PARTICIPATE IN MINORITY-DOMINATED RECREATION FACILITIES, PROVIDED THEY COULD ENJOY AN ENHANCED QUALITY OF LIFE FOR THEMSELVES AND THEIR FAMILIES, IRRESPECTIVE OF THEIR INDIVIDUAL CHOICES. AND, MAKE NO MISTAKE ABOUT IT, THE ABILITY TO CHOOSE FREELY RESTS SQUARELY ON ONE'S ECONOMIC CIRCUMSTANCES. THIS 1991 CIVIL RIGHTS ACT, NOW THE LAW OF THE LAND, DRAMATICALLY IMPROVES THE CHANCES FOR MAKING CHOICES COMPATIBLE WITH ONE'S OWN LIFESTYLE PREFERENCES.

<u>SUPREME COURT BARRIERS REMOVED</u>

IN OTHER WORDS, THE 1991 CIVIL RIGHTS ACT PASSED BY AN OVERWHELMING CONGRESSIONAL MAJORITY, AND SIGNED INTO LAW BY THE PRESIDENT TODAY, REVERSES FIVE INFAMOUS SUPREME COURT DECISIONS.

UNTIL NOW, SUCH A MASSIVE REVERSAL OF SO-CALLED SOCIAL DECISIONS HANDED DOWN BY THE SUPREME COURT HAD BEEN CONSIDERED AN IMPOSSIBLE DREAM. BUT, THE WORLD'S POLITICAL AND ECONOMIC CLIMATE HAS CHANGED RADICALLY. COUPLED WITH THAT REALITY IS THE FACT THAT AMERICA'S LABOR FORCE AND THE WORK FORCE THAT FLOWS FROM IT HAS

CHANGED RADICALLY TOO.

THUS, FOR THE FORESEEABLE FUTURE, AMERICA'S WORK PLACES AND ITS WORK FORCE WILL BE DOMINATED BY WOMEN AND RACIAL MINORITIES. AND THE PAST PRACTICES OF EXCLUSION MUST GIVE WAY TO THE REALITY THAT ALL OUR RESOURCES MUST BE MARSHALLED TO REGAIN OUR COMPETITIVE ADVANTAGE IN THE GLOBAL MARKETPLACE. A MOMENT'S REFLECTION WILL CAUSE ALL TO AGREE THAT IT IS IRONIC THAT OUR NATIONAL SURVIVAL NOW DEPENDS UPON THE PRODUCTIVITY OF THE VERY GROUPS THAT WE HAD TO PASS LEGISLATION TO WELCOME INTO THE NATION'S WORK PLACES. THE PRESIDENT'S SIGNATURE DEMONSTRATES THAT THE HOUR HAS ARRIVED WHEN THE NATION'S DESTINY, ITS ECONOMIC SECURITY, STABILITY, AND VERY PROSPERITY ARE IN THEIR HANDS. FOR THIS REASON, THE 1991 CIVIL RIGHTS BILL IS NOT MERE SOCIAL LEGISLATION. IT IS ACTUALLY AN ECONOMIC EQUITY BILL.

IN SHORT, REGARDLESS OF WHAT THE OPPOSITION CLAIMS, THIS LAW, IF PROPERLY ADMINISTERED, ENFORCED AND COMPLIED WITH, WILL SIMPLY LEVEL THE JOB AND CAREER OPPORTUNITY PLAYING FIELD, WHILE CREATING NEW RESOURCES TO WHICH AMERICAN CAPITAL CAN BE APPLIED SUCCESSFULLY. SPECIFICALLY, THE INDIVIDUAL BENEFITS GO TO THOSE WHO MEET AND/OR SURPASS THE THRESHOLD STANDARDS TO OBTAIN A JOB, AND, WHO ONCE IN THE WORKFORCE, CONTINUE TO PERFORM AT OR ABOVE EXPECTED LEVELS. THE PUBLIC BENEFITS COME IN THE FORM OF PROVIDING AMERICAN INDUSTRY A NEW AND NECESSARY RESOURCE FOR GLOBAL COMPETITION. IT DOES THAT AND NOTHING MORE -- QUOTA ALLEGATIONS NOTWITHSTANDING.

TO SAY IT ANOTHER WAY, AS I HAVE BEEN TELLING AUDIENCES THROUGHOUT AMERICA, PLUS ANYONE ELSE WHO WOULD LISTEN, EQUAL OPPORTUNITY AS I ENVISIONED IT IN 1969 WHEN I SIGNED THE REVISED PHILADELPHIA PLAN WAS (AND REMAINS) A REMEDY FOR DISCRIMINATION AGAINST QUALIFIED INDIVIDUALS ONLY. EQUAL OPPORTUNITY DOES NOT TARGET THE POORLY EDUCATED, THE UNTRAINABLE, OR THE UNSKILLED. IT IS THE JOB OF OTHERS TO MAKE THESE PEOPLE EMPLOYABLE. THAT IS THE MISSION OF THE NATION'S HUMAN DEVELOPMENT INDUSTRIES, NAMELY, OUR EDUCATION AND TRAINING INSTITUTIONS AND SYSTEMS, NOT OUR COURTS OF LAW.

THIS LATTER OBSERVATION SHOULD IN NO WAY BE VIEWED AS A HARD-NOSED ATTITUDE ON MY PART WITH RESPECT TO THE POOR, THE DISADVANTAGED OR THOSE EXPERIENCING LIFE ON THE MARGIN. WHY? BECAUSE I, TOO, AM A PRODUCT NOT ONLY OF THE GHETTO BUT ALSO PUBLIC HOUSING, INFERIOR SCHOOLING, EMPLOYMENT DISCRIMINATION, AND ALL THE ILLS THEY CREATE. MY SALVATION WAS THE WORLD WAR II GI BILL OF RIGHTS EDUCATION OPPORTUNITY LEGISLATION.

THAT COLOR-BLIND LEGISLATION MANDATED EDUCATION OPPORTUNITIES AND/OR TRAINING FOR EVERY WORLD WAR II RETURNING VETERAN WHO DARED TO TAKE ADVANTAGE OF ITS BENEFITS. THAT LEGISLATION HELPED FREE ME,

THROUGH MY OWN EFFORTS, COUPLED WITH THE ASSISTANCE OF OTHERS, FROM A LIFE OF SEGREGATION, DISCRIMINATION AND EXCLUSION FROM THE MAINSTREAM ECONOMIC ARENA. MY POINT IS: I KNOW THAT EDUCATION AND TRAINING NOT ONLY CAN BE, BUT IS THE PASSPORT TO AN ENHANCED QUALITY OF LIFE IF WE DARE BUT TO EXTEND ALL EFFORTS TO DEVELOP THE INNATE CAPACITIES THAT WE ALL HAVE UPON ENTERING THIS WORLD.

THE ROLE OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND THE DEPARTMENT OF LABOR'S OFFICE OF CONTRACT COMPLIANCE, IS TO ASSURE THAT INDIVIDUALS -- LET ME REPEAT -- INDIVIDUALS, EXPERIENCE FAIR AND EQUITABLE TREATMENT IN THE WORK PLACE, IN GENDER, RACE, RELATION, AND ETHNIC ORIGIN, DESPITE DISABILITY.

LET ME SAY IT ONE MORE WAY. AGAIN, AS I HAVE BEEN PREACHING TO AUDIENCES ALL OVER AMERICA; IF EXPERTS WERE TO DRAFT A LETTER-PERFECT AFFIRMATIVE ACTION PROGRAM -- I CALL THEM ECONOMIC EQUITY OPPORTUNITY PROGRAMS -- THAT INCLUDED EVERY DESIRABLE FEATURE IMAGINABLE, IT WOULD ONLY OFFER FREEDOM FROM WORK PLACE DISCRIMINATION FOR NONE BUT THE QUALIFIED. IN SHORT, AFFIRMATIVE ACTION (HEREAFTER, ECONOMIC EQUITY OPPORTUNITY PROGRAMS) AMOUNT TO ASSURANCE FOR THE QUALIFIED ONLY.

THE UNITED STATES
COMMISSION ON
CIVIL RIGHTS
1121 Vermont Avenue N.W.
Washington, D.C. 20425
Public Affairs
(202)-376-8312

NEWS RELEASE

Contact: CHARLES R. RIVE

Chairman of the U.S. Commission on Civil Rights Strongly Endorses Historic 1991 Civil Rights Act

WASHINGTON, D.C.---The President's signing of the 1991 Civil Rights Act is a landmark day for the nation, the civil rights movement and America's future, Arthur A. Fletcher, Chairman of the U.S. Commission on Civil Rights, said today in his strong endorsement of the legislation.

The overwhelming Congressional support for the bill, combined with the President's signature, Fletcher said, clearly demonstrates that the country is finally ready to admit that social justice clearly derives from economic equity.

"Notwithstanding David Duke's appeal and vote-getting capacity, in the final analysis, economic equity is what the battle for equality has been about all along," Fletcher added.

Fletcher emphasized that equal opportunity, as he has long envisioned it, offers freedom from workplace discrimination only for the qualified.

"Equal opportunity does not target the poorly educated, the untrainable, or the unskilled," Fletcher stressed. "It is the job of others to make these people employable. That is the mission of the nation's human development industries, namely, our education and training systems and institutions, not our courts of law."

In 1969, as the Assistant Secretary for Employment in the U.S. Department of Labor, Fletcher signed and issued the "Revised Philadelphia Plan" targeted at Philadelphia-area construction industry contractors doing business with the federal government.

That action, Fletcher recalled, unleashed a nationwide storm alleging "racial quotas" that has yet to subside. The signing of this new civil rights bill, he stated, represents a second journey begun in Philadelphia.

The 1991 Civil Rights Act, Fletcher said, is in keeping with an important national goal being promoted by U.S. Secretary of Labor Lynn Martin. Specifically, Martin has advocated the creation of a high performance American workplace, one in which employers, especially those in basic industries, find the abundant supply of high performance workers they need.

"This high performance workforce is essential," Fletcher said," if we are to remain first among equals in this super-competitive, global market that is already upon us."

The 1991 Civil Rights Act is important because it strengthens America at both the individual and public levels, Fletcher declared.

The individual benefits, Fletcher said, go to those who meet and/or surpass the threshold standards to obtain a job, and who once in the workforce, continue to perform at or above expected levels. The public benefits come in the form of providing American industry a new and necessary resource for global competition. "It does that and nothing more--quota allegations notwithstanding," Fletcher said.

The Commission is an independent, bipartisan Federal agency. Charles Pei Wang is Vice Chairman and other Commissioners are: Carl A. Anderson, William B. Allen, Mary Frances Berry, Esther G.A. Buckley, Blandina Cardenas Ramirez and Russell G. Redenbaugh.

-30-

11/21/91

TJ

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

OCT 25 1991

AC/TM/Boyden

Office of
the Chairman

THE CHIEF of STAFF
has seen 290518
HUOIC

The Honorable John Sununu
Chief of Staff to the President
The White House
Washington, D.C. 20500

Dear Mr. Sununu:

I am pleased to see that an agreement has been reached on the civil rights bill and I congratulate you for your efforts in reaching consensus. However, I would like to bring to your immediate attention a technical drafting error which is of great concern to the Commission.

The bill contains language that could be interpreted to preclude the EEOC and the Attorney General from obtaining compensatory and punitive damages under Title VII and the ADA for victims of intentional discrimination, even though such damages would be available in a private action. I do not believe that it is the Senate's intent to place this serious limitation on actions brought by the government and therefore I urge an amendment to the bill that would make clear that these enhanced remedies can be sought in actions brought by the government on the same basis as in actions brought privately.

The source of the problem is the bill's two different definitions of the term "complaining party" in section 5, which authorizes complaining parties to seek punitive and compensatory damages, and in section 7, which amends the general definitional section of Title VII. Section 5(a)(1) states that compensatory and punitive damages are available "[i]n an action brought by a complaining party under section 706 of The Civil Rights Act of 1964 against a respondent who intentionally engaged in an unlawful employment practice prohibited." (emphasis added). The definitional portion of section 5 states that a "complaining party" for purposes of section (a)(1) is "a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964." Section 5(d)(1)(A).

On its face section 5(d)(1)(A) would appear to include the EEOC and the Attorney General in the group of "person[s] who may bring an action . . . under title VII" and, therefore, among those complaining parties entitled to seek enhanced remedies. However, the problem is that section 7, which amends the general definitions

in Title VII, states that "[t]he term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this Title." Section 7(l) (emphasis added). My concern is that section 7's definition of complaining party, which specifically includes the EEOC and the Attorney General in addition to "a person who may bring an action," could be invoked to preclude the EEOC and the Attorney General from seeking compensatory and punitive damages because those remedies are limited to only "a person who may bring an action or proceeding under title VII." Sections 5(a)(1) and (d)(1)(A). Indeed, the fact that the Senate bothered to create two definitions of "complaining party" would add substantial weight to arguments that the EEOC and the Attorney General are not authorized to seek the enhanced remedies. There is no obvious explanation for why there are two separate definitions other than drafting error or that the Senate meant to exclude the EEOC and the Attorney General from the group of plaintiffs authorized to seek compensatory and punitive damages.

It would undermine the Commission's ability to enforce Title VII and the ADA if private parties, but not the EEOC, are allowed to seek the enhanced remedies. Indeed, if that were the case the Commission might have a duty to refer all cases of intentional discrimination to private attorneys because, by filing suit, the Commission would dramatically reduce the relief available to the victims. This would be true especially in the case of sexual harassment claims; because there is often no backpay at stake in those cases, the only monetary remedy would be compensatory and punitive damages.

I believe that a very simple amendment to the bill could remedy the problem. For example, section 5 could be amended to define the term "complaining party" to mean "the Commission, the Attorney General, or a person who may bring an action or proceeding under this title." That would make clear that the Commission and the Attorney General are not excluded from the group of "persons who may bring an action" and therefore that they are included among those who may seek compensatory and punitive relief. Such a change would, in my opinion, spare the EEOC and the courts a great deal of trouble and confusion in the future.

I trust the Commission's concerns will be addressed and that our mutual interest in protecting the civil rights of all Americans will be achieved.

Sincerely,

Evan J. Kemp, Jr.
Chairman

ID # 290713 CU

HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Carl T. Green

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Supports the President's position on civil rights

ROUTE TO: / **ACTION** / **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuoco	ORIGINATOR	91/12/03		C	91/12/06 CS
Cuat 10	A	91/12/04		C	91/12/06 CS
	Referral Note: see comments -				
		/ /			/ /
	Referral Note:				
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		/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: No further action required per N. Lund CS 12-6-91

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

29113

November 22, 1991

Boyden Gray
White House Counsel
The White House
Washington, D.C. 20500

Dear Mr. Gray:

I support the President's position regarding the elimination of hiring and promotional preferences based upon sex, race and ethnicity.

I am a 48-year old, educated, unemployed white male. When I am applying for employment with my Federal Government, I would like to have the same opportunity for employment and promotions that females, blacks, hispanics and Native Americans have.

The only preferences I support are for National Service.

Sincerely,

C. T. Green

Carl T. Green

P.O. Box 247
Mt. Vernon, WA 98273-0247
206/428-8953

CS

ID # 290841 CU

HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Michael Baly III

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Congratulations on the Passage of the Civil Rights legislation

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuye	ORIGINATOR	91/12/03		C	91/12/06 CS
Cudzio	Referral Note: DJ				
	A	91/12/04		C	91/12/06 CS
Cugay	Referral Note: DJ ATTN: FYI - DJ comments				
	I	91/12/04		C	91/12/04 CS
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Comments: No further action requested per N. Lund CS
12-6-91

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AMERICAN GAS ASSOCIATION
1515 WILSON BOULEVARD
ARLINGTON, VA. 22209

MICHAEL BALY III
PRESIDENT

(703) 841-8612

November 27, 1991

Hon. Boyden Gray
Counsel to the President
The White House, 2nd Floor, West Wing
Washington, DC 20580

Dear Boyden:

Congratulations on the signing of the Civil Rights Bill. I know of your key role in that legislation.

More Americans need to know of your strong efforts behind the scenes in major disability and civil rights legislation.

Look forward to getting together with you soon.

Sincerely,

Mike

Michael Baly III

CS

ID # 290858 CU

HU010

WHITE HOUSE
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Name of Correspondent: John Marion Williams

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: ambiguity of the Civil rights legislation

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuoco	ORIGINATOR	DJ 91/12/03		C	91/12/09 CS
Cuoco	Referral Note:				CS
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Comments: No further action required per M. Lund CS
12-9-91

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290858

WILLIAMS & VIGOR
Attorneys At Law
P.O. Box 1239
501 Price Building
Ashland, Kentucky 41105-1239

John C. Vigor (1913-81)
John Marion Williams
John C. Vigor, Jr.

Telephone:
606-329-6777
Fax:
606-329-0093

November 25, 1991

Hon. C. Boyden Gray
Counsel to the President
The White House
Washington, D.C. 20510

Dear Mr. Gray:

As a former Republican local office holder and activist party member as well as a strong supporter of the Reagan-Bush administrations, I am concerned about the civil rights flap and confusion coming out of Washington this past week.

If the administration can clear up the distinction between affirmative action and quotas to the public, which distinction I think I understand, this should go a long way toward solution of Republican problems presently with race relations.

Thank you for your attention to this matter.

Cordially,

J. Williams

John Marion Williams

JMW/plk

CS

ID # 290863 CU

HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Justin W. Dart, Jr.

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Congratulations on the Passage of the Civil Rights Act of 1991.

ROUTE TO: Office/Agency (Staff Name)	ACTION Action Code	Tracking Date YY/MM/DD	DISPOSITION Type of Response	Code	Completion Date YY/MM/DD	
Staff	ORIGINATOR	DJ 91/12/03		C	91/12/06	CS
Staff 10	Referral Note: DJ					
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Congress	Referral Note: FYI - see comments					
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29863cm

COUNSEL'S OFFICE
RECEIVED
NOV 29 1991

President's Committee on Employment
of People with Disabilities

Justin W. Dart, Jr.
907 6th St. S.W.
Apt. 516C
Washington, D.C. 20024
202/488-7684

November 27, 1991

Dear Boyden

Congratulations on overcoming many difficulties to achieve the passage of the Civil Rights Act of 1991. Your courage and leadership is appreciated

Justin W. Dart, Jr.

