Original FOIA Number: 2007-0758-S

2nd FOIA Number:

3rd FOIA Number:

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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Linda Porter

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

Subject: Empowerment ideas for possible inclusion in civil rights.

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU/HC	ORIGINATOR	9/10/04		C	9/10/04 PS
CU/HC	I	9/10/04		C	9/10/04 PS
		/ /			/ /
		/ /			/ /
		/ /			/ /

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

1/14/91, CBthomas

THE WHITE HOUSE
WASHINGTON

Date: Jan. 4, 1991

TO: BOYDEN GRAY

FROM: **RICHARD W. PORTER**
Special Assistant to the President and Executive Secretary to the Domestic Policy Council

As the Attorney General requested, I have enclosed a brief description of some "empowerment ideas" for possible inclusion in civil rights.

HOUSING:

1. Fund HOPE: You signed HOPE (Homeownership and Opportunity for People Everywhere) legislation in November. HOPE authorized several new and important initiatives advocated by the Administration, such as empowering public housing residents by encouraging them to own or manage public and assisted housing, and making government work for people by improving the link between housing and services for the homeless.

HOPE is the most far-reaching housing legislation since the 1960s. No funds, however, were appropriated for important components of HOPE in FY91. According to HUD, funding HOPE is vital to achieving the Administration's public goal of a million new low-income homeowners in 1992. OMB is considering HUD's request to reprogram FY91 funds to fund HOPE immediately.

Some of the arguments in favor of this idea have been:

- By funding HOPE, the Administration can demonstrate its commitment to housing for poor families and children, the homeless, and first-time home buyers.

- HOPE is a model empowerment initiative. Funding it now will demonstrate the Administration's conviction to empower people and will give impetus to this approach to social problems.

- The housing market is depressed. HOPE could contribute to an overall rebound in the economy by creating new home sales.

- HOPE targets Federally-owned properties currently in FHA or RTC inventories. Transferring these units to first-time home buyers will add dollars to the Federal Treasury.

Some of the arguments in opposition to this idea have been:

- Funding a new program at the same time that the Administration proposes a FY92 budget with cuts in established programs may not be supported by Congress.

- It is likely that, in return for funding HOPE, Congressional Democrats will want to fund their new housing program, HOME.

EDUCATION AND TRAINING:

2. Promote Educational Choice: During the last two years, educational choice initiatives have been undertaken in more and more jurisdictions across the country. East Harlem, New York; Cambridge, Massachusetts; Milwaukee, Wisconsin; and the State of Minnesota have implemented choice programs that permit parents to determine which schools their children should attend. Current Federal education programs, however, have not been reformed to support local choice initiatives.

The Federal government could encourage restructuring through choice demonstrations and voucher programs. States could be awarded grants for demonstration projects in return for a mutual agreement with the Federal government to waive certain regulations that impede choice. Each project would be required to agree to set performance objectives related to the National Education Goals and to report publicly on progress toward them. Projects would provide for, but not be limited to, educational choice among and between public schools and include special awards for excellence to high performing schools. A portion of Education's new funds might also be targeted only to low-income or high-dropout school districts that employ voucher programs, thus encouraging proliferation of voucher programs in areas that most need reform.

Some of the arguments in favor of this idea have been:

- Would provide Federal program resources to facilitate and evaluate urban restructuring and parental empowerment.
- Emphasis on urban areas targets Federal resources on highest concentration of low-income families and at-risk children.
- Reforms in school districts with high dropout rates provide an opportunity to help the districts most likely to have difficulties attaining the National Education Goals.
- Provides maximum flexibility for communities and school districts to select options most appropriate to local educational problems.

Some of the arguments in opposition to this idea have been:

- Legislation may face opposition from choice opponents on the Hill and in the public education arena.
- Could face a constitutional challenge if potential choice options include religiously-affiliated schools.
- Might be difficult to administer the transfer of funds from local school districts to other providers.

3. Reintroduce "Charlottesville" Flexibility Legislation: States and schools need to innovate if the nation is to achieve its educational goals. While most of the necessary reform must come from the State and local levels, Federal education, health, training, and social services programs can be modified to complement imaginative and effective change. A proposal supported by the Administration for waivers and flexibility failed to pass Congress this year.

Some of the arguments in favor of this idea have been:

- Flexibility would permit the resources from HHS, Labor, and Education programs to be spent at State and local levels with fewer regulatory constraints and greater effectiveness.

- Reintroducing the flexibility legislation would follow through on one of the major commitments coming out of the Education Summit with the Governors.

- This would enhance services integration efforts by granting to the Departments of Education, HHS, and Labor coordinated waiver authority.

Some of the arguments in opposition to this idea have been:

- The Administration's proposal received opposition both from conservative Republicans and from Democrats.

4. Job Training for Public Housing and Other Low-Income Residents: The Administration could actively promote an aggressive services integration initiative that is now being developed by HUD, HHS, and Labor. The goal of this initiative is to bring job training to public housing residents. This project is being shaped by recent research by the Rockefeller Foundation showing that job training programs that integrate an array of basic education and specific skill competencies are most effective in making low-income people self-sufficient. Local initiatives, such as Project Self-Sufficiency (Operation Bootstrap), demonstrate that job training for residents can be effective.

Some of the arguments in favor of this idea have been:

- Targeting job training to residents of public housing, and combining training with other empowerment initiatives for public housing residents, should create a highly productive synergy.

- Targeting job training on public housing residents has the effect of targeting those people who need help most because about one-third of all public housing residents are receiving public assistance.

Some of the arguments in opposition to this idea have been:

- Combining services at public housing sites will increase the attractiveness of remaining in public housing, which could have the unintended consequence of discouraging people from moving out of public housing.

- Neither public housing nor job training are entitlements. Targeting those who are fortunate enough to receive housing aid could create the appearance of inequitably helping one group at the expense of others.

THE ECONOMY AND JOBS:

5. Restore a Lower Tax Rate for Capital Gains: This proposal will not be presented for your decision in this paper. It is presented here for discussion purposes only because economic growth is a vital component of any antipoverty program.

Reduction in the capital gains tax rate would free up status quo wealth and create the seed capital for new small enterprises that generate most of the job gains in America, especially in poverty areas. The first need of minority and small businesses is access to capital. A prerequisite to fighting and winning a war against poverty is restoring a dynamic entrepreneurial process in the inner city by reducing the capital gains tax rate nationally, and by eliminating capital gains taxation in the most distressed communities.

A very low-cost way of cutting the capital gains tax would be to exempt taxes on gains from owner-occupied residences. Most gains are already exempted by allowing such gains to be rolled-over and by giving people over 55 a large exclusion. Thus the amount of taxable gains reported each year is quite small. But the actual burden on a family may be much greater. Taxpayers are required to continually buy more expensive homes in order to roll over their gains. This creates a burden for people, such as parents whose children have left home, who would like to trade-down to a smaller house but cannot do so without paying a large capital gains tax. It also forces people into debt as they take out home equity loans because they cannot realize the equity in their home any other way.

6. Create Enterprise Zones: Enterprise zones were removed in the final stages of the budget agreement last year and could be proposed again this year. The enterprise zone proposal would include both employment and investment incentives and could be tied to Federal, State, and local regulatory relief. With a slower economy, enterprise zones are needed more than ever.

States have been experimenting with enterprise zones for several years. Former Governor Kean implemented enterprise zones with great success in New Jersey. Data from these experiments could be compiled to demonstrate the effectiveness of free market tools to rejuvenate inner cities.

Last year, the Administration proposed: 1) a 5 percent refundable tax credit for the first $10,500 of wages earned by qualified employees in an enterprise zone; 2) elimination of capital gains taxes for tangible property used in a business located in an enterprise zone for at least two years; and 3) permitting individuals to expense some of the capital invested in enterprise zone businesses.

HUD believes that the enterprise zone proposal should also eliminate capital gains on intangible property -- e.g., goodwill or "sweat equity" -- as well as tangible property. HUD will work with Treasury to determine if the proposal can be modified to include intangible capital while avoiding potential abuses of such a provision.

Treasury estimated last year that phasing in these initiatives in 50 zones would reduce tax revenues by $1.9 billion over five years. Following your decision, the specific design of enterprise zones could be developed within the budget process.

Some of the arguments in favor of this idea have been:

- Enterprise zones would concentrate incentives solely in the most distressed communities, thus targeting tax expenditures where they are most needed.

- The enterprise zone concept includes more than tax incentives; it also requires a comprehensive local strategy to deal with the most distressed parts of rural and urban areas.

Some of the arguments in opposition to this idea have been:

- Some think enterprise zones would primarily stimulate the shifting of assets into the zone from areas surrounding the zone and not generate sufficient new investment to pay for the incentives.