CS

ID # 290873 CU

H0010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Tom Martin

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: ambiguity of the civil rights legislation

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuff	ORIGINATOR	DJ 12/03		C	91/12/09 CS
Cuff 10	Referral Note:				
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THOMAS A. MARTIN

1600 SOUTH EADS STREET
CRYSTAL TOWERS SOUTH 634
ARLINGTON, VIRGINIA 22202
(703/920-6919)

November 21, 1991

NEGOTIATED CONFUSION

The contrived ambiguity in the so-called "civil rights" legislation signed into law today irresponsibly confronts citizens with egregious uncertainty as to its intended meaning and implications. The accompanying pressclips reflect this deliberate statutory diversity. The sightless-examiners of the pachyderm had more perceptive knowledge of their subject-at-hand than did the civil rights partisans with their tortured achievement.

By the enactment of this disserving legislation, millions of entrepreneurs will be placed at litigious risk; their legal counsels will be hard put to guide them; the judicial system will be cluttered and clogged into the 21st Century. The foregoing will inevitably ensue from this unwise and improper abuse of the legislative process.

Would it be unseemly for entrepreneurs to ask their elected Federal officials what the new law was intended to mean? Such an uncertain course may be employers' last desperate and doubtful safeguard against the Damoclean fate suspended over them by this errant forensic misfeasance.

Tom Martin

ADDENDUM:
In Thursday's Rose-Garden scenario, the President signed a bill at variance with the one he described in his REMARKS.

T 11/23

THE WASHINGTON POST
THURSDAY, NOVEMBER 14, 1991

C. Boyden Gray

Civil Rights: We Won, They Capitulated

Contrary to a rapidly congealing press myth, President Bush did not "cave" or "surrender" on quotas in the new civil rights bill. Nor were any of the president's actions taken in response to the Clarence Thomas hearings or the David Duke campaign. On the contrary, the compromise bill the president will sign became possible only after the *Democrats* beat a total retreat on quotas, thereby paving the way for the president to make concessions on other, less fundamental, issues.

To understand what happened, the public needs to know the story of an extraordinary amendment that was adopted without debate or a vote. But first we must set the stage.

Under the Supreme Court's 1971 *Griggs* decision, employment practices having an adverse statistical impact on certain groups can lead to liability even if there was no hint of discriminatory intent. In 1989, the *Wards Cove* case summarized the rules under which such lawsuits would be conducted, noting that unfair rules would drive employers to use quotas to avoid any possibility of being dragged into such a lawsuit.

For the past two years, Democrats have insisted that *Wards Cove* overruled *Griggs* and that legislation was needed to "restore" pre-*Wards Cove* law. The changes they actually proposed, however, would have gone much further, exposing countless employers to ruinous litigation and liability any time their numbers were not "right."

Administration lawyers always believed that the Supreme Court was right to think that *Griggs* and *Wards Cove* were consistent with each other. More important, we knew that the Democrats' "restoration" was in fact a radical and destructive distortion of prior legal doctrine. If "bad numbers" alone became a sufficient basis for legal liability, employers would be foolish *not* to use quotas.

Last March, the president proposed a bill that made a symbolically important but practically insignificant concession to the Democrats on one issue involving the burden of proof. In other respects, the president's bill codified the law as it existed prior to *Wards Cove* (and which we believed was fully consistent with that decision). The Democrats in Congress never gave this bill the time of day.

Suddenly, on Thursday, Oct. 24, Sen. Edward Kennedy stunned administration negotiators by agreeing to a *Wards Cove* proposal developed by Sen. Robert Dole and transmitted through Sen. John Danforth. This option was virtually identical in substance to the president's bill and to other formulations that Kennedy and the private lobbyists for his bill had rejected time and again.

On most issues, the Dole proposal used language drawn from the president's bill and the analytical memorandum that accompanied the bill. On the contentious issue of "business necessity," which defines the standard that employers must meet in justifying statistical disparities, the proposal used essentially meaningless language from the Americans With Disabilities Act that left the term in question *undefined*. (Ironically, the negotiators of the disability law had settled on this empty language because they expected the issue to be addressed and resolved in the context of the upcoming civil rights bill.)

In its most critical component, the Dole proposal included *exclusive legislative history* that would supply the definition of "business necessity" by referencing the case law as it stood immediately prior to the *Wards Cove* decision. In two carefully negotiated explanatory sentences, the proposal indirectly accomplished what the president's bill had done in so many words: codifying the law of disparate impact as it stood at the time of *Wards Cove* (except on the burden of proof). Because the statutory language provided no definition, the definition referenced in the legislative history would necessarily be dispositive in the courts; for that reason, 90 percent of the negotiations centered on the legislative history rather than on the statute itself.

In return for Sen. Kennedy's complete capitulation on quotas, the administration agreed to several compromises proposed by Sen. Danforth on other issues. The question on which the administration was most reluctant was the application of jury trials and punitive damages to employment cases under the Civil Rights Act. Although the Danforth proposal includes caps on such awards, thereby setting an important precedent for tort reform, such remedies are undeniably a dangerous experiment (as is suggested by the senators' 54-42 vote *against* a proposal to apply to themselves the same remedies they are imposing on the private sector).

Despite our strong misgivings about jury trials and damages, the agreement was sealed, and our startling success on *Wards Cove* remained the most salient component of the package. Imagine, then, how disturbed we were to learn that Sen. Kennedy went to the floor of the Senate the very next day to create legislative history, inconsistent with Thursday night's agreement, attempting to resuscitate one of the most radically objectionable features of the original Democratic bill. Had we been sandbagged? Had the agreement so laboriously negotiated ever been meant to stick?

"The president won a clean victory for equal opportunity, and that victory will survive the current round of fictions."

The following Monday, the administration proposed an innovative statutory provisions specially designed to enforce the Thursday night agreement. This provision directed the courts to ignore any legislative history (such as the description of the agreement given by Kennedy on Friday) apart from the two sentences originally agreed to. Sens. Kennedy and Danforth objected to this proposal, while administration negotiators felt they had to insist. Tense meetings ensued, and it seemed at points that there might be no civil rights bill after all.

On Tuesday, Sens. Dole and Orrin Hatch engaged in heroic efforts to hold Sen. Kennedy and his allies to the agreement. Republican Leader Dole's arguments were particularly effective—that night, without any debate or a recorded vote, the Senate accepted a slightly modified version of the administration proposal enforcing the deal.

Heroic efforts to enforce the agreement would not have been required unless there had been something very significant were at stake. And there was. Buried in this dispute, as in earlier arcane debates over legal terminology, was the difference between preserving the essence of current law and creating a new quota monster. It also meant the difference between a system that will encourage kids to stay in school and a novel system of legal threats against those who reward hard work and achievement. On these fundamental issues the president won a clean victory for equal opportunity, and that victory will survive the current round of fictions about some supposed political surrender.

The writer is counsel to the president.

William T. Coleman Jr. and Vernon E. Jordan Jr.

How the Civil Rights Bill Was Really Passed

The administration did compromise.

The new civil rights bill, accomplished by a dedicated Danforth-Kennedy steadfast commitment, is a great achievement, both because it significantly strengthens civil rights protections and because it reestablishes a new political consensus on a subject that has historically divided us. C. Boyden Gray's "Civil Rights: We Won, They Capitulated" [op-ed, Nov. 14] misrepresents the bill's strong protections. Sadder still, Gray's article tries to destroy the spirit of consensus on civil rights that the compromise bill achieved. We are confident that the American people and the courts will reject Mr. Gray's flagrant effort to rewrite the story for political advantage by asserting a shameless, patently false claim.

The main debate about the bill focused on the so-called "disparate impact" approach to proving discrimination. In 1971, the Supreme Court held in *Griggs v. Duke Power* that employment practices which disproportionately exclude women and minorities are unlawful unless employers show that they serve a "business necessity," and that any employment practice which "cannot be shown to be related to job performance . . . is prohibited." In *Wards Cove v. Atonio*, the Supreme Court rewrote the rules for litigating disparate impact cases and abandoned the concept of "business necessity." Contrary to what Gray says, the new bill reverses *Wards Cove* in every major respect and codifies a strong version of the disparate impact test—a version that civil rights advocates had sought, and that the administration had opposed. And as the president now concedes, the bill—as was also true of *Griggs* for 18 years—will not lead to quotas.

Stripped of its rhetoric, the debate about how the civil rights bill should codify the impact test focused on two main issues: (1) Should employers or job-seekers have the burden of proving whether there is enough justification for a job selection practice even though it has a disparate impact? (2) If employers have the burden, should they have to show that selection practices are significantly related to actual job performance or only to vaguely defined business goals?

On both issues, the language of the new bill clearly rejects the administration's original position. The bill provides that once plaintiffs show a disparate impact, the employer must "demonstrate that the challenged practice is job related for the position in question *and* [not 'or'] consistent with business necessity." Thus, on the first issue, the bill makes clear that the burden of justification is on the employer, not the plaintiffs—a position the administration had previously opposed in testimony before Congress.

On the second issue, the bill could not be clearer that job selection practices must be shown to be significantly related to the performance of the job in question—a flat out repudiation of the administration's longstanding position that such practices should be lawful if related to business goals other than improved job performance.

Over the past several months, this was the central disagreement Sens. John C. Danforth and Edward M. Kennedy had with the administration. The administration repeatedly used the following example to make its point: Employers should be allowed to require high school diplomas of all workers even where there was no reason to think that diplomas would make better workers, so long as the employer was trying to encourage community children to stay in school. In the president's letter to Danforth of July 28, Bush stated that the bill would "seriously, if not fatally, undermine the reform and renewal of our educational system by discouraging employers from relying on educational effort and achievement." Sen. Danforth repeatedly characterized his disagreement with the White House: "The question is whether an employer can set up a qualification for employment that has nothing to do with the ability to do the job."

To reach agreement, the administration abandoned this position and accepted the central argument of civil rights advocates: Job selection criteria must be related solely to job performance. Indeed, the final agreement is even stronger than the prior Danforth-Kennedy proposal, since it requires that selection criteria be related to the particular "position" in question, not any one of a "class of jobs" to which an employee may be moved or promoted.

Taking Exception

The new bill makes clear that a weak relationship between selection criteria and job performance will not do. There must be a substantial relationship. Gray says that the bill "uses essentially meaningless language from the Americans With Disabilities Act." But that act, and final interpretative regulations issued by the EEOC last July, make clear that there must be a close relationship between selection criteria and actual job performance. Using identical language in the new civil rights bill has the same meaning.

Thus the bill embraces a strong, explicit version of the impact test. And it is fundamentally fair: If an employment practice has a disparate impact on minorities or women, exacerbating their historical disadvantages, then the employer must demonstrate that using that employment practice is significantly related to improving actual job performance. To say, as Gray says, that the final bill "was virtually identical in substance to the president's bill" is, to put it kindly, off base.

The bill says a weak relationship between selection criteria and job performance will not do.

Note that no part of our account of the bill draws upon "legislative history." It rests upon the clear language of the new bill itself. All lawyers know that clear, explicit statutory language is better than the best legislative history. Thus we are at a loss to understand why Gray thinks that civil rights groups

base their enthusiasm for the new bill on floor statements by senators that are not part of the "exclusive legislative history" of the bill.

That exclusive legislative history, which speaks vaguely about codifying decisions prior to *Wards Cove,* contains absolutely nothing that is inconsistent with the clear language of the bill—which places the burden of justification on the employer, requires the employer to show that job criteria relate to job performance and requires the relationship to be a significant one. The more accurate point is that the language of the bill is clearly inconsistent with the administration's prior positions.

There is, moreover, simply no question that the Civil Rights Act of 1991—in its findings, its purpose and its statutory provisions—rejects *Wards Cove* and every previous administration proposal to codify *Wards Cove.* The bill in fact specifically criticizes *Wards Cove.*

Contrary to Gray's claims, the compromise also represents a significant advance on many other issues. Most important, the administration abandoned its longstanding opposition to damages, awarded by a jury, for victims of intentional discrimination based on race, religion, sex, color or national origin. Indeed, it agreed to a compromise that actually increased the limits on damages from those contained in Sen. Danforth's bill. In addition, the administration finally accepted—without any change whatsoever—the provisions overruling the Supreme Court's decisions in *Martin v. Wilks* and *Price Waterhouse v. Hopkins.*

As Paul Gewirtz, a professor of law at Yale University, stated, the "agreement on a compromise civil rights bill won virtually everything that civil rights advocates first sought two years ago."

In his misguided and disingenuous effort to claim victory, Mr. Gray not only mischaracterized the bill's treatment of *Wards Cove* and understated the significance of the bill's other provisions, but also charges that Edward Kennedy, a champion of civil rights and (along with Danforth) the driving force behind the bill, attempted to modify the agreement with the White House at the last minute by changing the legislative history.

This charge is absolutely untrue. The agreed-upon legislative history addressed two specific aspects of the business necessity provision. It did not bar senators from explaining other aspects of the *Wards Cove* provisions; indeed, senators Orrin Hatch, John Danforth and Slade Gorton all discussed the *Wards Cove* provisions in floor statements on the same day Sen. Kennedy made his statement. Any person who has read the agreed-upon legislative history can see that Kennedy's statement did not contradict this language, and Danforth has stated that his understanding of the agreement with respect to the *Wards Cove* provisions is the same as Kennedy's understanding.

In the end, President Bush wisely decided to ignore the advice of Mr. Gray and a few other administration officials and to accept the bipartisan compromise on civil rights. He put behind him the destructive and divisive tactics opponents have employed over the past 18 months.

The president should be proud of the bill he is supporting, but not because his side "won" and the other side "capitulated." He should be proud because he, even though belatedly, returned the party of Lincoln to a position of supporting strong civil rights protections, and with that he helped to move civil rights issues back where they belong: as part of our national consensus, not one of our national divisions.

What maddens us most about C. Boyden Gray's op-ed piece is that it attempts to rip that consensus apart just as it was forming again. This ill-serves the president. And it ill-serves the country.

William T. Coleman Jr., secretary of transportation from 1975 to 1977, is chairman of the NAACP Legal Defense and Educational Fund. Vernon E. Jordan Jr. is a Washington attorney and former president of the National Urban League.

ID # 290901 CU

H1010

CS

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Name of Correspondent: Phil Brady

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Enrolled Bill S. 367 - Nontraditional Employment For Women Act

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Prof	ORIGINATOR	91/12/11		C	91/12/12 CS
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Referral Note: see comments

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Comments: Phoned no legal objection to John Gardner

12/12/91 2:30 p per M. LAND -

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Document No. 29090155

WHITE HOUSE STAFFING MEMORANDUM

DATE: 12/11/91 ACTION/CONCURRENCE/COMMENT DUE BY: THURSDAY, 12/12/91 5:00pm

SUBJECT: ENROLLED BILL S. 367 - NONTRADITIONAL EMPLOYMENT FOR WOMEN ACT

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	HORNER	☐	☐
SUNUNU	☐	☐	MCCLURE	☑	☐
SCOWCROFT	☐	☐	PETERSMEYER	☐	☐
DARMAN	☐	☑	PORTER	☑	☐
BRADY	☐	☑	ROGICH	☐	☐
BROMLEY	☐	☐	SMITH	☐	☐
CARD	☐	☑	CLERK	☐	☑
DEMAREST	☑	☐	_____	☐	☐
FITZWATER	☐	☑	_____	☐	☐
GRAY	☑	☐	_____	☐	☐
HOLIDAY	☑	☐	_____	☐	☐

REMARKS:

Please forward your comments directly to this office no later than 5:00 THURSDAY, DECEMBER 12. Thank you.

RESPONSE:

PHILLIP D. BRADY
Assistant to the President
and Staff Secretary
Ext. 2702

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

91 DEC 11 P2:30

THE DIRECTOR

December 11, 1991

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Enrolled Bill S. 367 - Nontraditional Employment for Women Act
Sponsors - Sen. Metzenbaum (D) OH and 11 others

Last Day for Action

December 16, 1991 - Monday

Purpose

Enhances efforts under the Job Training Partnership Act to increase the training and employment of women in nontraditional occupations.

Agency Recommendations

Office of Management and Budget	Approval
Department of Labor	Approval
Department of Justice	Defers (Informally)
Department of Education	Defers to Labor (Informally)
Equal Employment Opportunity Commission	No comment (Informally)

Discussion

The Job Training Partnership Act (JTPA) provides job training and other supportive services to economically disadvantaged individuals. The JTPA employment and training programs are administered by the States through service delivery areas (SDAs). S. 367 would amend JTPA in an effort to increase nontraditional employment and training opportunities for women.

The bill defines "nontraditional employment" as occupations in which women comprise less than 25 percent of the individuals employed. S. 367 includes two major components: (1) planning and reporting requirements and (2) a four-year demonstration program.

The major provisions of S. 367 are discussed below. A detailed description of the bill's provisions is included in the Department of Labor views letter.

Major Provisions of S. 367

Planning and Reporting Requirements. S. 367 would require States and SDAs to develop goals for training and placing women in nontraditional employment and to report on the results. State Job Training Coordinating Councils (SJTCC) would have to (1) review the planning and reporting activities of the governors and SDAs and (2) disseminate information on successful approaches to training and placing women in nontraditional employment. In addition, the bill would require governors and SJTCCs to coordinate nontraditional employment and training activities conducted under JTPA with those implemented under the Carl D. Perkins Vocational Education Act.

In its views letter, the Department of Labor expresses concern about some of the reporting requirements in S. 367. Labor, however, states that the bill "provides . . . flexibility in implementing most of these requirements." Labor believes that it could administer the programs "in a manner that will serve the Act's objective . . . without imposing unreasonable burdens on SDAs and States."