- Targeting powerful pro-growth incentives into just a few areas might unfairly benefit some people. Across the board incentives might be seen by some as more equitable.

- Some think that including intangible capital in enterprise zone proposals increases the risk of abuses.

7. Repeal the Social Security Earnings Test: The retirement earnings test is a statutory provision that requires the Social Security Administration (SSA) to reduce, and in some cases withhold, benefits if a recipient's yearly earnings exceed a specified amount. The provision affects beneficiaries under 65 and between the ages of 65 and 69 differently. In 1991, the annual exempt amount for persons aged 65-69 will be $9,720, and benefits are reduced $1 for every $3 earned over the exempt amount. For persons under age 65, the annual exempt amount will be $7,080, and benefits are reduced $1 for every $2 over the exempt amount.

Some experts argue that the earnings test amounts to an increased marginal tax rate for the elderly of up to 33 percent for earned income over the exempt amount. With additional Federal, State and local taxes, the total marginal tax rate can be even higher. SSA estimates the cost for administering the earnings test at $200 million a year. This provision may encourage elderly individuals to under-report income.

In 1989, SSA estimated that phasing out the earnings test for beneficiaries age 65-69 would cost about $6 billion over the first five years, but could actually generate gains for the trust funds in the long run.

Some of the arguments in favor of this idea have been:

- Eliminating the earnings test would encourage work, increase the economic well-being of older Americans and help the economy by keeping skilled and experienced people in the workforce longer.

- It would reduce the intrusion of the government into the lives of senior citizens and lower SSA administrative costs.

- Congressional Republicans have strongly supported the elimination of the test.

Some of the arguments in opposition to this idea have been:

- Elimination of the test would primarily benefit high income individuals. Complete elimination of the test for persons age 65-69 would result in 50 percent of the additional benefits going to families with incomes above $59,000.

- Some studies suggest the actual impact of the earnings test on the labor supplied by older workers is fairly small. There are many factors that affect the retirement decision,

such as health condition and pension benefits, so repealing the test might have only a minor impact on work activity by older Americans.

- If combined with other reforms of entitlements which would reduce benefits to wealthy seniors, it could become politically unpopular with a powerful group.

8. Improve Access of the Poor to More Jobs by Modifying Davis-Bacon: Davis-Bacon was enacted in the 1930s to require workers on Federally-financed projects to be paid the "prevailing wage." Some who supported the measure also sought to bar blacks from benefiting from the profusion of public works projects created by the New Deal.

It has been reported that Davis-Bacon increases costs by as much as 25 percent for small enterprises -- and it prevents the government from helping the least skilled people, many of whom are black, take their first steps onto the ladder of opportunity and independence through open bidding for contracts with the Federal government. At the current threshold, virtually no project is beyond the reach of Davis-Bacon.

(a) Repeal Davis-Bacon.

Some of the arguments in favor of this idea have been:

- In 1988, the CBO estimated that repeal of Davis-Bacon would result in savings of $6.6 billion over 5 years.
- Davis-Bacon requirements are considered very burdensome by small minority businesses. If the law were repealed, many more of these businesses would be encouraged to participate in Federal economic development programs. A large part of job formation comes from small businesses.
- Davis-Bacon is obsolete and unneeded because construction contractors supported by Federal assistance must pay fair and competitive wages if they are to obtain workers.
- If we advocate total repeal, we can do so on firmly principled grounds. (A principled approach would be especially useful if the proposal were included in a civil rights bill.)

Some of the arguments in opposition to this idea have been:

- Seeking outright repeal may backfire, leading to Congressional reversal of significant reforms just implemented, such as the Department of Labor's new "helper" rule (which is expected to save up to $610 million per year). For this reason, the Department of Labor strongly opposes this option.
- Repeal would be difficult to get through Congress because of strong labor opposition. Even modest efforts at reform supported by Republicans over the last eight years have been defeated.

- It may be bad timing to propose repeal of Davis-Bacon while the Labor Secretary-designate awaits Senate confirmation.

(b) Government-wide Reform of Davis-Bacon: Alternatively, a higher minimum threshold for Federal programs could be established under which prevailing wages would not apply. The threshold could be raised to $250,000, consistent with the proposal in the FY91 Budget.

Some of the arguments in favor of this idea have been:

- Raising the threshold would still result in significant budgetary savings.

- Raising the threshold would be easier to pass in Congress, although it would still be difficult.

Some of the arguments in opposition to this idea have been:

- Even if the threshold were raised, Davis-Bacon still imposes a regulatory burden.

- There is still likely to be strong labor opposition.

- Past efforts to enact such reforms have failed and, if attempted now, might put at risk Labor's new "helper" rule.

9. Target SBA Loans: The Small Business Administration (SBA) operates several loan and technical assistance programs which could be better targeted to promote entrepreneurship among low-income persons. SBA has proposed several new initiatives that are still being considered in the budget process:

-- Micro-Loan Pilot Program: SBA would use $17 million in FY91 funds to launch a Micro-Loan Pilot Program providing loans of $15,000 or less to economically or socially disadvantaged people who are starting or expanding a qualified small business. All applicants must undergo approved business training to be eligible for micro-loans.

-- Cottage Capitalism Initiative: The SBA proposes extending a joint HUD/SBA experiment in Salt Lake City, Utah, to 10 new sites by reprogramming FY91 funds. In this experiment, SBA is teaching public housing residents about basic business concepts and helping them develop business plans. Local lenders have developed "micro-enterprise loans" to provide the start-up capital needed by graduates of the training program. SBA will attempt to develop similar non-Federal programs with lenders in the new demonstration sites. SBA will also work with the new Rural Development Administration to develop similar programs in low-income rural areas.

-- Entrepreneur Training for Disadvantaged Youth: The SBA has asked for $425,000 in its FY92 budget submission to launch a new program to develop and provide entrepreneurial training materials for low-income youth. These materials, including a model curricula for use by schools and local organizations, would be designed to inform and motivate young people about the opportunity of small business.

Some of the arguments in favor of this idea have been:

o Coordinating SBA activities with other programs, as is being done in Salt Lake City, creates synergies and helps leverage private sector involvement.

o Efforts by several private, nonprofit organizations to lend small amounts of money to low-income entrepreneurs have shown promising success rates.

Some of the arguments in opposition to this idea have been:

o Entrepreneurial training for low-income clients is regarded by some experts as the least efficient use of business-development resources. Because low-income clients may lack

requisite academic skills, or may not be able to obtain child care and other needed assistance, the business failure rate among these clients could be greater than among other client groups.

- The micro-loan program may produce significantly higher loss rates than other government loan or loan guarantee programs. Relatively high loss rates must be an accepted risk if this program is undertaken.

- The increased FY92 spending needed to make these programs successful will need to be offset by reductions in other programs. If these funds come from other business-development programs, we may be replacing more-efficient services with less-efficient services.

10. Revamp the Public Employment Service: The Employment Service is a State-run, Federally-funded program intended to help unemployed workers find jobs. It is an important, but not wholly successful, tool in minimizing the financial hardship and length of unemployment for workers. Currently, the Employment Service interprets its mission as finding available jobs and then placing unemployed workers in those jobs. The openings identified by the Service tend to be for minimum-wage, day-laborer or clerical jobs. As a practical matter, the Service "skims" by placing only the best workers -- this assures that employers will continue to work with the Service in the future.

The task force has been considering the focus of the Employment Service might be changed. Rather than spending resources on trying to identify job openings (which the private market does very well through "want ads" and other mechanisms), the Service would focus its resources on job counseling targeted to low-income people and steering them to available training opportunities. The Administration could also propose tying continued Federal funding for each office on placement rates for both low-income people and the long-term unemployed.

Some of the arguments in favor of this idea have been:

- Changing the focus of the Employment Service and instilling performance standards and incentives would increase the social benefit of a program that is not currently working well.

Some of the arguments in opposition to this idea have been:

- If the economy has slipped into a recession, targeting activities of the employment service may not be politically feasible at this time.

FAMILY:

11. Restore the Value of the Personal Exemption: This proposal will not be presented for your decision in this paper. It is presented here for discussion purposes only because economic growth is a vital component of any antipoverty program.

In 1948, the personal exemption allowed each individual subject to tax to deduct $600 from his or her income before computing tax liability. Today that amount is $2,050, an amount that will increase according to inflation. The amount, however, would be $3,300 had it been indexed since 1948.

The Administration could endorse the objective of restoring the value of the personal exemption. Restoring the real value of the deduction to its 1948 level would cost at least $50 billion per year. Alternatively, this could be stated as a goal to be reached eventually, with any number of steps along the way. The Administration could propose to raise the deduction for children under age 4 in families of income under $24,000. Or increase the exemption by $1,000 for each additional child in a family. At the very least, Treasury could be directed to prepare a study on the alternatives.

EMPOWERING WELFARE RECIPIENTS:

12. Test Approaches to Make Welfare Transitional: The 11 million American mothers and children -- an all time high -- who receive benefits under the Aid to Families with Dependent Children (AFDC) program can be divided roughly into two groups: those on welfare for two years or less; and those in the midst of a period of receiving welfare lasting eight years or longer. This latter group makes up half of the welfare recipients at any given point in time.

The whole ethos of the welfare system must be transformed from a system that fosters dependency to one that provides transitional help inevitably leading to work. The welfare system must have a mission: to return people to economic independence as quickly as possible. For individuals of working age who are not permanently and totally disabled, long-term income support should be the exception and work the rule.

Cash payments could be limited to a set period of time after which a recipient would be dropped from the rolls. Such an approach, however, would generate significant controversy with little chance of legislative victory. Therefore, legislation should be sought only when it can be demonstrated that such an approach can be successful. Instead, this option could include:

-- Articulating the goal of the AFDC program to be gainful employment and not long-term dependence of beneficiaries and asking the States to begin planning for a system that effectively pursues this goal;

-- Providing States with research awards and technical assistance to understand the dynamics of their welfare recipient population and the characteristics of those individuals who are likely to spend lengthy periods on welfare; and

-- Invite States to begin demonstrations that will test various models of time limits.

First year (FY92) incremental costs would total $4 million: $1.5 million for research on the time dynamics of welfare receipt; $.5 million for costs of a small project team to work with States to develop demonstrations; and $2 million for awards to States for program design. Outyear costs will depend on how many States are interested and on how the demonstration projects are designed. These issues have not been addressed in HHS' budget submission, although OMB intends to include State waiver authority for AFDC time-certain terminations in the FY92 Budget.

Some of the arguments in favor of this idea have been:

- Although full and effective implementation of the Family Support Act of 1988 has the potential to reduce welfare dependency significantly, few believe that it represents a large enough change to eliminate welfare dependency.

- Time-limiting welfare benefits has been suggested by both conservative and liberal thinkers as a necessary element in any solution to the problem of welfare dependency.

- Testing such an approach will be perceived by some as a responsible, measured, timely step in dealing with a serious social problem.

Some of the arguments in opposition to this idea have been:

- If the Administration advocates time-limiting welfare benefits, in whatever form, it will be accused by some as being heartless and uncaring about the well-being of children.

- Opponents are likely to seek a temporary restraining order to prevent operation of demonstrations that deny entitlement benefits to otherwise eligible recipients.

- Most proposals to time-limit AFDC include an alternative means of support for families whose benefits expire -- for example, a universal child allowance, or more typically, a guaranteed government job. The cost of such alternatives may well be significantly higher, especially in the short run, than the savings from time-limiting AFDC.

- The dismal history of public service employment programs, especially their vast cost and inability to create serious job requirements, casts doubt on the likely effectiveness of guaranteeing government jobs.

13. Empowerment Opportunity Areas: An option being considered would seek a fresh start in programs for poor people through solutions that come from the bottom up. It would have two forms: the first organized around geographic concentrations of poor people; the other would be defined in terms of a target group such as unmarried first-time mothers. In each area we would encourage use of waivers from regular program rules and flexibility in the administration of Federal, State, and local laws and programs. The plan for each area would come from the area itself. Each plan must identify performance criteria before being approved; any project failing to meet the criteria would be subject to termination.

Areas would be chosen using the following criteria: 1) concentration of low-income population; 2) willingness of State and local governments to cooperate; 3) involvement of existing community institutions (community groups, voluntary associations); and 4) capacity to evaluate projects in terms of proposed performance standards.

Native American communities would be an initial target for developing these economic and community development partnerships. Each project would have three phases: project identification and design; implementation; and evaluation. Costs of $5 million in FY92 are expected for technical assistance for communities to develop the information necessary for review of proposals. Outyear costs will depend on the number and scale of demonstrations. This issue is being addressed in the budget process.

Some of the arguments in favor of this idea have been:

- Shows the Federal government believes in the potential for developing "bottom up" solutions.
- Allows an opportunity to see if our rhetoric of community control meshes with reality.

Some of the arguments in opposition to this idea have been:

- May trade one set of bureaucrats for bureaucrats in the community.
- May be criticized as change for change's sake.

ID # 207416 CU

HU010

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

- ☐ O - OUTGOING
- ☐ H - INTERNAL
- ☐ I - INCOMING

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

Name of Correspondent: Michael Williams

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

Subject: National Civil - Rights Enforcement Strategy

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Code	Completion Date YY/MM/DD
Cuoco	ORIGINATOR	91/01/23		C	91/05/23
Cuat 10	Referral Note: A	91/01/23		C	91/05/23
Cuat 7	Referral Note:	91/01/23		C	91/01/23
Cuat 1	Referral Note:	91/01/23		C	91/01/23
Cuat 2	Referral Note:	91/01/23		C	91/01/23
	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
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- 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: Attachment retained in the Counsel's Office

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5/81

ID# 209482

HU/CO

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: FEBRUARY 01, 1991

NAME OF CORRESPONDENT: MS. MARGARET W. SUMMERVILLE

SUBJECT: EXPRESSES CONCERN REGARDING THE PRESIDENT'S VETO OF THE CIVIL RIGHTS ACT AND THE FAMILY AND MEDICAL LEAVE ACT

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
KATHY JEAVONS	ORG	91/02/01			91/02/04 TC
99DOJ REFERRAL NOTE:	A	91/02/07 TC			91/02/13 TC
REFERRAL NOTE:					
REFERRAL NOTE:					
REFERRAL NOTE:					
REFERRAL NOTE:					

COMMENTS: _____

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 4800 ____ ____

PL 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	
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*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.

U.S. Department of Justice

Civil Rights Division

JRD:JSA:gtb
DJ 170-16-0

Employment Litigation Section
P.O. Box 65968
Washington, D.C. 20035-5968

FEB 13 1991

Margaret W. Summerville
United Methodist Women
Baltimore Conference
The United Methodist Church
3208 Yosemite Avenue
Baltimore, MD 21215

Dear Ms. Summerville:

Thank you for your January 24, 1991 letter to President Bush concerning the civil rights legislation.

President Bush and the entire Administration are committed to eliminating all forms of discrimination through enforcement of constitutional and existing statutory guarantees and through the use of a broad range of affirmative action and equal opportunity measures that ensure that no individual is denied opportunities on the basis of race, religion, sex, color, national origin or disability. Any legislation that is enacted should further these goals and not encourage or permit employers to make decisions through the use of quotas. The Administration can support only legislation that is consistent with these principles.

The Civil Rights Act of 1990 presented to President Bush for signature in November 1990 did not comply with these principles. Therefore, a veto of that legislation was necessary.

We appreciate your views on this very important matter.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

By:

James S. Angus
Chief
Employment Litigation Section

cc: Executive Secretariat

T H E W H I T E H O U S E O F F I C E

REFERRAL

FEBRUARY 7, 1991

TO: DEPARTMENT OF JUSTICE

ACTION REQUESTED:
APPROPRIATE ACTION

DESCRIPTION OF INCOMING:

ID: 209482

MEDIA: LETTER, DATED JANUARY 24, 1991

TO: PRESIDENT BUSH

FROM: MS. MARGARET W. SUMMERVILLE
PRESIDENT
THE BALTIMORE CONFERENCE
UNITED METHODIST WOMEN
3208 YOSEMITE AVENUE
BALTIMORE MD 21215

SUBJECT: EXPRESSES CONCERN REGARDING THE PRESIDENT'S VETO OF THE CIVIL RIGHTS ACT AND THE FAMILY AND MEDICAL LEAVE ACT

PROMPT ACTION IS ESSENTIAL -- IF REQUIRED ACTION HAS NOT BEEN TAKEN WITHIN 9 WORKING DAYS OF RECEIPT, PLEASE TELEPHONE THE UNDERSIGNED AT 456-7486.

RETURN CORRESPONDENCE, WORKSHEET AND COPY OF RESPONSE (OR DRAFT) TO:
AGENCY LIAISON, ROOM 91, THE WHITE HOUSE, 20500

SALLY KELLEY
DIRECTOR OF AGENCY LIAISON
PRESIDENTIAL CORRESPONDENCE

3208 Yosemite Avenue
Baltimore, MD 21215
January 24, 1991

The President
The Qhite House
Washington, D. C. 20500

Dear Mr. President:

On behalf of the United Methodist Women of the Baltimore Conference of the United Methodist Church, I am writing this letter to explain our grave concern about your veto of the Civil Rights Act and the Family and Medical Leave Act. We represent over 21,000 women including the areas of Washington,D.C., most of the state of Maryland and three counties in West Virginia.