Demonstration Program. The enrolled bill would authorize a new four-year demonstration program to develop programs to train and place women in nontraditional employment. For each of FYs 1992 through 1995, the Secretary of Labor would be required to use $1.5 million of JTPA National Activities funds for grants to no more than six States. S. 367 specifies the factors the Secretary would use in making grant awards and how the States could use the funds. Although Labor would have preferred that funds not be earmarked for this demonstration, it does not believe that the provision warrants a recommendation of disapproval.

Secretary's Report. S. 367 would require the Secretary of Labor to submit a report to Congress evaluating Federal, State, and local efforts to train, place, and retain women in nontraditional employment. The report must include recommendations for legislative and administrative changes.

Under Article II of the Constitution, the President has exclusive authority to decide whether and when the Executive branch should propose legislation. Congress is therefore prohibited from requiring the President or his subordinates to submit legislative proposals or recommendations. The Department of Justice informally advises that this type of reporting requirement has always been treated as advisory rather than mandatory. Justice believes, therefore, that the potential constitutional problem raised by the bill does not merit its disapproval.

Conclusion and Recommendations

We join Labor in recommending approval of S. 367, which passed both Houses of Congress by voice vote.

Richard Darman
Director

Enclosures

THE WHITE HOUSE

WASHINGTON

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S. 367

One Hundred Second Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Thursday, the third day of January, one thousand nine hundred and ninety-one

An Act

To amend the Job Training Partnership Act to encourage a broader range of training and job placement for women, and for other purposes

To amend the Job Training Partnership Act to encourage a broader range of training and job placement for women, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Nontraditional Employment for Women Act".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds that—

(1) over 7,000,000 families in the United States live in poverty, and over half of those families are single parent households headed by women;

(2) women stand to improve their economic security and independence through the training and other services offered under the Job Training Partnership Act;

(3) women participating under the Job Training Partnership Act tend to be enrolled in programs for traditionally female occupations;

(4) many of the Job Training Partnership Act programs that have low female enrollment levels are in fields of work that are nontraditional for women;

(5) employment in traditionally male occupations leads to higher wages, improved job security, and better long-range opportunities than employment in traditionally female-dominated fields;

(6) the long-term economic security of women is served by increasing nontraditional employment opportunities for women; and

(7) older women reentering the work force may have special needs in obtaining training and placement in occupations providing economic security.

(b) STATEMENT OF PURPOSE.—The purposes of this Act are—

(1) to encourage efforts by the Federal, State, and local levels of government aimed at providing a wider range of opportunities for women under the Job Training Partnership Act;

(2) to provide incentives to establish programs that will train, place, and retain women in nontraditional fields; and

(3) to facilitate coordination between the Job Training Partnership Act and the Carl D. Perkins Vocational and Applied Technology Education Act to maximize the effectiveness of resources available for training and placing women in nontraditional employment.

SEC. 3. DEFINITION.

Section 4 of the Job Training Partnership Act (hereinafter referred to as the "Act") is amended by adding at the end thereof the following new paragraph:

"(30) The term 'nontraditional employment' as applied to women refers to occupations or fields of work where women comprise less than 25 percent of the individuals employed in such occupation or field of work.".

SEC. 4. SERVICE DELIVERY AREA JOB TRAINING PLAN.

Section 104(b) of the Act is amended—

(1) by redesignating paragraphs (5), (6), (7), (8), (9), (10), and (11) as paragraphs (6), (7), (8), (9), (10), (11), and (12), respectively;

(2) by inserting after paragraph (4) the following new paragraph:

"(5) goals for—

"(A) the training of women in nontraditional employment; and

"(B) the training-related placement of women in nontraditional employment and apprenticeships;

and a description of efforts to be undertaken to accomplish such goals, including efforts to increase awareness of such training and placement opportunities;"; and

(3) in paragraph (12), as redesignated in paragraph (1) above, by—

(A) striking "and" at the end of subparagraph (B);

(B) striking the period at the end of subparagraph (C) and inserting in lieu thereof a semicolon; and

(C) adding after subparagraph (C) the following new subparagraphs:

"(D) the extent to which the service delivery area has met its goals for the training and training-related placement of women in nontraditional employment and apprenticeships; and

"(E) a statistical breakdown of women trained and placed in nontraditional occupations, including—

"(i) the type of training received, by occupation;

"(ii) whether the participant was placed in a job or apprenticeship, and, if so, the occupation and the wage at placement;

"(iii) the participant's age;

"(iv) the participant's race; and

"(v) information on retention of the participant in nontraditional employment.".

SEC. 5. GOVERNOR'S COORDINATION AND SPECIAL SERVICES PLAN.

(a) IN GENERAL.—Section 121(b) of the Act is amended by—

(1) redesignating paragraphs (3), (4), and (5) as paragraphs (4), (5), and (6), respectively; and

(2) by inserting after paragraph (2) the following new paragraph:

"(3) The plan shall include goals for—

"(A) the training of women in nontraditional employment through funds available under the Job Training Partnership Act, the Carl D. Perkins Vocational and Applied Technology Education Act, and other sources of Federal and State support;

"(B) the training-related placement of women in nontraditional employment and apprenticeships;

"(C) a description of efforts to be undertaken to accomplish such goals, including efforts to increase awareness of such training and placement opportunities; and

"(D) a description of efforts to coordinate activities provided pursuant to the Job Training Partnership Act and the Carl D. Perkins Vocational and Applied Technology Education Act to train and place women in nontraditional employment.".

(b) SPECIAL PROGRAMS.—Section 121(c) of the Act is amended by—

(1) redesignating paragraphs (9) and (10) as paragraphs (10) and (11), respectively; and

(2) inserting after paragraph (8) the following new paragraph:

"(9) providing programs and related services to encourage the recruitment of women for training, placement, and retention in nontraditional employment;".

SEC. 6. STATE JOB TRAINING COORDINATING COUNCIL.

Section 122(b) of the Act is amended by—

(1) redesignating paragraphs (5), (6), (7), and (8) as paragraphs (9), (10), (11), and (12), respectively; and

(2) inserting after paragraph (4) the following new paragraphs:

"(5) review the reports made pursuant to subparagraphs (D) and (E) of section 104(b)(12) and make recommendations for technical assistance and corrective action, based on the results of such reports;

"(6) prepare a summary of the reports made pursuant to subparagraphs (D) and (E) of section 104(b)(12) detailing promising service delivery approaches developed in each service delivery area for the training and placement of women in nontraditional occupations, and disseminate annually such summary to service delivery areas, service providers throughout the State, and the Secretary;

"(7) review the activities of the Governor to train, place, and retain women in nontraditional employment, including activities under section 123, prepare a summary of activities and an analysis of results, and disseminate annually such summary to service delivery areas, service providers throughout the State, and the Secretary;

"(8) consult with the sex equity coordinator established under section 111(b) of the Carl D. Perkins Vocational and Applied Technology Education Act, obtain from the sex equity coordinator a summary of activities and an analysis of results in training women in nontraditional employment under the Carl D. Perkins Vocational and Applied Technology Education Act, and disseminate annually such summary to service delivery areas, service providers throughout the State, and the Secretary;".

SEC. 7. STATE EDUCATION COORDINATION AND GRANTS.

(a) STATE EDUCATION COORDINATION AND GRANTS.—Section 123(a) of the Act is amended by—

(1) striking "and" at the end of paragraph (2);

(2) striking the period at the end of paragraph (3) and inserting in lieu thereof a semicolon and "and"; and

(3) inserting the following new paragraph at the end thereof:

"(4) to provide statewide coordinated approaches, including model programs, to train, place, and retain women in nontraditional employment.".

(b) USE OF FUNDS.—Section 123(c) is amended—

(1) in paragraph (2)(B) by striking "(1) and (3)" and inserting in lieu thereof "(1), (3), and (4)"; and

(2) in paragraph (3) by striking "(1) and (3)" and inserting in lieu thereof "(1), (3), and (4)".

SEC. 8. USE OF FUNDS.

Section 204 of the Act is amended by—

(1) redesignating paragraphs (27) and (28) as paragraphs (28) and (29), respectively; and

(2) inserting after paragraph (26) the following new paragraph:

"(27) outreach, to develop awareness of, and encourage participation in, education, training services, and work experience programs to assist women in obtaining nontraditional employment, and to facilitate the retention of women in nontraditional employment, including services at the site of training or employment,".

SEC. 9. DEMONSTRATION PROGRAMS.

Part D of title IV of the Act is amended by adding at the end thereof the following new section:

"DEMONSTRATION PROGRAMS

"SEC. 457. (a)(1) From funds available under this part for each of the fiscal years 1992, 1993, 1994, and 1995, the Secretary shall use $1,500,000 in each such fiscal year to make grants to States to develop demonstration and exemplary programs to train and place women in nontraditional employment.

"(2) The Secretary may award no more than 6 grants in each fiscal year.

"(b) In awarding grants pursuant to subsection (a), the Secretary shall consider—

"(1) the level of coordination between the Job Training Partnership Act and other resources available for training women in nontraditional employment;

"(2) the extent of private sector involvement in the development and implementation of training programs under the Job Training Partnership Act;

"(3) the extent to which the initiatives proposed by a State supplement or build upon existing efforts in a State to train and place women in nontraditional employment;

"(4) whether the proposed grant amount is sufficient to accomplish measurable goals;

"(5) the extent to which a State is prepared to disseminate information on its demonstration training programs; and

"(6) the extent to which a State is prepared to produce materials that allow for replication of such State's demonstration training programs.

"(c)(1) Each State receiving financial assistance pursuant to this section may use such funds to—

"(A) award grants to service providers in the State to train and otherwise prepare women for nontraditional employment;

"(B) award grants to service delivery areas that plan and demonstrate the ability to train, place, and retain women in nontraditional employment; and

"(C) award grants to service delivery areas on the basis of exceptional performance in training, placing, and retaining women in nontraditional employment.

"(2) Each State receiving financial assistance pursuant to subsection (c)(1)(A) may only award grants to—

"(A) community based organizations,

"(B) educational institutions, or

"(C) other service providers,

that have demonstrated success in occupational skills training.

"(3) Each State receiving financial assistance under this section shall ensure, to the extent possible, that grants are awarded for training, placing, and retaining women in growth occupations with increased wage potential.

"(4) Each State receiving financial assistance pursuant to subsection (c)(1)(B) or (c)(1)(C) may only award grants to service delivery areas that have demonstrated ability or exceptional performance in training, placing, and retaining women in nontraditional employment that is not attributable or related to the activities of any service provider awarded funds under subsection (c)(1)(A).

"(d) In any fiscal year in which a State receives a grant pursuant to this section such State may retain an amount not to exceed 10 percent of such grant to—

"(1) pay administrative costs,

"(2) facilitate the coordination of statewide approaches to training and placing women in nontraditional employment, or

"(3) provide technical assistance to service providers.

"(e) The Secretary shall provide for evaluation of the demonstration programs carried out pursuant to this section, including evaluation of the demonstration programs' effectiveness in—

"(1) preparing women for nontraditional employment, and

"(2) developing and replicating approaches to train and place women in nontraditional employment.".

SEC. 10. REPORT AND RECOMMENDATIONS.

(a) REPORT.—The Secretary of Labor shall report to the Congress within 5 years of the date of enactment of this Act on—

(1) the extent to which States and service delivery areas have succeeded in training, placing, and retaining women in nontraditional employment, together with a description of the efforts made and the results of such efforts; and

(2) the effectiveness of the demonstration programs established by section 457 of the Job Training Partnership Act in developing and replicating approaches to train and place women in nontraditional employment, including a summary of activities performed by grant recipients under the demonstration programs authorized by section 457 of the Job Training Partnership Act.

(b) RECOMMENDATIONS.—The report described in subsection (a) shall include recommendations on the need to continue, expand, or modify the demonstration programs established by section 457 of the Job Training Partnership Act, as well as recommendations for legislative and administrative changes necessary to increase nontraditional employment opportunities for women under the Job Training Partnership Act.

SEC. 11. DISCRIMINATION.

(a) For purposes of this legislation, nothing in this Act shall be construed to mean that Congress is taking a position on the issue of comparable worth.

(b) Nothing in this Act shall be construed to require, sanction or authorize discrimination in violation of title VII of the Civil Rights Act of 1964 or any other Federal law prohibiting discrimination on the basis of race, color, religion, sex, national origin, handicap, or age. No individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in any program under this Act because of race, color, religion, sex, national origin, age, handicap, political affiliation or belief. Failure to meet the goals in the Act shall not itself constitute a violation of title VII of the Civil Rights Act of 1964 or any other Federal law prohibiting discrimination on the basis of race, color, religion, sex, national origin, handicap, or age.

SEC. 12. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect upon the date of enactment of this Act, except that the requirements imposed by sections 4, 5, and 6 of this Act shall apply to the plan or report filed or reviewed for program years beginning on or after July 1, 1992.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

TJ

REVISED
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THE WHITE HOUSE
WASHINGTON

SIGNING CEREMONY FOR THE CIVIL RIGHTS ACT OF 1991

DATE: November 21, 1991
LOCATION: Rose Garden
TIME: 1:15 p.m. (15 minutes)

FROM: Frederick D. McClure

I. PURPOSE

To sign S. 1745, the Civil Rights Act of 1991.

II. BACKGROUND

S. 1745, which passed the Senate by a vote of 93 to 5 and the House by a vote of 381 to 38, overturns or modifies several recent Supreme Court decisions dealing with employment laws.

This bill, which is consistent with your principles on civil rights legislation, will allow a victim of employment discrimination to sue for damages, with caps on awards depending on the size of the business. The bill also shifts the burden of proof to the employer in cases of unintentional discrimination, while otherwise leaving current law essentially in tact. Most of the other provisions of the bill are non-controversial.

III. PARTICIPANTS

See Attachment.

IV. PRESS PLAN

Open press.

IV. SEQUENCE OF EVENTS

-- You will enter the Rose Garden accompanied by Vice President Quayle and join Attorney General Bill Barr and Chairman Evan Kemp on the dais;
-- You will make brief remarks;
-- You will proceed to the signing table where you will sign S. 1745.

Attachment A: Participants List
Attachment B: Remarks to be provided by speechwriting

Attachment A

PARTICIPANTS LIST

The President

The Vice President

William Barr, Attorney General
Lynn Martin, Secretary of Labor
Connie Newman, Director, Office of Personnel Management
Pat Saiki, Administrator, Small Business Administration
Evan Kemp, Chairman, Equal Employment Opportunity Commission
Arthur Fletcher, Chairman, Civil Rights Commission

Senator John Chafee (R-RI)
Senator Jack Danforth (R-MO)
Senator Bob Dole (R-KS), Republican Leader
Senator Pete Domenici (R-NM)
Senator Orrin Hatch (R-UT)
Senator Mark Hatfield (R-OR)
Senator Jim Jeffords (R-VT)
Senator Ted Kennedy (D-MA)
Senator Alan Simpson (R-WY)
Senator Arlen Specter (R-PA)

Congressman Bob Michel (R-IL), Republican Leader
Congressman Hamilton Fish (R-NY)
Congressman Gary Franks (R-CT)
Congressman Bill Goodling (R-PA)
Congressman Steve Gunderson (R-PA)
Congressman Duncan Hunter (R-CA)
Congressman Jerry Lewis (R-CA)
Congresswoman Susan Molinari (R-NY)

Department of Justice Staff

Congressional Staff

Representatives from various private sector organizations

CS

ID # 291558 CU
R: 12-9

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WHITE HOUSE
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- ☐ O - OUTGOING
- ☐ H - INTERNAL
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Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Kathy Baker

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Towards, letter for response from Rep C. Holloman opposing the Civil Rights Bill

ROUTE TO: | **ACTION** | **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuoco	ORIGINATOR	91/12/05		C	91/12/20
Cuoto/O	Referral Note:				
	A	91/12/06		C	91/12/20
	Referral Note:	91/12/20 note from NL to BAKER			
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ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

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5/81

THE WHITE HOUSE
WASHINGTON

Date: 12/31/91

TO: KATHY BAKER

FROM: **NELSON LUND**
Associate Counsel
to the President

- ☐ Action
- ☐ Comments
- ☐ FYI

SMG ROBO IS O.K.

THE WHITE HOUSE

WASHINGTON

29558cm

TO: C. B. Gray DEC 5 1991

FROM: Mail Analysis
Room 58, OEOB
456-6600

If you are unable to respond,
please return to:

Kathy Baker
OEOB 58
(for smg-159)

greater
IBERIA
chamber of commerce

November 6, 1991

cc BGray

President George Bush
Office of The President - White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear President Bush,

Although I have been a long time supporter of both you and the Republican Party, I was quite alarmed to read (Newsweek Nov 4) that you now support a civil-rights bill that will include putting the burden of proof on the employer to prove that hiring policies are not discriminatory.

Although our current legal system contains many faults, the one most important feature is that parties accused of wrong doing are **innocent until proven guilty,** not the other way around.

President Bush, please consider the ramifications of your actions to support such a provision. I can only believe that your actions result from the Clarence Thomas hearings and from David Duke's gubernatorial campaign. On the latter, I can assure you that supporting this civil-rights bill only plays into the hands of David Duke. It is exactly the response he needs to help further his cause.

As I know you are aware, we are being thrust into a global economy that contains a whole new set of problems for US industries, as well as many opportunities. We must reevaluate the relationship between business and government that has unfortunately become adversarial rather than cooperative.

We can overcome this situation, but it will take our elected officials sitting with business in an earnest effort to work together. Many good business men and women would be happy to sit on a task force to study this problem if they could be assured that the results of their work would not go in vain.

Population in Iberia Parish is only 70,000 yet we have been the leader in new job creation in Louisiana for several years, outdistancing the nearest Parish by two to one*. This was accomplished by working as a team with business and government, a situation envied by others. It can work!

111 W. Main St.
New Iberia, LA 70560
Bus. (318) 364-1836

[redacted]

I have written on several other occasions and always received your views through Ms. Shirley Green which I appreciate and understand considering the volume of mail received. I am requesting that this matter be handled directly by you, due to its potential harm.