United Methodist Women have worked for over 100 years on the needs and concerns of women and children. Recent Supreme Court decisions have made it almost impossible for women and persons of color to enforce their civil rights. We need and expect your support for equal employment rights for women and minorities and equality in employment for women who care for newborns, newly adopted children and sick children.

We hope that you will pass these bills in 1991.

Yours truly,
Margaret W. Summerville

Margaret W. Summerville
President
United Methodist Women
The Baltimore Conference

cc:Joyce Hamlin
Executive Secretary for Public Policy
The United Methodist Church
Board of Global Ministries

ID # 209843 CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Irving Jensen, Jr.

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

Subject: Comments on EEOC involvement in upcoming Civil Rights Bill and also the Deficit Reduction Bill

ROUTE TO: Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Exec	ORIGINATOR	91/01/31		C	91/02/27
Cuat/O	Referral Note: A	91/02/01		C	91/02/27
	Referral Note:		See Comments		
	_	/ /		_	/ /
	Referral Note:				
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ACTION CODES:
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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: Sent to Shirley Green for response - 2/27/91

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5/81

[redacted]

THE WHITE HOUSE
WASHINGTON

Date: 2-25-91

TO: Frances Shirley Green

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

[redacted]

- ☐ Action
- ☐ Comments
- ☐ FYI

O.K. for Smg
Robo - "Civil Rights"

[redacted]

209843cel

IRVING F. JENSEN CO., INC.
CONTRACTORS
2220 HAWKEYE DRIVE
P O BOX 1618 PHONE (712) 252-1891
SIOUX CITY, IOWA 51102

January 3, 1991

The Honorable President George Bush
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear President Bush:

I have already written you to thank you for your veto of the Civil Rights Bill, so called Quota Bill. I was visiting privately with Representative Fred Grandy and he indicates that this bill will probably resurface about February in the Congress. Fred feels that you will be under more pressure to sign some sort of bill. After discussion with Fred we would much prefer an expanded role for the EEOC rather than any more judicial intervention as is proposed in Kennedy-Hawkins. We feel that these matters should be kept out of the court system. The EEOC has been doing a relatively good job in handling the matters concerning equal employment opportunity in the country and I would feel that an expanded role in that area would serve that purpose. We oppose any punitive damages and we oppose the quota system as set forth in the Kennedy-Hawkins Bill. When businesses are dragged into court the cost will bankrupt many medium size companies.

I would hope that you would remain firm in your opposition to Espanded Judicial intervention and consider an expanded EEOC role in the forth coming Congress. You are probably going to be under enough pressure that some bill will have to come out of the next Congress. It would seem to me that you would still have the threat of being able to sustain a veto in the Senate, only one Senate seat was lost. I realize the veto was only sustained by one vote but there is probably another vote that can be turned to help sustain a veto. A veto may not be politically expedient for you, that is why I feel that it is imperative that the legislation be cleaned up to where it is palatable to your office and to the business community at large.

I would like to make a comment at this time about the Deficit Reduction Bill where taxes were increased and allegedly spending was supposed to be decreased. I have concerns that the bill may not have gone far enough in reducing spending. I would hope that you would tell Congress that as long as you are President there will be no more taxes and that they will have to look in the mirror and reduce spending and reduce waste in government. I am sure that billions of dollars could be saved if wasteful programs were reduced or eliminated.

Very truly yours,

Irving F. Jensen, Jr.

IFJ, Jr.:bs

CS

ID # 209901 CU

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

HU010

R: 2-6

- ☐ O - OUTGOING
- ☐ H - INTERNAL
- ☐ I - INCOMING

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

Name of Correspondent: Lewis Lipsitt

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

Subject: Copy of letter to Senator Kennedy on behalf of the American Psychological Assoc re) the Civil Rights Act of 1991.

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

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuyc	ORIGINATOR	91/01/31		C	91/02/25 CS
Cuat10	Referral Note: I	91/02/01		C	91/02/25 CS
	Referral Note:	ATTN: FYI	see comments		
(illegible)	Referral Note: I	/ /		C	/ /
	Referral Note:	/ /			/ /
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ACTION CODES:

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FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
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Comments: Close out - Nelson Lund 2-25-91 CS

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20990 1au

American Psychological Association

Advancing psychology as a science, a profession, and as a means of promoting human welfare

January 17, 1991

Senator Edward M. Kennedy, Chairman
Committee on Education & Human Resources
SD-428 Dirksen Senate Office Building
Washington, DC 20510-6300

Dear Senator Kennedy:

The American Psychological Association (APA) has written to you on several occasions concerning a number of issues regarding assessment and employment selection contained in the Civil Rights Act of 1990. With the beginning of a new Congressional Session, I am writing to reiterate our willingness to offer our expertise in these areas as attempts are made to draft similar legislation for the current Congress.

APA would be pleased to help in the development of language that will temper many of the issues in the Ward's Cove decision while ensuring that the technical and scientific issues concerning employment selection are adequately recognized. APA's 107,000 members have consistently been a leading force in promotion and support of Civil Rights legislation, but have also been the at the forefront of advocacy for appropriate use and development of psychological tests in employment settings. Please contact me if you feel that APA can offer any assistance in the development of language concerning aspects of assessment and testing in employment for the Civil Rights Act of 1991.

Sincerely,

Lewis P. Lipsitt *

Lewis P. Lipsitt, Ph.D.
Executive Director for Science

* Marion, Massachusetts native

1200 Seventeenth Street, N.W.
Washington, DC 20036
(202) 955-7600

ID # 210353 CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

HU010

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

Name of Correspondent: Richard Porter

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

Subject: Forwards copy of article on Clint Bolick which appeared in the City Paper.

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	91/02/01	TC	C	91/03/04
Cuat10	I	91/02/02		C	91/03/04
Cua167	I	91/02/02		C	91/02/02
Cuopay	I	91/02/02		C	91/02/02
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Referral Note: see comments

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

Comments: Noted Caphound may be closed out.
N. Lund 3-4-91 CS

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5/81

210353cu

THE WHITE HOUSE
WASHINGTON

Date: 1-31-1991

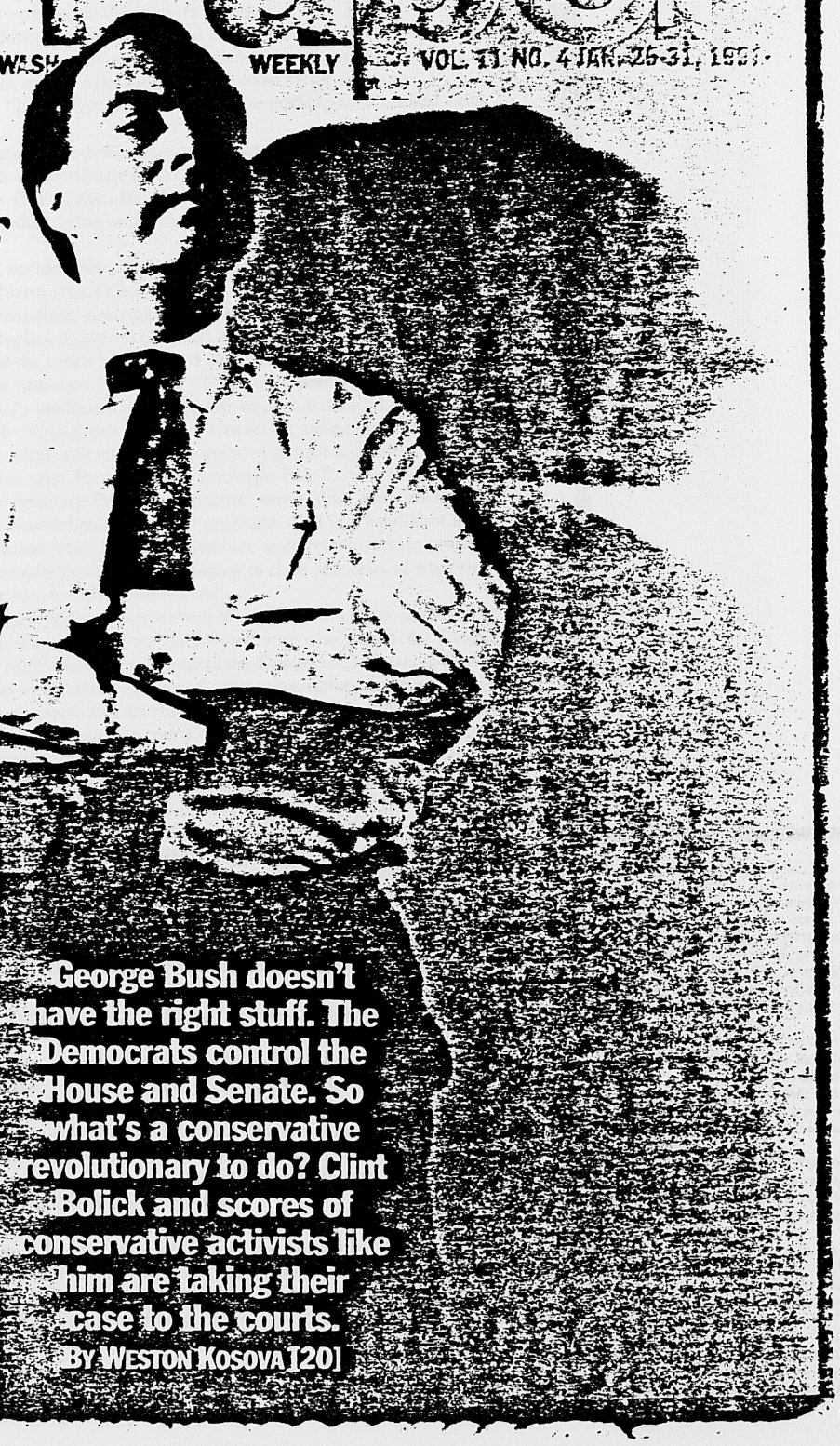
TO: Economic Empowerment Task Force and
the Domestic Policy Reform Breakfast Grou