Sincerely,

Roy C. Holleman
President & CEO

*Source - Louisiana Dept of Economic Development

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United States Senate

WASHINGTON, DC 20510-4701

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COMMERCE, SCIENCE, AND TRANSPORTATION
ETHICS
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June 14, 1991

VIA RIDING PAGE

The Honorable John Sununu
Chief of Staff
The White House
Washington, D.C. 20500

THE CHIEF of STAFF has seen

Re: Civil Rights

Dear Governor Sununu:

Per Senator Gorton's request, enclosed are hard copies of the materials telecopied to your office last night. I note that some cosmetic changes were made to the draft Dear Republican Colleague letter of Senator Gorton. I have enclosed a redline copy of the early draft, as well as the revised letter.

If you have any questions, please feel free to have a member of your staff contact me at 224-3279 (direct).

Sincerely,

Curtis D.W. Hom
Legislative Assistant to
Senator Slade Gorton

CDH:v

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INTELLIGENCE

June 13, 1991

VIA FACSIMILE (456-2397)
CONFIRMATION (456-6797)

The Honorable John Sununu
Chief of Staff
The White House
Washington, D.C. 20500

Re: Civil Rights

Dear Governor Sununu:

Per Senator Gorton's request, I am sending with this letter the following items:

1. Draft Dear Republican Colleague letter prepared by Senator Gorton;

2. Dear Colleague letter dated June 13, distributed by Senator Hatch; and

3. A side-by-side comparison that summarizes the key provisions of the principal civil rights bills introduced into this Congress, i.e., the Brooks/Kennedy bill, H.R. 1 (as introduced and as passed by the House), the Danforth three-part proposal, S. 1207, S. 1208 and S. 1209, and the Administration/Dole bill, S. 611. A copy of this document previously was sent to Boyden Gray.

Hard copies of these materials will be delivered to your office tomorrow morning.

Sincerely,

Curtis D.W. Hom
Legislative Assistant to
Senator Slade Gorton

CDH:v

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THE WHITE HOUSE

WASHINGTON

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Comments:

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Curtis D. W. Hom, Esq.
Legislative Assistant

Slade Gorton
U.S Senator
Washington

730 Hart Building
Washington, D. C. 20510
(202) 224-3441

June 14, 1991

Dear Republican Colleague:

1. The 1964 Civil Rights Act, proposed changes to which are now the focus of a major national and Congressional debate, was advanced, vigorously and eloquently, by Senator Hubert Humphrey and others, and designed to bring about a color-blind society. It now has been enforced and interpreted over a period of almost three decades by courts and administrative agencies.

The 1964 Civil Rights Act does not deal expressly with "unintentional discrimination" or with "disparate impact," concepts which are very much at the heart of the current debate. Those are concepts which have been developed by the courts as they have decided specific litigation based on specific fact situations.

2. In the case of Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849 (1971), the Supreme Court first dealt with those concepts in an organized fashion. In Griggs, the Duke Power Company required job applicants and employees to have completed high school or to have passed a general aptitude test to be eligible to be hired by, or transferred to, more desirable departments within the company. Prior to passage of the Civil Rights Act of 1964, the Duke Power Company had a history of overt employment discrimination. The Court said:

> "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. * * * On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the job for which it was used. * * * But Congress directed the thrust of the [Civil Rights Act] to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

401 U.S. at 432, 433, 91 S.Ct. at 853, 854 (emphases added).

Notably, Griggs dealt with one specific employment practice as it affected one specific employer, although the holding was couched in general language.

3. The Griggs test evolved over the years in a long series of lawsuits involving varying factual situations. At the same time, the Supreme Court became increasingly sensitive to the fact that "unintentional discrimination," while perhaps a useful concept, had the potential to create great abuse. In Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777 (1988), which extended the "disparate impact" analysis to subjective employment and evaluation practices such as interviews and evaluations for the first time, Justice O'Connor cautioned:

> "We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. * * * It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. * * * If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today."

108 S.Ct. at 2787-88.

4. A year later, in Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989), a majority of the Supreme Court came down with the next step on disparate impact, or unintentional discrimination. That decision triggered the current civil rights bill controversy. The Supreme Court said:

> "[In a] disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. * * * The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use

> of spurious, seemingly neutral employment practices. At the same time though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster; this degree of scrutiny would be almost impossible for most employers to meet, and would result in a hose of evils we have identified above [e.g., quotas]."

109 S.Ct. at 2125-26.

I believe this decision to be totally consistent with Griggs, while critics assert that it overrules Griggs. The fundamental question, however, is whether or not Wards Cove articulates an appropriate balance in disparate impact cases. I submit that it clearly does so.

5. Immediately after that decision, however, Senator Kennedy, at the behest of the civil rights community, introduced a bill to overturn the Supreme Court's decision in Wards Cove. That bill would have allowed a "business necessity" defense only when the employer could establish that the challenge practice was:

> "essential to effective job performance" (emphasis added).

If you will look back at the language used by the Supreme Court in the previous section, you will see that it was the obvious intent of Senator Kennedy's original bill to force employers to impose quotas upon themselves, as it used precisely the language that the Supreme Court said would inevitably result in such quotas!

That bill was a quota bill beyond a shadow of a doubt. The civil rights community has never wavered from that goal, and the more elaborate the statutory language they propose the more litigation their language will engender and the more likely the response of self imposed quotas by employers will be.

6. After extended debate ending late in the last Congress, the Congress passed and sent to the President a bill in which the original Kennedy language had been somewhat modified, but which still overturned the Supreme Court's Wards Cove decision and which still, in the view of the President and most Republicans, would have forced employers to hire by quota. The President's veto was sustained by a margin of one vote in the Senate.

7. The President's characterization of that bill as a quota bill is accepted by a vast majority of Americans. As Senator Gramm pointed out at lunch on Tuesday, the issue is the single most driving issue he has found in years affecting potential voter behavior in 1992. Your constituents are vehemently and overwhelmingly opposed to such legislation. For its actual impact on your business communities, note the Washington Post article of Thursday, a copy of which is attached.

8. H.R. 1, as introduced into the House in January, was substantially identical to the vetoed 1990 bill. While H.R. 1, as modified and passed by the House last week, is somewhat milder than its original version in some provisions outside of the ambit of the dispute over quotas, its Wards Cove language is quota language as clearly as was that of the 1990 bill, and is so regarded by the President and by a majority of the American people.

9. It is my firm opinion, regrettably, that the Danforth bill on the Wards Cove decision (the two other separate Danforth bills cover other subject matter areas) is not significantly different from, or less onerous than, H.R. 1 as passed by the House. The White House agrees. The Danforth bill expressly overrules Wards Cove and is complicated enough to provide years of employment for legions of lawyers. It attempts, vainly I believe, to codify a rapidly evolving field of court-developed law and to freeze it into a statutory straight jacket. The Danforth bill is just as likely as is H.R. 1 to cause intelligent employers to impose quotas on themselves in order to avoid protracted litigation.

10. Having said all this, the fundamental question still is whether or not the Wards Cove decision was properly decided by the Supreme Court majority. I submit that it was.

As I have already pointed out, the basic 1964 Civil Rights Act says nothing about unintentional discrimination, disparate impact, or business necessity. These are all court constructs, each case dealing with a different fact situation, and they cannot effectively and fairly be codified. The Supreme Court should be permitted the task, and the flexibility, to develop the law in this field.

Moreover, if you understand the essence of Wards Cove, I think you will agree that it states a perfectly fair and appropriate test. Perhaps the clinching argument for this proposition is the fact that, since the date of that decision, plaintiffs have not been losing significantly greater numbers of disparate impact cases than they were before the decision was rendered. The long series of bills seeking to overturn Wards Cove are a solution in search of a problem.

The Civil Rights Act of 1964 ain't broke; it doesn't need fixing. And it certainly doesn't need fixing in a fashion which adds unfairly to the burdens imposed on business people, adds a layer of court and administrative supervision to every hiring decision, and contradicts the desires of the vast majority of our constituents.

Sincerely,

SLADE GORTON
United States Senator

P.S. I also have attached a side-by-side comparison prepared by my staff that summarizes the key provisions of the principal civil rights bills introduced into this Congress, i.e., the Brooks/Kennedy bill, H.R. 1 (as introduced and as passed by the House), the Danforth three-part proposal, S. 1207, S. 1208 and S. 1209, and the Administration/Dole bill, S. 611. This chart may be very useful in the weeks ahead as the debate heats up in the Senate.

SG:cdh
Enclosures
Washington Post Article
Civil Rights Proposal Comparison Chart

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6/13 Post, p. 11 (Business Section)

TENETS OF THE CIVIL RIGHTS BILL

Legislation approved by the House is designed to overturn 1989 Supreme Court rulings on job discrimination. The bill:

- Amends the 1964 Civil Rights Act to allow victims of intentional job discrimination based on sex, religion and disability to collect compensatory and punitive damages for the first time.
- Makes it easier for victims of unintentional discrimination—those affected by employment practices that are neutral on their face but have a disproportionate impact on minorites—to win job discrimination lawsuits against employers.
- Expressly prohibits employers from establishing hiring or promotion quotas based on race, color, religion, sex or national origin.
- Forbids "race norming"—the adjustment of employment test scores based on race, color, sex, religion or national origin.

"I have watched quotas used against people for so long that I am leery of quotas."

— World Corp. Chief Executive Coleman Andrews

THE WASHINGTON POST

Civil Rights and Corporate Qualms

Executives Fear Huge Damage Awards as Result of Hiring Bill

By Cindy Skrzycki
Washington Post Staff Writer

For many American companies where affirmative action has been the norm for more than a decade, the pending civil rights legislation raises the specter of huge employment discrimination lawsuits with the odds tipped against the companies.

Corporations say they are worried about large damage awards by juries, particularly in cases involving their highly subjective decisions on pay and promotions.

Views on the legislation are hard to extract from American business executives. Because of the political explosiveness of the issue, many refused to comment or agreed to talk only if their names were not used. Those who did comment reflect extremes of opinion, particularly over the issue of hiring quotas, the most volatile flashpoint in the legislation.

The bill passed by the House last week reverses five recent Supreme Court decisions, making it tougher for employers to defend themselves in discrimination cases brought by employees. For the first time, victims of intentional job discrimination would be able to collect compensatory and punitive damages.

Hence, the prospect of costly litigation, opponents of the bill say, would lead companies to turn back the clock and use quotas to protect themselves from suits, even though the bill contains language outlawing quotas.

"You're supposed to make sure your numbers look right," said Pete Lunnie, head of the Fair Employment Coalition, a group of 250 companies that opposes the House legislation. "But if you use quotas, you'll be subject to reverse discrimination suits."

Yet there are a handful of progressive companies that view some form of quotas as an incentive to diversify their work forces more quickly.

"All this to-do over quotas is a lot of crap," one

See CIVIL RIGHTS, B16, Col. 1

Civil Rights Bill Has Executives Worried About Quotas

CIVIL RIGHTS, From B11

CEO of a Fortune 500 company said. "The only way it happens [women and minorities get hired] is if it's pushed, and it has to be pushed hard. The way things are accomplished in business is to set goals and reward those who reach them. You don't want to sacrifice quality or have reverse discrimination, but that doesn't have to be the case."

Coleman Andrews, chief executive of World Corp., a charter airline headquartered at Dulles International Airport, said he would worry about any legislation that might increase the use of quotas because they traditionally have been used to limit, not expand, the number of certain workers.

"I have watched quotas used against people for so long that I am leery of quotas," he said.

Small companies are especially opposed to the bill, saying they would be financially ruined if employees brought discrimination suits against them.

The bill is "a disgraceful, inside-the-beltway mountain of demagoguery," said William A. Stone, president of Louisville Plate Glass Co. in Louisville, Ky., which has 80 employees. "Nobody who has any brains gives a damn about race, color, creed or national origin because we are so desperate for good employees."

He said he supports an "alternate dispute resolution" system whereby employers and employees would settle differences out of court. "Any employer who doesn't stop sex harassment ought to be hung," he said. "But give the employer a break. Take the profit out" of damage suits.

C.J. Silas, chairman and chief executive of Phillips Petroleum Co. in Bartlesville, Okla., called the bill "a great lawyer employment act."

According to Silas and other business leaders, many American companies are already practicing the nondiscriminatory hiring policies that the civil rights legislation seeks to achieve.

"We do have affirmative action. We bring in all types of people. We are trying to balance our work force but on more of a voluntary basis," Silas said. "What we have has worked. If it's not broken, why do you want to fix it?"

Many companies, in hiring women and minorities, have been using programs that are little more than thinly disguised quotas or affirmative-action initiatives that achieve the numbers or balance they desire. Some companies set goals for hiring a mix of people for their work forces. Others have targets or programs that give bonuses to managers who are mindful of hiring women and minorities for their staffs.

"Most companies have accepted affirmative action," said Larry Lorber, an attorney who represented the Business Roundtable, a group of 200 of the nation's largest companies, in recent informal talks with civil rights groups involved with the legislation. "In some respects, they view it as a helpful management tool to keep them from getting sued."

Though every company says it hires the best person for the job, efforts to increase minorities and women on payrolls reflect several business realities, experts said: a shortage of skilled workers, the tendency of disgruntled employees to sue when they think they are victims of discrimination and the belief on the part of some companies that it's the right thing to do.

"It is self-interest besides being the socially right thing to do," said Thomas Abbott, a spokesman for Xerox Corp. in Stamford, Conn. "We need to fill jobs and we can't do it with all white males."

"For companies that have been scrupulous in observing the law, there should be little impact [of the bill]. You always run the risk of a frivolous suit, but those people generally don't win them," said Robbie Patterson, director of fair employment practices at US Sprint Communications Co.

For these companies, changes in the law probably would not significantly affect their hiring practices.

It is in the areas of promotion and firing where many companies most fear the impact of the legislation, executives and experts said.

According to the Equal Employment Opportunity Commission, the number of suits filed for all types of employment discrimination—race, creed, sex, color and age—has increased steadily from 222 suits in 1984 to 523 last year. Many of the suits now filed challenge a company's promotion policy or how it handles a downsizing, rather than discrimination in the initial hiring process.

The difficulty that women and minorities have had in reaching the top ranks in corporations is commonly referred to as the problem of the "glass ceiling"—the invisible barriers that seem to check their progress.

Examples of that lack of progress abound in corporations. At Campbell Soup Co. more than half of the company's mid-level managers are female, but the picture is different at the very top: Only two of the company's 33 corporate officers are women, one of whom is black. Almost half of American Telephone & Telegraph Co.'s work force is female, but only 3.9 percent of senior managers who are involved in major policy decisions are women, and 3.1 percent are minorities.

Increasingly, companies are addressing the challenge of moving women and minorities up the corporate ladder with a carrot-and-stick approach.

Xerox now looks at how well managers are doing in the hiring, training and promotion of minorities and women in performance appraisals, which determine raises. Tenneco Inc. is even more direct. Its executive incentive compensation program links a significant portion of an executive's bonus to reaching goals in promoting women and minorities.

For the handful of companies determined to break the glass ceiling or meet the special needs of minorities, the focus is on creating and managing what has come to be known as a "diverse" work force, one that includes minorities, women—and white males.

"Corporations are beginning to ask how do we get the desired results naturally, without quotas or unnatural efforts," said Roosevelt Thomas, president of the American Institute for Managing Diversity, a nonprofit affiliate of Morehouse College in Atlanta.

Beatrice Young, vice president at Harbridge House Inc., a consulting firm, put it another way: "Create an environment that makes it unnecessary to sue the employer. Those doing it effectively aren't afraid of legislation."

Redline copy

DRAFT - June 13, 1991
7:30 p.m.
[Date]

Dear Republican Colleague:

1. The 1964 Civil Rights Act, proposed changes to which are now the focus of a major national and Congressional debate, was advanced, vigorously and eloquently, by Senator Hubert Humphrey, and others, ~~as~~ designed to bring about a color-blind society. It now has been enforced and interpreted over a period of almost three decades by courts and administrative agencies.

The 1964 Civil Rights Act does not deal expressly with "unintentional discrimination" or with "disparate impact", concepts which are very much at the focus of the current debate. Those are concepts which have been developed by the courts as they have decided specific litigation based on specific fact situations.

2. In the case of Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849 (1971), the Supreme Court first dealt with those concepts in an organized fashion. In Griggs, the Duke Power Company required job applicants and employees to have completed high school or to have passed a general aptitude test to be eligible to be hired by or transferred to more desirable departments within the company. Prior to passage of the Civil Rights Act of 1964, the Duke Power Company had a history of overt employment discrimination. The Court said:

> "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the job for which it was used. . . . But Congress directed the thrust of the [Civil Rights Act] ~~of~~ the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

401 U.S. at 432, 91 S.Ct. at 853 (emphasis added).

Notably, Griggs dealt with one specific employment practice as it affected one specific employer, although the holding was couched in general language.

3. The Griggs test evolved over the years in a long series of lawsuits involving varying factual situations. ~~but~~ the Supreme Court became increasingly sensitive to the fact that "unintentional discrimination", while perhaps a useful concept, had the potential to create great abuse. In Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777 (1988), which extended the "disparate impact" analysis to subjective employment and evaluation practices such as interviews and evaluations for the first time, Justice O'Connor cautioned:

> "We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. * * * It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. * * * If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today."

108 S.Ct. at 2787-88.

4. A year later, in Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989), a majority of the Supreme Court came down with the next step on disparate impact, or unintentional discrimination. That decision triggered the current civil rights bill controversy. The Supreme Court said:

> "[In a] disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. * * * The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the

> same time though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster; this degree of scrutiny would be almost impossible for most employers to meet, and would result in a hose of evils we have identified above [e.g., quotas]."

109 S.Ct. at 2125-26.

I believe this decision to be totally consistent with Griggs, while critics assert that it overrules Griggs. The fundamental question, however, is whether or not Wards Cove articulates an appropriate balance in disparate impact cases. I submit that it clearly does so.

5. Immediately after that decision, however, Senator Kennedy, at the behest of the civil rights community, introduced a bill to overturn the Supreme Court's decision in Wards Cove. That bill would have allowed a "business necessity" defense only when the employer could establish that the challenge practice was:

"essential to effective job performance (emphasis added)."

If you will look back at the language used by the Supreme Court in the previous section, you will see that it was the obvious intent of Senator Kennedy's bill to force employers to impose quotas upon themselves, as it used precisely the language that the Supreme Court said would inevitably result in such quotas. That bill was a quota bill beyond a shadow of a doubt. The civil rights community has never wavered from that goal, and the more elaborate the statutory language they propose the more litigation their language will engender and the more likely the response of self imposed quotas by employers will be.

6. After extended debate ending late in the last Congress, the Congress passed and sent to the President a bill in which the Kennedy language had been somewhat modified, but which still overturned the Supreme Court's Wards Cove decision and which still, in the view of the President and most Republicans, would have forced employers to hire by quota. The President's veto was sustained by a margin of one vote in the Senate.

7. The President's characterization of that bill as a quota bill is accepted by a vast majority of Americans. As Senator Gramm pointed out at lunch on Tuesday, the issue is the single most driving issue he has found in years affecting potential voter behavior in 1992. Your constituents are vehemently and overwhelmingly opposed to such legislation. For its actual

impact on your business communities, note the Washington Post article of Thursday, a copy of which is attached.

8. H.R. 1, as introduced into the House in January, was substantially identical to the vetoed 1990 bill. While H.R. 1, as modified and passed by the House last week, is somewhat milder than its original version in some provisions outside of the ambit of the dispute over quotas, its Wards Cove language is quota language as clearly as was that of the 1990 bill, and is so regarded by the President and by a majority of the American people.

9. It is my firm opinion, regrettably, that the Danforth bill on the Wards Cove decision (the two other separate Danforth bills cover other subject matter areas) is not significantly different from, or less onerous than, H.R. 1 as passed the House. The White House agrees. The Danforth bill expressly overrules Wards Cove and is complicated enough to provide years ~~if~~ employment for legions of lawyers. It attempts, vainly I believe, to codify a rapidly evolving field of court-developed law and to freeze it into a statutory straight jacket. The Danforth bill is just as likely as is H.R. 1 to cause intelligent employers to impose quotas on themselves in order to avoid protracted litigation.

10. Having said all this, the fundamental question still is whether or not the Wards Cove decision was properly decided by the Supreme Court majority. I submit that it was.

As I have already pointed out, the basic 1964 Civil Rights Act says nothing about unintentional discrimination, disparate impact, or business necessity. ~~They~~ are all court constructs, each case dealing with a different fact situation, and they cannot effectively and fairly be codified. The Supreme Court should be ~~left with~~ the task ~~of developing~~ the law in ~~this field~~.

Moreover, if you understand the essence of Wards Cove, I think that you will agree that it states a perfectly fair and appropriate test. Perhaps the clinching argument for this proposition is the fact that, since the date of that decision, plaintiffs have not been losing significantly greater numbers of disparate impact cases than they were before the decision was rendered. The long series of bills seeking to overturn Wards Cove are a solution in search of a problem.

The Civil Rights Act of 1964 ain't broke; it doesn't need fixing. And it certainly doesn't need fixing in a fashion which adds unfairly to the burdens imposed on business people, adds a layer of court and administrative supervision to every hiring decision, and contradicts the desires of the vast majority of our constituents.

Sincerely,

SLADE GORTON
United States Senator

Enclosures
Washington Post Article

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 13, 1991

Dear Colleague:

I sincerely commend Senator Danforth on his recent efforts to try and develop legislation that satisfies the concerns of all parties involved in the civil rights debate. Clearly, the bill that passed the House of Representatives last week satisfied none of the concerns that have been raised with regard to this legislation.

I have concerns and questions, however, about the details of the legislation with which Senator Danforth has decided to move forward. These concerns have been conveyed by a separate letter to Senator Danforth. Moreover, I do not feel that many persons have given the President's bill sufficient attention.

The President's bill is a strong bill. It represents a compromise between the status quo under Wards Cove, by shifting the burden of persuasion to the employer, and the Democrat's bill. The President's bill, in my view, ought to form the basis for resolving this matter in a way which adequately responds to recent Supreme Court decisions, but will not lead employers to hire by the numbers to avoid litigation.

I admit, therefore, to reservations over efforts that are aimed at achieving a "middle ground" between the Democratic bill, which I believe will inevitably result in unfair preferences, and the President's bill. This is a road some of us have been down before. With the second anniversary of the Wards Cove decision upon us, I have yet to hear how cases that ought to have been won have been lost in court because of that decision. I urge interested senators to discuss with the Attorney General how cases have played out under Wards Cove.

The debate over civil rights does not resonate in this country because persons do not believe in equal opportunity. It resonates because people out there, many based on firsthand experience, believe that unfair preferences and reverse discrimination are already too much a part of the workplace. The divisiveness of this matter is not a result of Washington political rhetoric. It is a reaction to what has been happening in the workplace. Indeed, according to a Washington Post story (attached hereto), even a survey taken by the Leadership Conference on Civil Rights reflects this.

This letter might be a useful starting point to briefly outline some of the questions and concerns I have with Senator Danforth's proposal. I address here only one of his bills i.e. on Wards Cove (S.1208), but also have some concerns about the other bills.

Let me mention at the outset that the disparate impact standard itself is a very powerful tool for plaintiffs. Relying as it does on workforce statistics as its underlying premise, and requiring no intention to discriminate, the theory itself, in any form, creates significant pressure for employers quietly to make sure their numbers are right to avoid these kinds of lawsuits.

That is why carefully keeping this theory within reasonable bounds is important. What we are trying to avoid is even more pressure on employers to hire and promote by the numbers. This is the concern that led Justice O'Connor, in her 1988 plurality opinion in Watson v. Ft. Worth Bank & Trust Co., 108 S.Ct. 2777 (1988) (plurality opinion), to say that the plaintiff must identify the practice causing the disparity in a job, the burden of persuasion remains at all times with the plaintiff to show that discrimination occurred, and the definition of "business necessity" must reflect Griggs v. Duke Power Co.. She feared that in the absence of these safeguards, employers will quietly resort to hiring and promoting by numbers, whatever the euphemism used to mask it. These safeguards were especially important, she said, because in Watson the Court for the first time extended the disparate impact theory to subjective practices, like supervisor evaluations and interviews. As you know, after Justice Kennedy was confirmed, these same principles were adopted by a majority of the Court in Wards Cove.

With respect to the particulars of the bill, I have these comments. First, one of the most visible aspects of this controversy is the definition of "business necessity." Proponents of reversing Wards Cove have always said that all they want to do is to "restore" Griggs. They have never produced a definition, however, which does so. Neither, unfortunately, does the Danforth bill.

In Griggs, the Court defined business necessity as "manifest relationship to the employment in question." The Court's subsequent disparate impact cases clearly reflect this definition.[1]

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[1]Incidently, I have always believed that the Wards Cove formulation--"whether the challenged practice serves, in a significant way, the legitimate employment goals of the employer"--is consistent with Griggs. Indeed, the Court pretty much said so in 1979. New York Transit Authority v. Beazer. 440 U.S. 568, 587 n.31. (1979).

The Court has used this phrase in Albemarle Paper Co. v. Moody, 422 U.S. at 425 (1975); Dothard v. Rawlinson, 433 U.S. at 329 (1977); New York Transit Authority v. Beazer, 440 U.S. at 587 n.31 (1979); Connecticut v. Teal, 457 U.S. at 446 (1982) (a Justice Brennan opinion); and Watson v. Ft. Worth Bank & Trust, 108 S.Ct. 2777, 2790 (1988) (O'Connor plurality opinion for four Justices). Even Justice Stevens' dissent in Wards Cove, joined by Justices Brennan, Marshall, and Blackmun, cites the "manifest relationship" language at least three times as the applicable disparate impact standard. 109 S.Ct. at 2129, 2130 n.14.

The most obvious problem with the Danforth bill's deviation from Griggs is its new standard requiring that employment practices "bear a manifest relationship to the requirements for effective job performance." The phrase "effective job performance" or like phrases have consistently caused the concern that employers will only be able to hire marginally qualified applicants. At a minimum, since this is a new and different standard that has not appeared in any Supreme Court disparate impact case including Griggs, it will engender years of costly litigation to thrash out its meaning.

As many industrial psychologists have advised me, terms like "effective job performance" suggests job performance is dichotomous rather than continuous. Job performance simply cannot be separated into "effective" (or "successful") versus "ineffective" (or "unsuccessful"). Job performance is better viewed along a continuum, such as ineffective, minimally effective, fully effective, excellent, and outstanding. So long as requirements yield a minimally effective employee under S.1208, those standards cannot be raised if to do so results in a disparate impact on a group.

I do not believe that the bill's language--"nothing in Title VII or this Act shall be construed to prevent an employer from hiring the most effective individual for a job"--resolves this concern in any way. The problem with this language and all other versions of the bill to date, other than the President's and Al Simpson's, is not that employers will literally be "prevented" from doing anything. The problem is that the potential for litigation and liability costs for not satisfying the bill's disparate impact rules will make quiet hiring and promoting by the numbers the only safe recourse to avoid a lawsuit. These rules create the problem.

Moreover, Senator Danforth's definition of "requirements for effective job performance," compounds the problem. By saying one need only perform the job "competently," it reinforces the notion that once minimally satisfactory job performance is obtained, raising standards is illegal if doing so causes a disparate impact. Defining "effective" in this way, renders the concept of relative qualifications a practical nullity. A plaintiff will

easily be able to tell a hapless employer trying to hire or promote the best qualified person that under the bill's definition of effective job performance, there is no way to say one of two applicants is more "effective" than the other if both are competent. This language, inadvertently, denies the employer that flexibility.

Plus, why put into a statute, as Senator Danforth's bill does, that the person must be judged on the "actual work activities lawfully required by the employer?" Who determines what are part of the actual work activities of a job--a bureaucrat at EEOC? A federal judge? I thought employers get to determine what the job is--it is the practices they use to hire and promote for a job that are properly subject to a disparate impact analysis, not the content of the job. Moreover, the content of many jobs is fluid, reflecting the day-to-day realities of the workplace. The same questions apply to the term "competent," which will now be construed by bureaucrats and judges as well. I just don't think the workplace is so mechanical and rigid a place as to be susceptible to legislative categorizations such as these. The bill's further use of the phrase "important to the performance of the job" is subject to the same concerns.

Indeed, this is an entirely new legislative superstructure imposed on employers. All of these new terms and phrases are fraught with importance and will affect employers in the conduct of their business. The unavoidable consequence will be years of litigation to thrash all of this out. Employers have spent 20 years adjusting to Griggs. Instead of employers being able to focus on removing barriers to upper level jobs--the "glass ceiling"--this bill will force them to divert their attention back to entry and mid-level hiring and promotion issues many of them thought they had worked out in the last two decades.

Another concern, of course, is that this bill applies the "effective job performance" requirement to all selection practices. Many selection practices, however, such as layoffs and transfers due to a plant relocation or closure cannot possibly meet an "effective job performance" test. These selection decisions may be made for very legitimate non-performance related reasons. As we all recognize, if these decisions are made for discriminatory reasons, they will be pursued as cases of intentional discrimination.

It is becoming almost bizarre that, if we all say we want to restore Griggs, we just don't do that and avoid these problems.

Second, on the "particularity" issue, I think I understand what Senator Danforth is are trying to achieve. The bill's language, however, does not achieve the appropriate result.

The provisions of the Danforth bill bear little resemblance, to my knowledge, to what any court, before or after Wards Cove, has required. Why do we need language in this regard? Where are the post-Wards Cove cases that have reached a result in this regard with which we disagree? Codifying detailed, technical and confusing requirements will only lead to costly litigation with no real equal opportunity interests being served.

The Danforth language also still allows a blanket complaint against an employer's entire set of practices. It does not require that an individual practice cause a disparity. Indeed, by merely requiring identification of practices that are "responsible in whole or in significant part for the disparate impact," it allows a plaintiff to challenge all of an employer's practices. This type of challenge will occur since all such practices are, as a group, responsible for the disparity.

Even assuming that a complaint might be narrowed down after a case is well underway, which I doubt will occur under the bill's language, the key point remains: no employer wants to run the risk that it will have to defend all of its practices, let alone defend each of them under a new business necessity definition. How will they avoid the problem? By quietly hiring and promoting by the numbers, to avoid disparate impact in the first place and the lawsuit that will follow.

This language also opens the door to the resurrection of the discredited comparable worth theory of pay discrimination, i.e., that employees in primarily female (or minority) jobs are paid less than employees in different but allegedly comparable male (or non-minority) jobs. As you know, employers rely on a range of factors in setting pay, including marketplace factors and the like. There is no way anyone can narrow down the particular practices resulting in the setting of pay. Justice Kennedy, while still on the Court of Appeals for the Ninth Circuit, wrote an excellent opinion explaining why the disparate impact theory is inappropriate for challenges to paysetting practices precisely because of the need to identify the particular practice causing the disparity. AFSCME v. State of Washington, 770 F.2d 1481 (9th Cir. 1985).

I also tried to resolve this problem last year in an effort to reach a compromise. The language then, similar to the Danforth bill now, did not reflect my preferred approach. Simply stating that particular cases are not overruled will not preclude the use of the comparable worth theory, under this bill, in the future.

Third, under this bill, even if an employer can justify its practices under the very difficult test of "business necessity," he or she is still liable if a plaintiff can demonstrate that there is an alternative practice that would serve the employer as

well but have less disparate impact. I understand that this provision may have been included under the view that it reflects what the law has always been. It does not. Rather, the Supreme Court has held only that such a showing would be evidence that the practice was being used as a pretext for discrimination, not dispositive of the question whether the employer committed discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

I think this has serious implications. An employer, to be protected from liability, would have to search the universe before implementing each and every one of its employment practices, even if such practices readily satisfy the business necessity standard, to try to find those that meet his needs with the least disparate impact. But even that is not enough, because there is no way that an employer can predict beforehand whether one particular practice versus another will have a disparate impact on any particular group. This provision, by itself, therefore, might lead an employer to hire or promote only by the numbers. That may be the only one way to avoid potential liability with any certainty.

Three other quick points. This bill has language saying the bill does not "require or encourage an employer to adopt hiring or promotion quotas." I have never argued that any bill requires such a result, only that the rewriting of the Supreme Court's disparate impact rules will induce employers quietly to hire by the numbers, whatever the euphemism used to mask it, to avoid these lawsuits. And saying the bill does not "encourage" this result is of no practical effect in light of its new disparate impact rules. Hortatory language does not help when the operative language of this bill leads in the direction of hiring and promoting by the numbers.

The language that "the mere existence of a statistical imbalance in the workforce of an employer on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation," solves none of our concerns. First, the issue is not the composition of the employer's workforce as a whole, but of a particular job. Second, which statistical imbalance is being referred to--the general population, the relevant labor market for the occupation in question, or the applicant pool? If it is the first comparison, it does not address the concerns we have raised about misuse of statistical comparisons. But, third, in any event, no plaintiff will allege that the disparate impact alone, whatever comparison is used, is illegal. The plaintiff will assert the disparity is caused by some or all of the employer's practices and that is what is illegal. This language gives no succor.

Finally, I applaud Senator Danforth's response to the pernicious practice of race-norming. But, if an employer is guilty of discrimination, why should an innocent job applicant have his or her test scores jimmied because of his or her race or ethnicity? Under this bill, if an employer unintentionally discriminates, innocent employees can have their test scores altered on these grounds. That is no more "fair" because it is embodied in a court order than if undertaken voluntarily by employers. If an employer has discriminated, then give the discriminatees back pay, the next available job that they have been wrongly denied, retroactive seniority, and, of course, end the use of the discriminatory practices--but don't juggle an innocent, future applicant's test scores because of race. What did he or she do to deserve such unfair treatment? If a particular test causes a disparate impact and cannot be defended under the Griggs business necessity standard, then the test itself fails. No readjustment of the scores would be needed in this circumstance.

I sincerely regret that I firmly believe that Senator Danforth's Wards Cove bill will have the same inevitable consequences as H.R. 1, albeit by using some different language. Perhaps the best solution, suggested by his splitting these issues into three bills, is to get behind the overturn of Lorance on seniority systems and Patterson on Section 1981 and challenge the Democrats to pass that bill. There is where we have had unanimity since day one.

Sincerely,

Orrin G. Hatch
United States Senator

Attachment

THE WASHINGTON POST

Rights Drive Said to Lose Underpinnings

Focus Groups Indicate Middle Class Sees Movement as Too Narrow

3/9/91

By Thomas B. Edsall
Washington Post Staff Writer

Key civil rights leaders are struggling to develop strategies to counter findings of a private voter study they commissioned that shows the civil rights movement has lost the moral high ground with key segments of the white electorate.

The study, according to one of its authors, Celinda Lake, found that "the civil rights organizations and proponents of civil rights were no longer seen as . . . addressing generalized discrimination, valuing work and being for opportunity. The proponents weren't seen as speaking from those values."

The study, commissioned by the Leadership Conference on Civil Rights, a coalition of labor, civil rights, women's and liberal organizations, found strong support for such basic principles as equal opportunity, promotion for merit and hard work, and for fairness in the workplace. But the study also found that many white voters believe civil rights advocates are pressing for special, preferential benefits instead of such goals as equal opportunity.

The conference, which declined to release the written reports or the poll data, is seeking to develop a strategy to win approval of the Civil Rights Act of 1991. The organization is particularly concerned because racial issues contributed to President Bush's victory in 1988, and the issue of "quotas" helped produce Republican victories in the 1990 California gubernatorial contest and the North Carolina Senate race.

Bush vetoed last year's civil rights bill because he said it would result in quotas, and congressional Democrats were unable to overturn it. The administration is ready to make a similar argument this year, and Democrats are looking for a way to defuse what has become a politically persuasive issue.