FROM: **RICHARD W. PORTER**
Special Assistant to the President
and Executive Secretary to the
Domestic Policy Council

Thought the attached article on Clint
Bolick might be of interest to you.

WASHINGTON
CityPaper
WEEKLY VOL. 11 NO. 4 JAN. 25-31, 1991

Righting the Law



George Bush doesn't have the right stuff. The Democrats control the House and Senate. So what's a conservative revolutionary to do? Clint Bolick and scores of conservative activists like him are taking their case to the courts.

BY WESTON KOSOVA [20]

Darrow Montgomery

Righting the Law

BY WESTON KOSOVA

Washington may be the last place on Earth where a mere notion can make you an overnight star. Even a piffling idea, timed right, can become the stuff of heated confrontations in the White House mess. The biggest ideas win their lucky sires a date to the Gridiron Club, a Style section profile, or the grandest perch of all—30 minutes head-to-hair with Koppel.

The idea doesn't necessarily have to be new. Often a fresh coat of paint and a catchy acronym is all that's needed to market an old standard as ground-breaking neoterica. Clint Bolick is one such recycler, and his eye is fixed on the limelight.

"I consider myself a radical," Bolick says. "I think that the ideas that we're pushing are as radical today as they were 200 years ago."

At the tender age of 33, lawyer Bolick is stitching together from legal remnants nothing less than a conservative civil rights revolution. In the red-brick townhouse on the north slope of Capitol Hill that houses his Landmark Legal Foundation Center for Civil Rights, Bolick and a staff of five plot ways to win the courts and the Constitution back for conservatives; using tactics that he says "the left uses extremely effectively, but the right has never really used."

If you doubt the likelihood of a zealous upstart shaking the roots of American jurisprudence, think George Gilder two years before *Wealth and Poverty*; think Charles Murray before *Losing Ground*. Those two urged people to rethink their long-held notions about economics and welfare, and especially notions about affirmative action and minority set-asides. But Bolick intends (literally) to take the law into his own hands.

He isn't alone in believing that the law and the courts are ripe for a conservative intifada. His efforts are bucked up with funding from conservative cash cows, including Milwaukee's Bradley Foundation, the Smith-Richardson Foundation, and his group's headquarters, the Kansas-based Landmark Legal Foundation. Many of Washington's other conservative strongholds have their eyes on the same prize, assigning in-house judicial policy wonks to monitor the bench and employing lawyers to inspect high court decisions for fissures in the law that they can crack wide open. Paul Weyrich's hard-right Free Congress Foundation, the libertarian Cato Institute, the old right's American Enterprise Institute (where Judge Bork holds down a seat), and the right-with-Reagan Heritage Foundation all run legal programs. And in a handful of litigation mills across the country, like-minded conservative judicial activists are working to overturn property rights statutes, licensing restrictions, and regulations on business, hoping to erase 100 years of what they see as specious (read liberal) readings of the country's fundamental law.

Clint Bolick says that liberals have been reading rights into the Constitution for decades. Now, after 10 years of Republican court-packing, it's the conservatives' turn.

While some conservatives reminisce about the bygone days of tax-slashing and defense-building—bickering among themselves over who stalled the Reagan revolution, who left the Senate door open to the Democrats, and who delivered the White House to an effete blue-blood—the conservative movement's legal masseurs have been capitalizing on the only Reagan legacy that the Democratic House and Senate can't erase: the courts. In his eight years in the Oval Office, Ronald Reagan appointed three Supreme Court justices, and 385 federal judges —just over 50 percent of all sitting federal judges—in all, more than FDR. The word of these men and women is law, and activists like Bolick hope to put conservative words into those judicial mouths.

A self-described conservative libertarian (with reservations), Bolick says that the Constitution is properly read with an eye toward the plain meaning of the text and the intended meaning of its authors. But since the days of the New Deal and the Warren Court, he says, liberal judges have been fabricating constitutional powers from the ether. Although conservatives hounded liberals for "using the courts to legislate" throughout the '50s, '60s, and '70s, Bolick argues that conservatives must now retaliate.

"Using judicial activism to curb the judiciary's creation of new rights or responsibilities is not only legitimate but essential in the conservative construct," he says.

These right-wing machinations have not gone unnoticed by liberals. Ralph Neas, director of the Leadership Council for Civil Rights and one of Bolick's frequent sparring partners, acknowledges that the conservatives have mounted a legal counterrevolution.

"There's certainly no question that the one successful goal of the right wing over the past 10 to 12 years has been the takeover of the federal judiciary," he says. "What you have now is a situation where, certainly on the Supreme Court, you have a court practicing judicial activism with respect to eroding many of the civil rights protections that have been part of the law for the last 35 years."

Bolick doesn't equate liberal "judicial activism," which he sees as rewriting the Constitution, with conservative "judicial action," which seeks to restore the true intent of the framers. But Jamin Raskin, a professor of law at American University, gags on Bolick's claim that the conservative goal is to read politics out of the Constitution.

"The Supreme Court, in its conservative incarnation, has been as active if not more active than the Warren Court was in terms of intervening and creating law," he says.

FRESH OUT OF UC-DAVIS LAW SCHOOL in 1982, Bolick began his road to judicial revolution, logically enough, at the conservative Mountain States Legal Foundation, best known as former Secretary of the Interior James Watt's early stomping ground. The Denver-based outfit brought an entrepreneurial flair to its legal crusade, successfully pushing litmus-test cases into the courts. Mountain States turned young conservative lawyers like Bolick loose to earmark potentially precedent-setting cases. "For a young attorney there was tremendous opportunity because there wasn't a heck of a lot of supervision," he says.

Bolick recalls that his politics have been Republican "gosh, since I was a little kid, although always an uneasy alliance. I remember in high school, we had an adviser quit our teen-age Republican group because we endorsed decriminalization of marijuana and prostitution," he says.

In college Bolick's pubescent libertarianism was "aided tremendously by discovering the writings of Ayn Rand." (A framed quote from Rand's early novel *Anthem* hangs behind Bolick's desk.)

"She's unquestionably the catalyst for my philosophical evolution. Although it's much broader now, but she definitely got the ball rolling. She helped me to eliminate inconsistencies in my philosophies," he says. "I would *definitely* not consider myself a Rand fanatic, but in terms of capitalism as a moral philosophy, a real cynicism about government in general and the motives of people in government, and things of that nature, I

really find her very insightful." Tom Paine, Martin Luther King Jr. (whom I've studied extensively), free-market economists Milton Friedman and Thomas Sowell, and William Lloyd Garrison also place prominently in Bolick's intellectual pantheon.

At Mountain States, Bolick cut his teeth on local cases with a libertarian bent, overturning Denver's government-mandated cable television monopoly. He also helped to prepare *Wygant vs. Jackson Board of Education*, in which white school teachers with seniority were fired to preserve a racial balance at the Jackson, Michigan, public schools. The school system argued that it was simply following affirmative action guidelines, voluntarily reversing historical discrimination against black teachers. The district and appellate courts agreed, but the Supreme Court eventually found against the school system, voting 5-4.