Ralph Neas, executive director of the conference, said, "We want to particularly stress that the bill is an inclusive bill, that it is a bill for racial minorities, it is a bill for women, it is a bill for persons with disabilities, it is a bill for all working Americans."

This strategy, according to the study, faces some hurdles. There is a strong receptivity to Bush's argument that the civil rights legislation will result in quotas.

"Voters believe that business will implement this bill as quotas," Lake said. "Whenever legislation or policy distinguishes among groups [blacks, white, Hispanics, men, women], business, just to get it done, will implement quotas." These findings are especially damaging to efforts to counter the Bush administration's portrayal of pending civil rights legislation as promoting quotas. "There is no resistance to the Bush notion about quotas," one source said.

Another damaging finding of the study was that advocates of civil rights "have lost the advantage," Lake said. "It's a tremendous loss in terms of moving an agenda forward." She based her comments on the study for the leadership conference and on work her firm, Greenberg-Lake, has done in the past decade.

Lake said the problem facing civil rights proponents is that such advocacy is now seen as pressing the "narrow" concerns of "particularized" groups, rather than promoting a broad, inclusive policy of opposing all forms of discrimination.

The study found that many white voters believe there is pervasive reverse discrimination in the workplace and that civil rights leaders are more interested in special preferences than in equal opportunity, according to persons involved in the research.

The study, which included a national poll and focus groups held in white working-class and southern communities, did not find intensified racism or opposition to fundamental principles of equality. Instead, it showed strong support for basic egalitarian principles, including equality of opportunity and the obligation of employers to give everyone a fair chance.

In addition, the study found strong opposition to discriminatory practices based on race, gender, age or disability, according to Lake and Geoff Garin of Garin-Hart Strategic Research, another Democratic polling firm.

Garin would not make as strong a judgment of the difficulties facing the civil rights movement, but, he said, "at some point the civil rights community needs to restate its claim to the idea of a level playing field, and that means in part being more forthcoming in saying that reverse discrimination is unacceptable."

Neas contended that the most troublesome conclusions voiced by Lake were not based on the poll data, but on the focus groups, for which voters averse to civil rights had been purposefully selected, and on the basis of other work by the Greenberg-Lake firm, which has specialized in studying working and lower-middle-class white voters the past decade.

Lake said the critical views of the civil rights movement are held most strongly by key swing votes in the electorate—"blue-collar voters, economically marginal younger voters, ticket-splitting, swing white Southern voters"—who in any election are critical to the strategies of both parties to "add up enough voters to get to 51 percent."

"It is a broad-based problem," she added, with similar, if less intense, views held by many other white voters.

Among some of the other findings from the voter study, according to on-the-record interviews and background information provided by those familiar with it:

- Many white voters see the work force as a hierarchy, in which many hiring and promotion decisions are based as much, if not more, on race and gender as on merit and performance.

Civil rights laws are seen by a substantial number of voters as creating unfair advantages, setting up "rank orders of privilege in the labor market," one source said.

- Public support of egalitarian principle is closely tied to a strong belief that a primary responsibility of elected officials is to support the mainstream goals and values of the middle class.

Voters want politicians who represent them to "address the middle class, those who work hard and pay all the taxes," Lake said.

Civil Rights Proposals
Provision Summaries

Prepared by Curtis D.W. Hom
Legislative Assistant and Counsel to
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Updated: June 10, 1991

Civil Rights Proposal
Provision Summaries

I(A) DISPARATE IMPACT PROVISIONS (Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989)) -- Causation and Specificity.

"[W]e note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employers's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."

H.R. 1, as introduced.	H.R. 1; as passed the House.	Danforth, S. 1208.	Administration/Dole, S. 611
Plaintiff required to identify which practices contributed to disparate impact, but only if court finds plaintiff is able to do so.	Plaintiff required to identify which practices contributed to disparate impact unless court determines plaintiff, after discovery, is unable to do so.	Plaintiff required to identify particular employment practices that result in a significant disparate impact. Note: The 1990 Committee Report defined "significant" disparate impact as "anything more than trivial." **In short, a mere laundry list of all employment practices, without proving the causal link, arguably would satisfy the specificity requirement.**	Plaintiff required to identify employment practices, and prove the causal link to disparate impact.

I(B) DISPARATE IMPACT PROVISIONS (Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989)) -- Burden of Proof (Production and Persuasion)

Once the plaintiff establishes a prima facie case, then "the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate impact plaintiff. . . . This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts, see Fed. Rule Evid. 301, and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration."

H.R. 1, As Introduced.	H.R. 1, as passed by the House.	Danforth, S. 1208.	Administration/Dole, S. 611:
After plaintiff establishes prima facie case, then employer must prove business necessity.	After plaintiff establishes prima facie case, then employer must prove business necessity.	After plaintiff establishes prima facie case, then employer must prove business necessity.	After plaintiff establishes prima facie case, if the employer produces evidence of a legitimate business justification, then plaintiff must persuade the court that there was disparate impact, and which particular practices caused the disparate impact.

I(C) DISPARATE IMPACT PROVISIONS (Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989)) -- Business Justification

In Wards Cove, the Court noted that "[In a] disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. [citations]. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster; this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above. [e.g., quotas]."

In Griggs v. Duke Power, the Supreme Court noted that "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the job for which it was used." 401 U.S. 424, 432, 91 S.Ct. 849, 853. [. . .] "But Congress directed the thrust of the Act of the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

In New York Transit v. Beazer, the Court noted in a footnote that "Finally, the District Court noted that those goals are significantly served by -- even if they do not require -- [the Transit Authority's] rule as it applied to all methadone users including those who are seeking employment in non-safety-sensitive positions. . . . The record thus demonstrated that TA's rule bears a "manifest relationship to the employment in question."

(Note: the first quote in Griggs was cited in the White dissent in New York Transit v. Beazer, 440 U.S. 568, 602.).

Note that the first quote in Griggs seems far too precise to articulate a general rule; it seems more like an application of a principle to a given fact pattern (hiring tests), than the formulation of a general rule. The second quote seems more broadly written, more like a governing principle.

H.R. 1, as introduced.	H.R. 1, as passed in the House.	Danforth, S. 1208.	Administration/Dole, S. 611.
The term 'required by business necessity' means (A) in the case of employment practices involving selection, . . . the practice or group of practices must bear a significant relationship to successful performance of the job; or (B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.	The term 'required by business necessity' means the practice or group of practices must bear a significant and manifest relationship to the requirements for effective job performance. . . . The term 'requirements for effective job performance' may include, in addition to effective performance of the actual work activities, factors which bear on such performance, such as attendance, punctuality, and no engaging in misconduct or insubordination, i.e., all negative factors.	The term 'required by business necessity' means (1) in the case of employment practices involving selection, . . . the practice or group of practices bears a manifest relationship to requirements for effective job performance; or (2) (if not involving selection), the practice . . . bears a manifest relationship to a legitimate business objective of the employer. The definition for 'requirements for effective job performance' also focuses on actual work activities.	The term 'justified by business necessity' means that the challenged practice has a manifest relationship to the employment in question or that the respondent's legitimate employment goals are significantly served by, even if they do not require the challenged practice.
Parallels, but is not identical to, the first definition of business necessity in Griggs.	**Merges parts of both definitions of business necessity in Griggs, and comes up with a new test.**	**Merges parts of both definitions of business necessity in Griggs, and comes up with a new test.**	**Parallels the second definition of business necessity in Griggs, as interpreted by fn. 31 in Beazer.**
Note: no definition of what constitutes "selection."		**Note: no definition of what constitutes "selection").**	

I(D) DISPARATE IMPACT PROVISIONS (Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989)) -- Alternative Practices

In Wards Cove, the Court clarified that: "[Even if plaintiffs] cannot persuade the trier of fact on the question of [employers'] business necessity defense, [plaintiffs] may still be able to prevail. To do so, [plaintiffs] will have to persuade the factfinder that 'other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate (hiring) interest(s);' by so demonstrating, [plaintiffs] would prove that '(employers were) using (their) tests merely as a "pretext" for discrimination.' [citation]. . . . If [plaintiffs], having established a prima facie case, come forward with alternatives to [employers'] hiring practices that reduce the racially-disparate impact of practices currently being used, and [employers] refuse to adopt these alternatives, such a refusal would belie a claim by [employers] that their incumbent practices are being employed for non-discriminatory reasons."

This appears intended to set out an evidentiary standard that the existence of less burdensome alternatives (and refusal by the employer to adopt them) would undercut the "good faith" requirement implicitly a part of the business necessity defense.

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth, S. 1208.	Administration S. 611.
Makes the existence of less burdensome alternatives sufficient for the plaintiff to win a disparate impact case, despite business necessity.	Makes the existence of less burdensome alternatives sufficient for the plaintiff to win a disparate impact case, despite business necessity.	Makes the existence of less burdensome alternatives sufficient for the plaintiff to win a disparate impact case, despite business necessity.	Makes the existence of less burdensome alternatives sufficient for the plaintiff to win a disparate impact case, despite business necessity, but only if employer refuses to adopt them.

II. MIXED MOTIVE PROVISIONS (Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989) (Brennen, Marshall, Blackmun, Stevens)).

Price Waterhouse clarified that if plaintiff establishes (both burden of persuasion and proof) that impermissible consideration was a motivating factor in an employment decision, then employer must prove that the same decision would have been made absent that consideration.

Focussing on the interpretation of whether an employment decision was made "because of" the individual's sex, 42 U.S.C. 2000e-2(a)(1), (2), the Court added that: "The critical inquiry . . . is whether gender was a factor in the employment decision at the moment it was made. Moreover, since we know that the words 'because of' do not mean 'solely because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. . . ." 109 S.Ct. at 1785 (emphasis in original).

"It is difficult for us to imagine that, in the simple words, 'because of,' Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based consideration in coming to its decisions."

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth, S. 1208.	Administration/Dole, S. 611.
The plaintiff must prove that an impermissible consideration was a "contributing" factor in the employment practice. Cause of action fails if employer would have taken the same action in the absence of discriminatory employment practice.	The plaintiff must prove that an impermissible consideration was a "motivating" factor in the employment practice. Cause of action fails if employer would have taken the same action in the absence of discriminatory employment practice	The plaintiff must prove that an impermissible consideration was a "motivating" factor in the employment practice. Cause of action does not fail if employer would have taken the same action in the absence of discriminatory employment practice. Declaratory and injunctive relief, as well as costs and attorney's fees, may be awarded, but damages or reinstatement may not.	Does not address.

III. FINALITY OF JUDGMENTS OR ORDERS (Martin v. Wilks, 109 S.Ct. 2180 (1989), Hansberry v. Lee, 311 U.S. 32 (1940)).

In Martin v. Wilks, white fire fighters claimed that the City of Birmingham had discriminated against them by refusing to promote them because of their race. The City argued that their claim was barred because the City's promotion process had been sanctioned in a consent decree between the City and black firefighters, of which consent decree the white firefighters had been aware but were parties. The Court held that the consent decree did not bind the white firefighters because they were not made party to the decree, and they were not within a certified class of defendants whose interests were adequately represented by a named defendant.

Binds only parties and non-parties of a certified class whose interest were adequately represented by a named party.

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth, S. 1209.	Administration/Dole. S. 611.
Binds parties and non-parties alike, limited only by due process requirements.	Binds parties and non-parties alike, limited only by due process requirements.	Binds parties, as well as certain non-parties, depending on whether the order or decree was rendered before or after the effective date of the amendments, e.g., persons whose interests were adequately represented by a party to the case/degree (even though there was no certified class).	Reaffirms Martin v. Wilks. Binds parties and non-parties of a certified class whose interests are adequately represented by a named party to the case/decree.

IV. MAKING AND PERFORMANCE OF CONTRACTS (Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989)).

In Patterson, the Court held that Section 1981 only applied to making or enforcing contracts, not their performance. Section 1981 does not provide a remedy for individuals who are subjected to discriminatory performance of their employment contracts (through racial harassment, for example). Thus, the only available recourse is through use of Title VII.

(Note: Section 1981 was a post-Civil War statute to ensure that the slaves had the right to "make and enforce" contracts to the same extent as did white citizens. It first was used as an anti-discrimination tool in the mid-1900's.)

Section 1981 applies only to making or enforcing contracts, not their performance. Only Blacks are within the scope of Section 1981.

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth, S. 1209.	Administration/Dole, S. 611.
Section 1981 modified to apply to the making, performance, modification and termination of contracts. Only Blacks are within the scope of Section 1981.	Section 1981 modified to apply to the making, performance, modification and termination of contracts. Only Blacks are within the scope of Section 1981.	Section 1981 modified to apply to the making, performance, modification and termination of contracts. Only Blacks are within the scope of Section 1981.	Section 1981 modified to apply to the making, performance, modification and termination of contracts. Only Blacks are within the scope of Section 1981.

V. SENIORITY SYSTEMS AS DISCRIMINATORY EMPLOYMENT PRACTICES (Lorance v. AT&T Technologies, Inc., 109 S.Ct. 2261 (1989))

In Lorance, female employees challenged a seniority system pursuant to Title VII, claiming that, although facially nondiscriminatory, it was adopted with an intent to discriminate against women. The Court held that the claim was barred by Title VII's requirement that a charge must be filed within 180 days (300 days if the matter can be referred to a state agency) after the alleged discrimination occurred.

Claims to challenge seniority systems as discriminatory must be filed within 180 days (300 days if the matter can be referred to a state agency) after an alleged discriminatory practice.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1209.	Administration/Dole, S. 611.
Establishes multiple points in time when an alleged unlawful employment practice occurs. Also provides that a seniority system can be challenged up to 2 years after the plaintiff has affected adversely by its provisions.	Establishes multiple points in time when an alleged unlawful employment practice occurs. Also provides that a seniority system can be challenged up to 540 days (1-1/2 years) after the plaintiff has affected adversely by its provisions.	Establishes multiple points in time when an alleged unlawful employment practice occurs. Does not extend time limits for filing claims.	Establishes multiple points in time when an alleged unlawful employment practice occurs. Does not extend time limits for filing claims.

VI. LIMITATIONS ON DAMAGES FOR INTENTIONAL DISCRIMINATION.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1207.	Administration/Dole, S. 611.
Allows for full compensatory and punitive damages, to be determined by a jury.	Allows for compensatory damages to be determined by a jury, and punitive damages capped for all employers at the greater of $150,000 or the sum of compensatory damages plus equitable monetary relief.	Authorizes compensatory damages (not including back pay) to be determined by a jury, and an "equitable penalty" if necessary to deter future discriminatory practices. There are similar caps for both types of award: $150,000 for companies of 100 or more employees; $50,000 for others. Costs are awarded if an equitable penalty is assessed. Also creates an "equal employment opportunity trust fund," funded by assessment of equitable penalties, and proceeds to be for civil rights enforcement programs and family violence protection programs.	Allows $150,000 of damages in excess of equitable monetary relief if the equities so require, damages (and liability if Constitutional) to be determined by the court.

VII. ADDITIONAL REMEDIES FOR HARASSMENT IN THE WORKPLACE -- Declaratory and Injunctive Relief.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth (S. 1207, S. 1208, S. 1209).	Administration/Dole, S. 611.
Not addressed.	Not addressed.	Not addressed.	Creates new Title VII cause of action for sexual harassment, including (i) sexual advances relating to hiring or promotion, and (ii) sexual advances that create an intimidating, hostile or offensive working environment. Requires the plaintiff to utilize within 90 days complaint procedures established by the employers before a cause of action will lie. Also provides for immediate injunctive relief and expedited hearing of the case.

VIII. OTHER PROVISIONS

1. Expert Fees. Not authorized under Title VII.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1209.	Administration/Dole, S. 611.
Authorizes expert witness fees and other litigation expenses without limitation. Prohibits the waiver of attorney's fees as a condition to a consent or settlement.	Authorizes expert witness fees and other litigation expenses without limitation, including Section 1981 claims. Prohibits the waiver of attorney's fees as a condition to a consent or settlement.	Authorizes expert witness fees and other litigation expenses without limitation.	Limits expert witness fees to $300 per day.

2. Alternative Means of Dispute Resolution.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1208.	Administration/Dole, S. 611.
Clarifies that amendments do not affect court-ordered remedies, affirmative action programs or conciliation agreements that are otherwise in accordance with the law. Also adds language that amendments do not require <u>or encourage</u> hiring or promotion quotas.	Clarifies that amendments do not limit employers from establishing job requirements, or require, permit or encourage quotas. "Quota" is very narrowly defined as a fixed number or percentage of persons which must be attained, or which cannot be exceeded, regardless of their qualifications. Also quietly codifies an unnamed string of Supreme Court cases regarding affirmative action by providing that the amendments shall be construed to approve the lawfulness of voluntary or court ordered affirmative action that is consistent with current Supreme Court cases.	Clarifies that amendments should not be construed to limit employers from establishing lawful job requirements, and also neither (i) requires or encourages hiring or promotion quotas, or (ii) prevents an employer from hiring the most effective individual for a job. Note: the bill <u>does not</u> state that employers should be discouraged from quotas!	Encourages alternative means of dispute resolution.

3. Employment Ability Tests (Race Norming).

Current statutory law (42 USC Sec. 2000e-2(h)) permits employers to use ability tests "provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1208.	Administration/Dole, S. 611.
Does not address.	Permits ability tests that predict on a nondiscriminatory basis "the ability of such test takers to perform the job with respect to which such test is used." Also prohibits employers from adjusting scores of ability tests. **Taken together, these provisions would outlaw all but job specific tests for which race norming would not be necessary. In short, the only tests that would be valid are the ones that already have race norming built in.**	Prohibits race norming, unless used to comply with court order.	Does not address.

4. Extraterritorial Application.

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth (S. 1207, S. 1208, S. 1209).	Administration/Dole, S. 611.
Does not address.	Covers U.S. workers employed abroad to the extent not inconsistent with local law.	Does not address.	Does not address.