"I developed early on a knack for finding cases that would be good vehicles to make public policy arguments," he says. But in 1985, Bolick "heard the siren call of Washington" and responded.

When Bolick came to town, the dozens of conservative think tanks and special interest groups that flowered during the Reagan years were riding the crest of Reagan's pre-Contragate popularity. The conservatives had patterned their think tanks after the grand old monoliths of the liberal establishment, like the Brookings Institution and the Carnegie Endowment. By the '80s, these liberal think tanks had become as predictable and anachronistic as the crusty policy papers they devised, and the rise of hungry conservative organizations like the Heritage Foundation, the Cato Institute, and the elderly but minute American Enterprise Institute caught Washington's sleepy policy circles off guard.

"The last thing liberals expected was the rise of the conservatives," wrote Sidney Blumenthal in *The Rise of the Counter-Establishment* (1986). "Operating on the assumption that their own intellectual authority was unassailable, it followed that conservatism was absurd. The notion of conservative intellectualism struck most as oxymoronic. Conservatives were ignored or disparaged as a fringe element."

Blumenthal goes on to say that "By constructing their own establishment, piece by piece, they hoped to supplant the liberals. Their version of Brookings—the American Enterprise Institute—would be bigger and better. The Olin Foundation would give millions, with greater effectiveness than Ford. The editorial pages of the *Wall Street Journal* would set the agenda with more prescience than the *New York Times*. And although the *Washington Times*, funded by the Reverend Sun Myung Moon, wasn't a formidable adversary for the *Washington Post*, a new generation of advocacy journalists, planted in a host of newspapers, would begin to create an alternative presence."

If Reagan was looking for a presidency of photo-ops and invigorating rhetoric, before he'd even taken the oath of office Heritage had penned a book, *Mandate for Leadership*, which set forth an itinerary for his eight years. Reagan Republicans would turn to *Mandate* again and again for policy prescriptions. Heritage also lacquered congressional offices with policy papers, pamphlets, and books; held seminars on policy issues, and even distributed a phone directory of "experts" whom struggling legislative aides or pressmen were invited to ring up when they needed a little conservative wisdom. By the force of their ideas and enterprise, the idea-generating conservatives helped shift the course of the policy debate.

This was the Washington that greeted young Clint Bolick in 1985, when he took a job at the Equal Employment Opportunity Commission, working closely with black conservative Clarence Thomas, the EEOC's chairman who later rose to the federal bench.

"Clarence really, really helped reorient my strategy, and to a certain extent my philosophy," Bolick says. "While he was strongly against racial quotas too, he didn't consider it the most compelling civil rights issue of our era, and convinced me that the most important way to go was in a positive direction on civil rights." Traditionally, conservatives had gone after affirmative action by painting it as reverse discrimination against whites. But Thomas taught him that the real—and more politically sympathetic—victims were minorities themselves. "The plight of white firefighters is nothing compared to the people in the black underclass," he says.

A year later, anxious to return to the courtroom, Bolick moved over to the Justice Department's Civil Rights Division, then under the direction of Bradford Reynolds.

"I really honed my litigation skills there," Bolick says. "I got some really, really big cases."

The biggest, *United States vs. Yonkers*, touched off a conservative catfight. The Reagan Justice Department, which had inherited the case from the Carter administration, was prosecuting the city of Yonkers for race discrimination and segregation for effectively restricting new low-income housing to predominantly black neighborhoods. Bolick argued the government's appeal and won.

"That's one area where I've really been criticized by conservatives, who felt that that was not a good case," Bolick says. "The general conservative feeling is that a community

Righting the Law

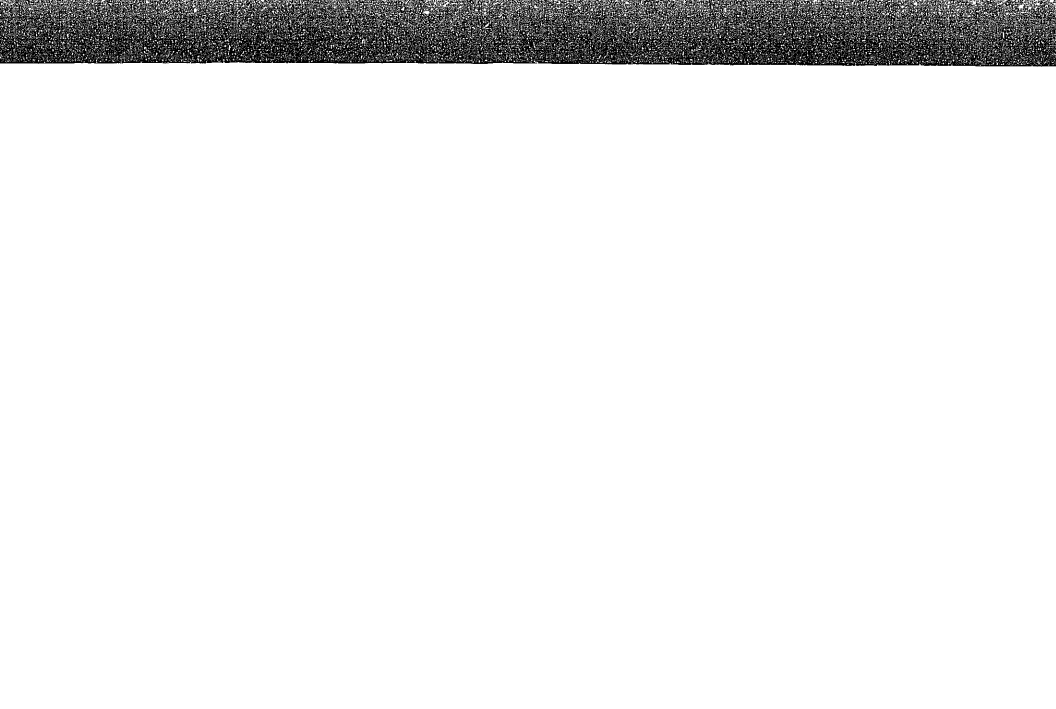
should be able to place low-income housing anywhere it wants, and the theory is that what they were doing was simply placing low-income housing in low-income neighborhoods."

For Bolick, "Yonkers was just like your typical Southern racist government." But to many conservatives, for one of their own to pull precious threads from the tattered cloth of states' rights amounted to heresy. *Wall Street Journal* editorial writer Gordon Crovitz and the Free Congress Foundation's court-watcher Patrick McGuigan repeatedly lashed out against the decision to pursue the case.

"Paul Kamenar of Washington Legal Foundation has literally hounded me in public on that issue," says Bolick. Kamenar's wounds may have yet to heal. Washington Legal Foundation refuses to discuss Bolick, his ideas, or his legal initiatives.

In 1987, Bolick published his first book, a manifesto titled *Changing Course: Civil Rights at the Crossroads*, that he had begun writing two years before at the EEOC. Containing many of the ingredients that presidential assistant James Pinkerton mixed into his heralded "New Paradigm" cocktail, the book advocates the empowerment of blacks and minorities through market-oriented programs: school vouchers, enterprise zones, tenant management and ownership of government housing.

Soon after the book's release, Bolick was approached by Jerry Hill, president of the Landmark Legal Foundation, a Kansas-City based conservative litigating group, who asked him, "How would you like to take your book and turn it into a litigating organization?" Bolick accepted. Hill's offer immediately. "I was really looking forward to doing more creative things," he says. "The folks over at the Reagan administration really believed in judicial restraint. They did not believe in using the courts to advance a policy agenda."



Hair-Raising Cases: The City Council is looking to uproot Taalib-Din Abdul Uqdah's Cornrows & Co. salon.

Bolick felt no such restraints. In his new book, *Unfinished Business: A Civil Rights Strategy for America's Third Century*, published last September by the libertarian Pacific Research Institute, he articulated his anti-affirmative action credo, advocating the overturning of a century of legal sanctions for minorities—in the name of civil rights.

Bolick is foursquare behind the Civil Rights Act of 1964, unlike many conservatives who still bridle over the expansion of state power into what they see as private affairs. But Bolick argues that the limitations that the act puts on whites—compelling res-

Righting the Law

taurant and hotel owners to serve all comers, for instance—is miniscule compared to freedom it affords blacks

Bolick says the problem with the contemporary civil rights movement has failed by ignoring economic rights, what he calls the "forgotten civil rights." Like his intellectual hero, Thomas Sowell, Bolick believes that the greatest impediment to black progress has not been racism, but the government's affirmative action programs. Only by eliminating what he calls the "paternalistic handouts from the state"—which are based on group rights instead of individual rights and equality of outcome instead of equality of opportunity—will minorities become "equal partners in the American dream." With the enactment of affirmative action programs, set-asides, and racial preference requirements after the passage of the Civil Rights Act of 1964, Bolick says, the civil rights movement lost its moral underpinnings and has "drifted recklessly off course for a generation."