5. Construction.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth (S. 1207, S. 1208, S. 1209).	Administration/Dole, S. 611.
Encourages broad construction.	Encourages broad construction.	See Alternative Means of Dispute Resolution, above.	Does not address.

6. Effective Dates.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth (S. 1207, S. 1208, S. 1209).	Administration/Dole, S. 611.
Retroactive application.	Retroactive application.	Not addressed in S. 1207 and S. 1208. Generally date of enactment in S. 1209, except for provisions relating to finality of judgments or orders.	Prospective application.
		Generally silent or prospective, except for provisions relating to finality of judgments or orders.	

CS

ID # 291834 CU

HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
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Date Correspondence Received (YY/MM/DD) 1 11

Name of Correspondent: Fred McClure

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Memo from Shawn Smeallie re Civil Rights deal with Danforth

ROUTE TO: | **ACTION** | **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuofc	ORIGINATOR	91/10/10		C	91/12/02 CS
Cuat10	Referral Note: A	91/10/10		C	91/12/02 CS
Cuat07	Referral Note: see comments I	91/10/10		C	91/10/10 CS
Cuplay	Referral Note: F	91/10/10		C	91/10/10
	Referral Note:	/ /			/ /
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
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Comments: Captioned matter undertaken by events CS
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5/81

THE WHITE HOUSE
WASHINGTON

DATE: 10/10/91

TO: Boyden

FROM: FRED MCCLURE
Assistant to the President for
Legislative Affairs
2nd Floor, West Wing, x2230

PLEASE:

- ☒ Read/FYI
- ☐ Handle
- ☐ Review with me
- ☐ Prepare response
- ☒ Comment and return

What do you think?
Continue on our present course -- the President's bill plus ADA 8 words?
Let me know.
Thanks.

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01. Memo	Case Number 291834CU From Shawn to Fred McClure RE: Civil Rights (1 pp.)	10/09/91	P-5	

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Re-review Case #:		**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P-3 Release would violate a Federal statute [(a)(3) of the PRA]
P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE

WASHINGTON

October 9, 1991

MEMORANDUM TO FRED MCCLURE

FROM: Shawn

SUBJECT: Civil Rights

This is perhaps our best opportunity to strike a civil rights deal with Danforth on favorable terms. Danforth, and many of his bill's cosponsors, currently have extremely low opinions of the civil rights groups, particularly Ralph Neas. Danforth's aide told me that those groups' performance during the Thomas nomination will weigh heavy on Danforth's civil rights strategy.

Because Democrats have vested too much credibility in Danforth on civil rights, he will have enough power to make appropriate changes on the floor, without the fear of being renounced. Remember, Democrats have not even introduced their own bill in the Senate. It is very likely that Southern Democrats will join Danforth, no matter what he does.

There are different ways to approach Danforth on this. We may want to work through either Dole, or preferably, Rudman. I know already that Danforth is sympathetic to improving the remedies section, and, at this point, may be receptive to a NEW and creative fix to the business necessity definition.

I know the timing is tough, but Mitchell still intends to bring up civil rights after the Thomas nomination. This is a great opportunity to pay back Ralph Neas and Co.

TP.

ID# 292015

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

HU010

INCOMING

DATE RECEIVED: DECEMBER 09, 1991

NAME OF CORRESPONDENT: THE HONORABLE ELIOT L. ENGEL

SUBJECT: REQUESTS THAT THE PRESIDENT CHANGE THE POLICY ON SENDING GREETINGS TO COUPLES FOR 50TH ANNIVERSARY RECOGNITION TO INCLUDE GAY AND LESBIAN COUPLES IN THIS POLICY

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
FREDERICK MCCLURE		ORG	91/12/09	Fm	A	91/12/11 DJ
REFERRAL NOTE: COGree						
	REFERRAL NOTE:	DJA	91/12/934		C	92/07/29 RL
	REFERRAL NOTE:		__/__/__			__/__/__
	REFERRAL NOTE:		__/__/__			__/__/__
	REFERRAL NOTE:		__/__/__			__/__/__

COMMENTS: REQUESTS THAT THE GREETINGS OFFICE SEND A CONGRATULATORY LETTER TO GEAN HARWOOD AND BRUHS NERO ACKNOWLEDGING THEIR 61ST ANNIVERSARY

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 1230 ____ ____

__ MAIL USER CODES: (A)_____ (B)_____ (C)_____

*ACTION CODES:	*DISPOSITION	*OUTGOING CORRESPONDENCE:
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS OF SIGNER
*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	* CODE = A
*D-DRAFT RESPONSE	*C-COMPLETED	*COMPLETED = DATE OF OUTGOING
*F-FURNISH FACT SHEET	*S-SUSPENDED	
*I-INFO COPY/NO ACT NEC		
*R-DIRECT REPLY W/COPY		
*S-FOR-SIGNATURE		
*X-INTERIM REPLY		

REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE (ROOM 75,OEOB) EXT-2590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

THE WHITE HOUSE
WASHINGTON

DATE: 1/28/92

TO: Memo to Records Mgt -

Per Phil Brady:

Do not respond.

Gary Andres in Leg. Aff. agreed.

But, please keep this on file - under Congressman's name.

SHIRLEY M. GREEN
Special Assistant to the President
for Presidential Messages
and Correspondence
Room 94-OEOB, 456-7610

THE WHITE HOUSE
WASHINGTON

DATE: 1/3/91 92 JAN 7 P5:06

TO: Phil Brady

The issue we hoped wouldn't resurface - has!

Based on your guidance, for your clearance —

Gary - 6620

SHIRLEY M. GREEN
Special Assistant to the President
for Presidential Messages
and Correspondence
Room 94-OEOB, 456-7610

Shirley -
Per our conversation.
Thanks
JS

Diane - Pls
do draft SMG
resp. along lines
we discussed - "rec.
traditional marriages"
but GB certainly
opposes all disc. -
for Phil Brady
clearance -
sg

THE WHITE HOUSE
WASHINGTON

DATE: 1/13/92

92 JAN 15 A10 : 30

FROM:

~~TO:~~ FRED MCCLURE

TO:

FROM: PHILLIP D. BRADY
Assistant to the President and
Staff Secretary

For your approval. Please call us with any comments. Thank you.

ok
JM 1/14

SMG
shall I do a
draft? OR would
you like to or
should we ~~[illegible]~~
just drop-six?
Lets discuss -
sg

Put in file pls

Dear Congressman Engel:

Your letter requesting a message from President Bush to Gean Harwood and Bruhs Nero has been forwarded to my office for response.

Because of the enormous number of requests for Presidential greetings for weddings, anniversaries, birthdays, and the like, guidelines have had to be established in order to be fair to all requestors. In addition, the volume of requests for all greetings increases each year, severely stretching our limited resources to be responsive. We must, therefore, maintain the long-established criteria for anniversaries as 50 years of traditional marriage. Incidently, you may also be interested to know that we are only able to fill as many requests for greetings as we do because these the cards are addressed by our 400 wonderful White House volunteers.

We hope you will appreciate the necessity of anniversary guidelines and understand that there is no prejudice involved in maintaining it -- any more than there is prejudice against persons celebrating their 75th birthdays (who do not receive a card) because our guidelines establish 80 years and older as qualifying for birthday greetings. Certainly, the President agrees with you that there is no place in our society for

violence or hatred against homosexuals, and he will continue to speak out against such bigotry when it occurs.

I am sure Mr. Harwood and Mr. Nero appreciate your efforts in their behalf. Please convey to them our best wishes.

Sincerely,

SMG

Diane

DRAFT

Dear Mr. Harwood:

As much as we would like to do so, we cannot respond to the many requests we receive for Presidential greetings. A criteria for answering such requests was set by the White House many years ago to reach the largest segment of our senior population. At that time couples celebrating fifty or more years of marriage in the traditional sense, were chosen to be honored.

Although times and attitudes have changed since the policy was established, we feel anniversaries of traditional marriages still represent the greatest majority of our citizens. To include the recognition of long relationships such as the one Misters Harwood and Nero have shared would be setting a precedent of policy changing that would be difficult to control.

We hope you will understand the necessity of this decision and realize there was no prejudice involved in its making. As you know the President is a great proponent of equal rights and opposes discrimination in any form.

We are sure Misters Harwood and Nero appreciate your thoughtful efforts in their behalf. Please convey to them our very best wishes for continued happiness.

SMG

December 11, 1991

Dear Congressman Engel:

Thank you for your recent letter requesting a message from President Bush for Gean Harwood and Bruhs Nero.

We appreciate being advised of your interest in this request. Please know that I have directed your letter to the appropriate White House officials for their review.

Thank you again for your interest in writing.

With best regards,

Sincerely,

Frederick D. McClure
Assistant to the President
for Legislative Affairs

The Honorable Eliot L. Engel
House of Representatives
Washington, D.C. 20515

FDM:TBA:

bcc: w/ copy of inc to Shirley Green - for Appropriate Action

. ENGEL
1 District, New York

COMMITTEES
FOREIGN AFFAIRS
SCIENCE, SPACE, AND TECHNOLOGY
SELECT COMMITTEE ON HUNGER

L 12 015

Congress of the United States
House of Representatives
Washington, DC 20515

WASHINGTON OFFICE
1213 Longworth House Office Building
Washington, DC 20515
(202) 225-2464

DISTRICT OFFICES
3250 Westchester Avenue
Bronx, NY 10461
(212) 823-7200

641 Yonkers Avenue
Yonkers, NY 10704
(914) 376-1600

177 Dreiser Loop, Room 3
Bronx, NY 10475
(212) 320-2314

November 26, 1991

The White House
Greetings Office
Room 39
OEOB
Washington, D.C. 20500

Dear Mr. President:

It has recently reached my attention that GLAAD, (the Gay and Lesbian Alliance Against Defamation, Inc.) has sent several letters to you, asking you to acknowledge the 61st anniversary of Gean Harwood and Bruhs Nero of New York City.

I am aware that your Greetings Office, upon request, sends all married couples an anniversary letter in recognition of 50 or more years of marriage. I am urging you to include gay and lesbian couples in this policy.

By recognizing long-term relationships of gays and lesbians in the same way heterosexual marriages are honored, you would be setting an important example for the American people. Currently, violence against homosexuals is dramatically on the rise throughout America. It is essential that the Presidency set the national tone, illustrating that any form of discrimination against homosexuals will not be tolerated.

I ask that you change your current policy and send a congratulatory letter to Mr. Harwood and Mr. Bruhs. Sixty-one years of love and commitment is a great achievement that deserves to be commended.

Sincerely,

Eliot L. Engel

Eliot L. Engel
Member of Congress

GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, INC.

8/6/91

Diane Moore
The White House
Greetings Office Room 39
Washington D.C. 20500

Dear Ms. Moore,

Please find enclosed a copy of a letter sent on May 31, 1991 to your office, requesting a Presidential anniversary letter to Gean Harwood and Bruhs Mero. Mr. Harwood and Mr. Mero did not receive any type of reply. We are well aware that Mr. Harwood and Mr. Mero are not considered a traditionally married couple but, as we're sure you are aware, they may not legally marry though they have loved and lived with each other for sixty-one years. Mr. Harwood and Mr. Mero have experienced discrimination many times over the years. A letter from President Bush would mean a great deal to these courageous men. We believe their relationship deserves a simple acknowledgement. Thank you for your consideration, and I look forward to your reply.

Sincerely,

Craig Harwood

Craig Harwood
Vice Chair
Visibility Action Committee
GLAAD/NY

CC Barbara Bush

GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, INC.

May 31, 1991

The White House
Greeting Office
Room 39
OEOB
Washington, D.C. 20500

Dear Mr. President:

On June 24, 1991 Gean Harwood and Bruhs Nero will celebrate their 61st anniversary as partners in a loving, monogomous relationship. Although their relationship is not considered a "marriage" in the traditional sense of the word, Gean and Bruhs have undergone the same pains and joys that other "marriages" have endured.

President Bush, I am sure that as a fair and conscientious man you will find the sensitivity to acknowledge this couple for their 61st anniversary as you have acknowledged other Americans who have been together for 50 years or more. A letter from you will mean a great deal to both Gean and Bruhs. Their mailing address is **205 3rd Avenue, New York, N.Y. 10003.**

If you have any questions please feel free to contact me. I look forward to receiving a favorable reply. Thank you

Sincerely,

Craig Harwood

Craig Harwood, Vice Chair
Visibility Committee/GLAAD

CH/teb

cc: Barbara Bush

TP

ID# 292015

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

HU 010

INCOMING

DATE RECEIVED: DECEMBER 09, 1991

NAME OF CORRESPONDENT: THE HONORABLE ELIOT L. ENGEL

SUBJECT: REQUESTS THAT THE PRESIDENT CHANGE THE POLICY ON SENDING GREETINGS TO COUPLES FOR 50TH ANNIVERSARY RECOGNITION TO INCLUDE GAY AND LESBIAN COUPLES IN THIS POLICY

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
FREDERICK MCCLURE		ORG	91/12/09	Fm	A	91/12/11 DJ
REFERRAL NOTE: FDJ COGree		A	91/12/24			
REFERRAL NOTE:						
REFERRAL NOTE:						
REFERRAL NOTE:						
REFERRAL NOTE:						

COMMENTS: REQUESTS THAT THE GREETINGS OFFICE SEND A CONGRATULATORY LETTER TO GEAN HARWOOD AND BRUHS NERO ACKNOWLEDGING THEIR 61ST ANNIVERSARY

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 1230 ____ ____

__ MAIL USER CODES: (A)_____ (B)_____ (C)_____

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*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	*CODE = A
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KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

December 11, 1991

Dear Congressman Engel:

Thank you for your recent letter requesting a message from President Bush for Gean Harwood and Bruhs Nero.

We appreciate being advised of your interest in this request. Please know that I have directed your letter to the appropriate White House officials for their review.

Thank you again for your interest in writing.

With best regards,

Sincerely,

Frederick D. McClure
Assistant to the President
for Legislative Affairs

The Honorable Eliot L. Engel
House of Representatives
Washington, D.C. 20515

FDM:TBA:

bcc: w/ copy of inc to Shirley Green - for Appropriate Action

ELIOT L. ENGEL
1 DISTRICT, NEW YORK
COMMITTEES
FOREIGN AFFAIRS
SCIENCE, SPACE, AND TECHNOLOGY
SELECT COMMITTEE ON HUNGER

Z 92015

Congress of the United States
House of Representatives
Washington, DC 20515

WASHINGTON OFFICE
1213 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-2464

DISTRICT OFFICES
3250 WESTCHESTER AVENUE
BRONX, NY 10461
(212) 823-7200

641 YONKERS AVENUE
YONKERS, NY 10704
(914) 376-1600

177 DREISER LOOP, ROOM 3
BRONX, NY 10475
(212) 320-2314

November 26, 1991

The White House
Greetings Office
Room 39
OEOB
Washington, D.C. 20500

Dear Mr. President:

It has recently reached my attention that GLAAD, (the Gay and Lesbian Alliance Against Defamation, Inc.) has sent several letters to you, asking you to acknowledge the 61st anniversary of Gean Harwood and Bruhs Nero of New York City.

I am aware that your Greetings Office, upon request, sends all married couples an anniversary letter in recognition of 50 or more years of marriage. I am urging you to include gay and lesbian couples in this policy.

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I ask that you change your current policy and send a congratulatory letter to Mr. Harwood and Mr. Bruhs. Sixty-one years of love and commitment is a great achievement that deserves to be commended.

Sincerely,

Eliot L. Engel

Eliot L. Engel
Member of Congress

ID # 292207 CU

CS

HU010 12-12-11

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 /

Name of Correspondent: Thomas E. Wood

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: California-based proposal to counteract reverse discrimination effects of the Civil Rights Act of 1991 through the State's initiative process

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOF	ORIGINATOR	91/12/09	WO	C	91/12/19 CS
	Referral Note:				CS
CUAT 10	A	91/12/10	NL	A	91/12/19
	Referral Note:	91/12/19 Letter to Wood from NL			
	_	/ /		_	/ /
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

THE WHITE HOUSE

WASHINGTON

December 19, 1991

Dear Mr. Wood:

On behalf of the Counsel to the President, thank you for your thoughtful letter of December 2.

Limitations on the jurisdiction of the office will prevent us from assisting you in the way you requested, but I wanted to acknowledge your letter and wish you well.

Thank you again for writing.

Yours truly,

Nelson Lund
Associate Counsel to the President

Mr. Thomas E. Wood
1717-A Addison Street
Berkeley, California 94703

29220Cy

THOMAS E. WOOD
1717-A ADDISON STREET
BERKELEY, CALIFORNIA 94703

415/548-4619

DEC 9 1991

December 2, 1991

C. Boyden Gray
White House Counsel
The White House
Washington DC 20500

Re: California-based proposal to counteract reverse discrimination effects of the Civil Rights Act of 1991 through the State's initiative process

Dear Mr. Gray:

I have been prompted to write to you by the attention you have recently received in the news media for your uncompromising stand against the reverse discrimination bias that has been written into the Civil Rights Act of 1991. I fully support your anti-reverse-discrimination position, and admire the energy and courage with which you have represented it.

Since you have been on the front lines on this issue in Washington for over two years now, and on the right side of it, you may be in a unique position to assist a project which is being designed here in California to fight reverse discrimination through the political process at the state level. This you could do by providing us with references to legal scholars or experts who might be willing to provide this project with some needed legal advice.

Glynn Custred and I, who are members of the California Association of Scholars, have had the idea (independently, as it turns out) of putting a proposition on the next state ballot that will prohibit all hiring, promotions and admissions policies in California that are made on the basis of an individual's race, color, religion, sex, or national origin. Our proposal would permit special *recruitment* programs for increasing the representation of qualified women and minorities in the employer's applicant pool (i.e., "spreading-the-net-widely" programs), but once the pool of qualified applicants has been obtained fairly in this way, no race- and/or gender-based preferential treatment of candidates would be allowed in the actual selection of candidates, for any reason.

The main thing that Glynn and I need at this point is to have a legal expert in the field of affirmative action and employment law write the proposition for us. With this in hand, we would then proceed to contact wealthy individuals who might be willing to finance the signature-raising campaign. (We know of at least one group of very wealthy individuals that would be an obvious target.) We have been told that we could hire any of a number of well-established businesses in the state that have turned signature-raising campaigns for initiatives into a well-honed art, and that the signature-raising campaign would cost anywhere

from $200K to $300K. Unless Glynn and I are very greatly mistaken, once the proposition gets on the ballot, the money and support will roll in, and the proposition will win by a landslide.

Provided that we have enough time to do so, we would also like to arrange to have the proposition placed on the ballot by a coalition of organizations, including (if possible) at least one Jewish, one conservative Hispanic-Chicano, one Asian-American, one anti-affirmative action African-American, and one non-feminist women's organization. We are also hoping that the California Association of Scholars will endorse the initiative, and that a non-affiliated group of scholars drawn from its membership can be formed to work actively on its behalf in the institutions of higher education in the state. To that end, we have begun to contact members of the CAS who live in the Bay Area about our proposal.

Any potential financial contributor to either the signature-raising campaign or the actual campaign itself would have to be satisfied that the proposition had been drawn up properly, and in a way that would not invite legal challenges. Here, I think, California state employment law would be largely a non-issue, since the proposition could easily be written to over-ride any existing California law or statute that might be in conflict with it. What would be trickier, perhaps, is to write the initiative in a strong enough way to accomplish our objectives, but without making the initiative vulnerable to legal challenges on the basis of *federal* law.

The main legal task, probably, would be to reduce the chances of conflict with the recently passed Civil Rights Act of 1991 (CRA91). This Act, at least as I read it, produces a very strong bias in favor of preferential employment practices by 1) placing the burden of proof on the employer to justify its employment policies if the plaintiff can show a disparate impact, while 2) making it permissible (!!) for an employer to reverse discriminate against members of "over-represented" groups in the population (i.e., high-achieving groups like Asian-Americans, Jews and white males generally) through blatantly preferential hiring and promotions programs. Presenting an employer with this kind of legal climate clearly creates a strong bias in favor of hiring, promotions and admissions policies that are based on an individual's race, color, religion, sex, or national origin—through fear of litigation, if nothing else.

Our proposal can best be viewed, I think, as an attempt to counteract the reverse discrimination bias that has been built into CRA91 by foreclosing preferential employment and admissions policies as one of the employer's *options*. From a purely legal point of view, it should be possible for a state initiative to do this, since, so far as I know, Congressional law and federal court decisions have only addressed the issue of whether preferential programs are *permissible*. No legislation or court decision, so far as I know, has ever declared it *mandatory* (at least for an employer who is not guilty of first-order, intentional discrimination) to use preferential employment practices. This is the window of opportunity that our proposal is intended to exploit: for if preferential programs are not mandatory, then

it should lie within the power of voters to prohibit the use of race- and sex-based preferences, at least in their own states.

It must be conceded, however, that our proposition would be entangled in CRA91 to the extent that, if our initiative passed, an employer in the state would then be subject to two different laws (i.e., state and federal) which, while not in actual conflict, would have rather different intents. Great care would have to be taken, therefore, to allay concerns that employers in the state might have that our proposition would place them in an intolerable position—i.e., that it would subject them to anti-preferential lawsuits by Innocent White Male and Innocent Asian-American victims on the basis of the California law on the one hand, and disparate impact suits on the basis of CRA91 on the other.

I am a philosopher by trade rather than a legal scholar, so I cannot see my way through all of these issues, but it seems to me that we ought to be able to find a wording for the initiative that avoids this problem, or at least reduces it to manageable proportions. One way in which we might accomplish this, I think, is by applying the "job related for the position in question and consistent with business necessity" clause in CRA91 with a vengeance, and *against* the advocates of reverse discrimination.

I for one have no objection to *this* particular feature of CRA91; what I do find pernicious about it is that it has been conjoined in CRA91 with the implied *permission to reverse discriminate*. It also seems to me that its probable baleful effects will arise from an employer's *uncertainties* about what will be allowed to count as "job-related and business necessity" criteria, rather than the requirement per se. If I am right about this, then one of the things that we would need to do in our initiative is to spell out with sufficient clarity what *our own* permissible job- and business necessity-related criteria are, so that it would be perfectly clear that an employer using those criteria would not be under any significant risk of legal action on the part of the advocates of reverse discrimination. In other words: put the burden of proof (at least in the state law) on the *reverse discrimination activists*, rather than the *employer*. whenever the employer is using the criteria that are spelled out in the initiative.

It seems to me that it should be possible to reach a viable legal definition for such criteria, for criteria with good predictive power are already in place and widely used (e.g., ability tests as used in Civil Service and industrial employment; SAT scores for college students; and the prevailing standards for faculty hiring and promotion like peer review, publications record, distinction of the institution awarding the Ph.D. etc. in institutions of higher education). It should be possible, therefore, at least in California, to establish that all such criteria are *presumptively* valid, for it seems scarcely conceivable that the Rehnquist court (or even a very different Supreme Court, for that matter) would declare that the burden of proof lies with the *employer* on this point. Of course, the proponents of reverse discrimination have not shrunk from questioning even these widely-recognized and well-established criteria, at least whenever it has suited their purpose to do so; but it seems to me

that it should be possible to exempt the *individual employer* from legal action connected with them. If so, then any challenges to such criteria would have to take the form of of legislative lobbying and legislative action (where, I think, the advocates of reverse discrimination would be very likely to lose).

In any case, I mention this legal (or legal-cum-economic) aspect of our proposal as only one example. The more general point is that all such possible problems and questions would have to be brain-stormed and anticipated in advance, and taken into account when our proposition is actually drafted. For this purpose, we need to have a very qualified and highly credible legal scholar or legal expert draw up the proposition for us. Since it is federal law, rather than California state law, that is the real issue, Glynn and I are hoping that you will be able to provide us with some references to a legal scholar in a university, a conservatively oriented public-interest law firm, or even a highly qualified individual attorney who might be interested in working on our project on a *pro bono* basis. With a credible proposition in hand, we could then set about contacting wealthy Californians who, we think, could easily be persuaded to fight reverse discrimination with their pocketbooks.

Since we are hoping to get our initiative on the next state ballot, time is now of the essence. If you have any ideas that might be of assistance to us in our project, please let us know at your earliest convenience.

Sincerely,

Thomas Wood

c: Glynn Custred

CS

ID # 293078 CU
R: 10/31

HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Evan Kemp

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Copy of letter to John Danforth from Evan Kemp re Title VII

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Exec	ORIGINATOR	91/10/31		C	91/12/06 CS
Cmt 10	Referral Note: A	91/11/01		B	91/12/06 CS
Cygay	Referral Note: I	91/11/01	ATTN: FYI—see comments	C	91/11/01 CS
	Referral Note:	/ /			/ /
	Referral Note:	/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing CS

Comments: No further action required per N. Lund 12-6-91

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

U.S. Equal Employment Opportunity Commission
Office of Communications and Legislative Affairs
1801 L Street, N.W., Room 9024
Washington, D.C. 20507

FAX TRANSMITTAL FORM

DATE: 10/30 TIME: 5:20

TO: C Boyden Gray

FAX TELEPHONE NUMBER: 456 6279

FROM: Evan J Kemp Jr

DOCUMENT: letter

NUMBER OF PAGES TRANSMITTED (INCLUDING COVER): 3

SPECIAL INSTRUCTIONS:

IF YOU DO NOT RECEIVE THE ENTIRE MESSAGE, PLEASE NOTIFY US
IMMEDIATELY AT: (202) 663-4900
OCLA FAX #: (202) 663-4912

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

OCT 30 1991

Office of
the Chairman

The Honorable John C. Danforth
United States Senate
249 Russell Senate Building
Washington, D.C. 20510

Dear Jack:

For the reasons explained below, an amendment is needed to the portion of Section 5 of S.1745 identified as §1977A(b)(3)(A). As you know, Section 5 provides that a Title VII complainant is entitled to compensatory and punitive damages against a respondent who intentionally engaged in an unlawful employment practice. The limitations on damages provision, subsection (b)(3), places a cap on the amount of punitive and speculative compensatory damages that can be awarded against respondents. That cap is based on Respondent's size with the smallest respondents, of course, being subject to the least damages. The group subject to the smallest ($50,000) cap is defined, in subsection (b)(3)(A), as respondents who have "16 - 100 employees." This definition appears to contain a technical error.

Title VII applies, to employers who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. While Title VII applies to employers who have exactly fifteen employees, the new Bill's limitations on damages provision does not apply to them. Thus, the bill appears to say that employers of exactly 15 employees are subject to unlimited damages.

Similarly, Title VII also applies to employment agencies and to labor organizations. Those entities are covered by Title VII without respect to their own size if, for example, they deal with Title VII covered employers. Thus, under the current bill, very small employment agencies and labor organizations, like employers of fifteen employees, appear to be subject to unlimited damages.

Accordingly, we recommend that subsection (A) be amended to provide that:

> in the case of a respondent who has 100 or fewer employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000.

Sincerely,

Evan J. Kemp, Jr.
Chairman

cc: The Honorable William P. Barr
The Honorable Robert J. Dole
The Honorable John R. Dunne
The Honorable C. Boyden Gray
The Honorable Nelson Lund
The Honorable George J. Mitchell
The Honorable John Sununu

CS

ID # 293857 CU

H4010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: NELSON LUND

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Civil Rights -- three one-pagers requested by Governor Sununu

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOFC	ORIGINATOR	91/05/27		C	91/05/27
	Referral Note:				
CUAT 10	A	91/05/27		C	91/05/27
	Referral Note:	5/27/91 NL Memo for Gray			
	_	/ /		_	/ /
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				

CS CS

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Code = "A"
Completion Date = Date of Outgoing

Comments: _____

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5/81

THE WHITE HOUSE

WASHINGTON

DRAFT

Why the Latest Democratic "Compromise" Version of H.R. 1 Is Still a Quota Bill

Situation	H.R. 1 "Compromise"	H.R. 1375 President's Bill
A 21 year old Hispanic woman applies to be a fire fighter. Because of a court approved quota system created when she was a child, the job goes to someone with a much lower score on the exam. She wants to challenge the quota scheme in court. Can she do it?	NO	YES
She goes to court and her case is thrown out. Other civil rights plaintiffs must pay their own lawyers, but not their opponents'. Is she treated the same?	NO. SHE MUST PAY ALL LAWYERS.	YES. SHE PAYS ONLY HER LAWYER.
A lawyer wants to hire law students as interns because she chooses new lawyers based on their performance as interns. Can she do this?	NO	YES
A black-owned business, located in a white suburb where there is prejudice against working for blacks, hires mostly by word-of-mouth in a nearby city. EEOC sues. Who must prove what caused the disparity?	EMPLOYER	EEOC
The American Cancer Society refuses to hire smokers. Can this meet the "business necessity" test?	NO	YES
A factory is located near a bus stop for a line that goes to a mainly white area but not to any black neighborhoods. The factory has six criteria for new hires: 1. High School Degree. 2. Must be 18. 3. No drug use. 4. A written test. 5. Interview. 6. References. At the end of the hiring process, the factory has "bad numbers."	COURT FINDS HIGH SCHOOL DEGREE NOT REQUIRED BY "BUSINESS NECESSITY." EMPLOYER GUILTY.	PLAINTIFF MUST IDENTIFY WHICH OF THE SIX PRACTICES, IF ANY, CAUSED "BAD NUMBERS."
The lawyer wants to hire only law students as interns, the black businessman wants the best workers he can find, the Cancer Society wants to avoid smokers, and the factory owner wants to keep its six criteria. But each is determined to avoid lawsuits. How?	**QUOTAS**	**HIRE ON MERIT**

THE WHITE HOUSE

WASHINGTON

DRAFT

WHY THE DEFINITION OF "BUSINESS NECESSITY" MATTERS

Situation	"New" H.R. 1 - "substantial and manifest relationship to requirements for effective job performance"	President's bill - "manifest relationship to the employment in question" (Griggs) or "legitimate employment goals are significantly served by, even if they do not require," the policy (Beazer)
A trucking company promotes from within. Dock workers (the pool for future drivers) are not allowed to have drunk driving convictions.	NO DEFENSE	DEFENSIBLE POLICY
A struggling company must close one of two plants. It closes the older one (80% female employees), not the newer one (50% females).	NO DEFENSE	DEFENSIBLE POLICY
The new president of a small college decides to require all new faculty members to have Ph.D's.	NO DEFENSE	DEFENSIBLE POLICY
To reduce insurance costs, a mining company refuses to hire smokers.	NO DEFENSE	DEFENSIBLE POLICY
At the mayor's request, a fast food chain rejects dropouts below age 18 for jobs during school hours.	NO DEFENSE	DEFENSIBLE POLICY
An employer routinely rejects any applicant if she finds out they lied on their application.	NO DEFENSE	DEFENSIBLE POLICY
None of these employers is biased against women or minorities. They want to keep their policies without being sued. How?	**USE QUOTAS**	**TREAT EVERYONE THE SAME**

THE WHITE HOUSE

WASHINGTON

DRAFT

THE PRESIDENT'S CIVIL RIGHTS BILL

- The President's bill -- H.R. 1375 -- includes all the worthwhile measures supported by a bipartisan consensus:
  - Overturns the Patterson and Lorance decisions.
  - Overturns the Wards Cove decision by shifting the burden of proof to the employer in defending "business necessity."
  - Creates new monetary remedies under Title VII with meaningful caps.
  - Authorizes expert witness fees in civil rights cases.
  - Extends the statute of limitations and authorizes the award of interest against the U.S. Government.
- The President's bill will avoid creating new pressures on employers to engage in "race norming."
- Only the President's bill uses the exact language from the holding in Griggs in defining "business necessity" -- "manifest relationship to the employment in question."
- Only the President's bill includes the exact "business necessity" language from the 1979 Beazer opinion, which was accepted in the Wards Cove dissent (written by the author of Beazer).
- Any deviation from the exact language of the Supreme Court's pre-Wards Cove holdings will inevitably raise the risks for employers who do not have the "right" numbers. Years of litigation will be needed to sort out the meaning of the new definition, and employers who cannot endure that litigation will have to use quotas.
- Only the President's bill will permit the President's educational reform initiative to go forward unimpeded (see attached op-ed by Dr. Chester Finn).
- Only the President's bill preserves the right of victims of illegal quotas to have their day in court and be treated like other civil rights plaintiffs.
- Only the President's bill will avoid a new litigation explosion and new attorneys fees -- a lawyers' bonanza.

THE WHITE HOUSE

WASHINGTON

May 27, 1991

MEMORANDUM FOR C. BOYDEN GRAY

FROM: NELSON LUND

SUBJECT: Civil Rights

Attached, as we discussed, are drafts of the three one-pagers Gov. Sununu asked for at last week's meeting.

Attachment

Education Reform vs. Civil Rights Agendas

By Chester E. Finn Jr.

Tough tests will aid minority students.

WASHINGTON

The Achilles' heel of education renewal is the lack of real-world incentives for young Americans to excel in school. Creating such incentives without triggering charges of discrimination is harder still.

Sure, it's important to get a diploma. But among those who complete high school, it matters little which courses they take, how hard they study or what grades they earn.

The reason, said the Commission on the Skills of the American Workforce in its 1990 report, is that employers have come to see the diploma as more a clue to character than to learning. "They realized long ago," the commission tartly notes, "that it is possible to graduate from high school in this country and still be functionally illiterate."

An ever growing proportion of high school graduates now heads for college rather than the workplace. But not more than 50 U.S. campuses reject more applicants than they admit. Most of our 3,400 degree-offering institutions welcome anyone with a heartbeat and a checkbook — and the latter may be waived if you qualify for financial aid.

Open access to higher education is a prized feature of American society. But what message does it send to the 11th grader deciding whether to stay home on Tuesday night to revise his chemistry lab report or go out and party with his friends?

President Bush's new education strategy, introduced last month, would change all this. The plan, developed by Secretary of Education Lamar Alexander and a group of advisers (myself included), proposes to set world-class standards in English, math, science, history and geography, and to accompany these with new national tests that colleges and employers will use in their admissions and hiring decisions.

When that day dawns, young people will have incentives to study. Admissions and personnel offices will confer real rewards on those who attain the new, higher standards in school and will levy unwelcome consequences on those who don't. In response, millions of students will alter their behavior. Americans, regardless of background, will take learning seriously because it will make a practical difference in their lives.

What happens in the meantime, however, if those new standards and tests yield results that differ by gender, race or ethnic group? Will any college or employer dare to use them?

Federal law already makes it difficult for employers to require any educational credentials or test scores that have a "disparate impact." Pending civil rights legislation would make this harder still. The Democrats' bill requires employers to prove that tests bear a "significant relationship to successful performance of the job." Even the Administration's milder version expects any education credentials to show a "manifest relationship" to the job.

How many personnel directors will be able to convince a Federal enforcer or judge that a young person's command of science and geography is germane to the work of a forklift operator or receptionist? Yet so long as employers are inhibited from examining a candidate's test scores, "rational" students will see no payoff for buckling down to learn such subjects. High marks won't matter.

Colleges could easily justify stiffer academic prerequisites. But few campuses can afford to be persnickety in their admissions decisions — and virtually all are determined to enroll more minority students at any cost. Never mind that the soaring dropout rate among minority college students is a sign of the weak educational foundation that reformers hope to strengthen.

A thoroughly revamped education system would help end this paralysis. Each year we would have millions more young Americans schooled to world standards as proved by test results that are indistinguishable by race, gender or ethnicity.

Today, however, we face a Catch-22 situation in which few students are apt to change their study habits because neither employers nor colleges reward academic achievement. The President is urging them to do so. Yet any that respond may be accused of discriminating. Is that any way to reach our national education goals?

Chester E. Finn Jr., professor of education at Vanderbilt University, is author of "We Must Take Charge: Our Schools and Our Future." He was an Assistant Secretary of Education during the Reagan Administration.