Conservatives have been arguing variations on that theme for years. But Bolick takes them one step further. Affirmative action programs aren't only harmful, he says, but *unconstitutional* as well.

Bolick argues that blacks—and whites—were robbed of their fundamental economic rights by the Supreme Court's decision in the Slaughter-House Cases of 1873. The court upheld a Louisiana statute that granted a monopoly to a New Orleans slaughterhouse and restricted where cattle could be slaughtered. By allowing states to make arbitrary restrictions on the conduct of free enterprise, Bolick says, Slaughter-House did grave damage to the 14th Amendment's guarantee of equal protection of all citizens, and provided the legal underpinnings for Jim Crow-era laws that keep entrepreneurial blacks from getting an economic start.

As Chairman Mao once posited, the longest march begins with one step, and the first footfall in Bolick's legal insurrection landed him at Ego Brown's door. Brown was a shoeshine artist whose corner stands in downtown Washington had been shuttered by the city under a 1905 Jim Crow law outlawing "bootblacks" from setting up shop on the streets. In 1989 Bolick sued the District, and a chastised City Council repealed the law. The case made a minor ripple in the papers, with ABC's *World News Tonight* naming Brown "Man of the Week."

While Bolick hammers against civil rights laws and fellow litigators burrow rightward tunnels beneath other articles of the law, operatives in the conservative think tanks smooth the right's path to the courts with a conglomeration of legal studies, conferences, and courtroom box-scoring.

"I like to choose cases where the results of the law are perverse," Bolick says. Take, for instance, his handling of the case of Taalib-Din Abdul Uqdah. Uqdah, who owns the Cornrows and Co. hair salon on Jefferson and 14th Streets NW, has been the target of District government regulators for years. Repeatedly, the city has tried to shut him down because his hairdressers aren't licensed under the District's 1938 Cosmetology Act, which requires that even shampooers undergo 125 hours of instruction. Uqdah says the law is discriminatory because the licensing exams, which test for proficiency with dyes and chemicals, have nothing to do with the cornrows, braiding, extensions, and other African hairstyles that his salon offers.

"The law as created in 1938 did not include professional hair-braiding. Except for people working out of their homes, it wasn't a viable industry," Uqdah says. "It was my understanding that one of the things the court would look at in deciding was the intent of the law, and I don't think that it was meant to include hair-braiding."

Uqdah and Bolick hope that the City Council will exempt Cornrows and Co. from the licensing requirements so they won't have to sue. In the meantime, Bolick has invited Uqdah onto his board of directors.

"I find his insights generally to be extremely helpful. He personifies the sort of coalition-building we're trying to do here," Bolick says.

Bolick is also representing Prince George's

County schoolteachers of both races who are transferred from school to school to meet racial-mix requirements, and a third-generation Virgin Islander boatman who says he was driven out of business by the territorial government's regulations and licensing requirements

While many conservative legal activists are similarly critical of the Slaughter-House ruling, Bolick's constitutional argument against affirmative action is a judicial road yet untraveled Bolick contends that *Plessy* vs *Ferguson*—the 1896 Supreme Court decision that established the notorious "separate but equal doctrine"—was not really overturned by *Brown* vs *Board of Education* in 1954, because the *Brown* ruling still allows for "reasonable" racial classifications to be made

In this loophole Bolick finds lurking the principle underlying affirmative action programs Racial distinctions, he says, no matter how "reasonable," contradict the original intentions of the 14th Amendment's framers, and the stated intentions of the sponsors of the 1964 Civil Rights Act, who vowed that it was not a quota bill

"*Brown* and its progeny embraced group remedies as a way to remedy violations of equal protection We are now saying that one way to discredit this entire notion of groupness is to give individuals remedies," he says

Bolick wants the Supreme Court to embrace the dissenting *Brown* opinion of Justice John M Harlan, who interpreted the 14th Amendment as colorblind

Bolick is alone on his *Plessy* crusade—most of his fellow conservatives have never heard of his arcane view But AU Law Professor Jamin Raskin knows why Bolick is picking at *Plessy*'s remains

"Bolick wants to erase the history that went into the 14th Amendment, so that it would be as if it were written on a blank slate, and it would apply to everyone equally so that affirmative action would appear to be a form of discrimination as opposed to a form of reparation," he says

"First of all, this is a perverse argument for a purported conservative to be making Conservatives are supposed to be interested in the original intent of the framers of constitutional language Nothing could be more obvious than the Congress that voted for the 14th Amendment was interested in advancing the position of the African-American community"

Bolick's longterm strategy is to chip away at Slaughter-House and *Plessy* with repeated challenges to the high court "until the day on which the entire structure"—affirmative

Like Marxist-Leninists, the conservatives are patiently building a cadre while awaiting the objective conditions for revolution.

action, minimum wage laws, various licensing and regulatory statutes—"eventually collapses under its own oppressive weight"

Bolick's crusade for civil rights is a solo endeavor on the right But his shop is only one of many where conservative litigators are replowing the judicial landscape The oldest and largest, Sacramento's Pacific Legal Foundation, concentrates almost exclusively on property rights, suing cities and states on behalf of individuals threatened by what they consider to be intrusive government regulation of real estate Chicago's upstart Lincoln Legal Foundation, by contrast, tackles broad readings of the Interstate Commerce Clause, and recently filed suit on behalf of state Supreme Court justices in Vermont who are required to retire when they hit 70 And Bolick's old haunt, the Mountain States Legal Foundation, has now turned its attention to taking conservative stands on environmental issues

While Bolick hammers against *Plessy* and Slaughter-House and fellow litigators burrow rightward tunnels beneath other articles of the law, operatives in the conservative think tanks smooth the right's path to the courts with a conglomeration of legal studies, conferences, and courtroom box-scoring

The Heritage Foundation's in-house judicial studies project is headed up by none other than Ed Meese

The Cato Institute's Center for Constitutional Studies, with former Reagan Justice Department official Roger Pilon at the helm, casts a libertarian sheen on constitutional issues with debates and conferences Lectures like "Flag-Burning, Discrimination, and the Right to Do Wrong" and "Will the Worldwide Liberal Revolution Bypass America Through Judicial Restraint?" draw not only other legal policy wonks, but federal judges

Paul Weyrich's Free Congress Foundation eschews intellectual hairsplitting for overt politicking His team of court scouters keeps stats on rising conservative stars, ranks judges according to their conservative credentials, and looks out for potential judge

Righting the Law

material When a court vacancy opens up, the foundation is quick to hype its conservative prospects to the receptive White House

The American Enterprise Institute, still struggling to regain dominance after years of stagnation, snapped up the fallen Robert Bork to be their in-house constitutional *philosophe* So proud is AEI of its acquisition that the would-be justice has his own listing under the think tank's name in the phone book (Before Antonin Scalia was kicked upstairs, AEI was one of his homes)

The "movement" even has its own magazine, *Benchmark*, which reports on matters of interest to conservative court-watchers

Like Marxist-Leninists, the conservatives are patiently building a cadre while awaiting the objective conditions for revolution By many counts, the high court already has a 5-4 conservative majority The conservative circle will be completed when liberal justices —geezers like Thurgood Marshall, John Paul Stevens, and Harry Blackmun—are replaced by youthful Bush appointees

From where Bush sits, the view is especially pleasing With control of an increasingly sympathetic judiciary, he can banish certain painful political questions to the courts and be reasonably assured of favorable results The recent political backlash over minority scholarships, for example, sent Bush scampering for the trees to escape the political fallout But had one of his conservative champions pursued the same restrictions in the courts instead, he could argue the lie of separation of branches and pay nothing at the polls The idea isn't so new Liberals nibbled at *Plessy*'s edges until *Brown* brought the house down, winning a fight that could never have been waged successfully in Congress

Joe Sellers, project director of Equal Employment Opportunities at the Washington Lawyers' Committee for Civil Rights Under Law, is not cheered by the prospect of a judiciary overrun with conservatives

"Part of the problem with particularly some of the Reagan-appointed judges is that they came to the court with very little experience, and they're white males, outside of the particular view of the world that they had " Others, he says, "will come to the court with some ideological orientation that was very well established in prior writings "

Of course, the same charge could be leveled against liberals as well But where liberals are comfortable with a reading of the Constitution that adapts to "evolving social principles," conservatives don't like to admit that any reading of the law inevitably reflects the political orientation of the reader

The law is nothing but politics frozen in time, Marcus Raskin once said When the liberal co-founder of the Institute for Policy Studies expressed that sentiment, surely he thought that when the thaw came the legal waters would flow left, not right Activists like Clint Bolick have seized on the thaw brought on by 10 years of Reagan-Bushism, and looking forward to another six years of Bush, intend to refreeze the law—this time in a conservative cube

Appointing federal judges and Supreme Court justices aren't the only ways the executive can manipulate the courts The Justice Department sets the judicial agenda and fixes the tenor of the courts by deciding which pillars to sunder and which cases to take. Strict constructionism or not, which cases end up before the judges will be a strictly political decision.

Bolick, for one, understands the advantages of using the courts to push his agenda Statutes are easily overturned, but federal and Supreme court rulings have a sanctity that safeguard them from the itinerate political spasms of Congress and the president

"I hate the legislative process," Bolick says "I find it an infuriating process when your goal is individual liberty and principles "

In the end, surely it's not legal principles that he believes are at stake Bolick knows that *Roe* vs *Wade* wasn't an accidental case about contraceptives Abortion-rights lawyers pored over the case books looking for a way to make new law through existing law, and struck gold in an implied right to privacy

Even Bolick, who places principle so highly, says "One of the neat things is that we can pitch [our cases] liberal or we can pitch them conservative—facts on the liberal side or principle on the conservative side "

Bolick may never find the right pitch to topple Slaughter-House or reprimand *Plessy* in harsher terms He admits that his plan could take 20 or 30 years But at 33, Bolick has time In the year 2011, when he's appointed solicitor general by a Republican president, the young men of today's Court, Scalia, Souter, and Kennedy, will be the hoary defenders of the faith, flanked by six conservative justices who attended law school the year Ronald Reagan was first sworn in as president **CP**

ID # 210483 CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET HU 3K

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

Name of Correspondent: James Dukes

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

Subject: JUSTICE Proposed Testimony re: HR 1, Civil Rights Act of 1991

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

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Chron	ORIGINATOR	91/04/04		C	91/02/05
Chron 10	Referral Note:				
	D	91/04/04	NAO	C	91/02/05
	Referral Note: Memo to file				
	_	/ /		_	/ /
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				
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	Referral Note:				

ACTION CODES
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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

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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.
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5/81

THE WHITE HOUSE

WASHINGTON

February 5, 1991

MEMORANDUM FOR THE FILE

FROM: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Justice Proposed Testimony Re: H.R. 1, Civil Rights Act of 1991

I told Sidra that I had no legal objections to the captioned testimony and gave the edits marked on the attached hard copy directly to Nick Wise by phone.

Attachment

10-pages

TESTIMONY

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

TESTIMONY

FEB 04 1991

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-19

TO: Legislative Liaison Officer -

LABOR - Robert A. Shapiro - 523-8201 - 330
SBA - Michael P. Forbes - 653-7581 - 315
EEOC - James C. Lafferty - 663-4900 - 213

SUBJECT: JUSTICE Proposed Testimony RE: HR 1, Civil Rights Act of 1991

DEADLINE: NOON TUESDAY FEB 05 1991

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Questions should be referred to **James BROWN (395-3457)**, the legislative analyst in this office.

James J. Jukes

JAMES J. JUKES for
Assistant Director for
Legislative Reference

CC:
Boyden Gray
Nelson Lund
Bob Damus
Ken Schwartz
Cora Beebe
Marianne McGettigan

(Justice)
(Draft)

Mr. Chairman and members of the Subcommittee, it is a pleasure to have the opportunity to appear before you today to discuss H.R. 1 and the need, generally, for legislation addressing discrimination in employment.

The Administration remains committed -- as I know all of the members of this subcommittee do -- to the elimination of barriers to equal employment opportunity grounded in race, color, religion, sex, and national origin. Disagreements with the last Congress were not over this goal, but how to achieve it. As it did last Congress, the Administration supports legislation that will provide adequate remedies for all forms of discrimination. It remains steadfast in its view, and this continues to be a high priority for our Nation. Indeed, in his State of the Union last week, the President called for legislation "to strengthen the laws against employment discrimination without resort to unfair preferences."

Although the very serious attempts last year to negotiate an effective law did not produce a final product acceptable to both Congress and the President, I am hopeful that we will be able to overcome our differences this year and fulfill President Bush's strong desire to strengthen our country's equal employment opportunity laws.

The President remains steadfast as well, however, in his opposition to the legislation he was compelled to veto last year. As the President said in his veto message, that legislation was returned to the Congress because "[d]espite the use of the term 'civil rights'...the bill employs a maze of highly legalistic language to introduce the destructive force of quotas into our Nation's employment system." That bill also "closed the courthouse doors" to legitimate civil rights plaintiffs, and it radically altered the remedial provisions of Title VII, "replacing measures designed to foster conciliation and settlement with a new scheme modeled on a tort system widely acknowledged to be in a state of crisis."

Unfortunately, H.R. 1 is nearly identical to -- and in at least one respect more troublesome than -- that legislation. There are no provisions in H.R. 1 which respond to the President's objections; in fact, this bill is even more of an engine of litigation for plaintiffs lawyers at the expense of conciliation, settlement and harmony in the workplace than its predecessor. H.R. 1 is not legislation the Administration can support.

Although there were serious differences last year over certain important provisions, there was also agreement on several other equally important proposals. I would urge this Subcommittee to consider promptly passing those parts of the civil rights package on which there is no disagreement. For example, the Administration long ago proposed that the Supreme

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Similarly, the Administration has repeatedly called for effective remedies against sexual harassment on the job. That practice is a particularly pernicious one and, unfortunately, is all too prevalent. Redress for victims of sexual harassment should not be held hostage to negotiation over provisions about which differences exist. Moreover, we have before us the example of the Americans With Disabilities Act. Last year, the President and the Congress worked together to enact this landmark legislation, which will bring Americans with disabilities into the mainstream of society. Again, I urge you to pass quickly those civil rights initiatives on which we agree.

Let me reiterate for the Administration, however: we will not accept a bill that results in quotas or other unfair preferences. Such quotas are not only unfair; they are counterproductive. This Administration understands the crucial difference between inclusive affirmative action to cast the recruitment net as widely as possible, which helps overcome the effects of discrimination, and rote adherence to racial and

ethnic quotas --a pernicious practice which provides at most a Pyrrhic victory even for those who temporarily benefit.

Quotas are not the antidote to racism and discrimination. At its core, quota hiring is decision making based upon one's status in a particular class, rather than upon one's individual ability. As President Bush has stated: "Any measure that causes employment decisions to turn on factors of race, sex, ethnicity, or religion -- rather than on qualifications -- is fundamentally unfair, and is at odds with our civil rights tradition." Our goal ought to be an equal opportunity society, and that is not achieved when we predetermine the results. In the words of the President: "Our war against discrimination is impeded, not advanced, by a bill that encourages the adoption of quotas."

Additionally, quotas allow an employer to cover up hiring and promotion practices that discriminate against minorities by use of offsetting "pro-minority" practices. But numerical equality is not the same as equal treatment and it is not a substitute for an effective outreach program that will truly correct for past discrimination. Rather, equality requires elimination of <u>all</u> discriminatory practices; correction for exclusion requires intentional affirmative reaching out and embracing the excluded.

The participants in the civil rights movement of the 1950's and 1960's worked hard and sacrificed dearly to have the government finally make good on the words of the Constitution and the Declaration of Independence that all men and women be

guaranteed their unalienable rights of life, liberty, and the pursuit of happiness. Title VII of the 1964 Civil Rights Act is a tough and effective statute that dramatically opened up employment opportunities and worked to rid the workplace of discrimination. Despite attacks by some who now seek to do away with 26 years of success -- in the guise of "restoring the law" -- Title VII is an effective law that has worked quite well to break down the institutional barriers to equality that were erected and refined throughout our society over several hundred years. Proposals to declare that carefully crafted statute inadequate or in need of dramatic change -- by, for example, opening it up to unpredictable jury trials with tort-style recovery even where the traditional remedy of backpay is fully available -- are themselves misguided, however well-meaning. The remedial and conciliatory mechanisms of Title VII have had a revolutionary effect on the workplace and should not be scuttled in favor of untested and open-ended schemes whose most likely effect would be to enrich a small number of litigants and attorneys at the expense of all workers who benefit by the present statute.

Following the Supreme Court's 1989 Term, the President asked the Attorney General to monitor the application of that term's major civil rights decision. After a relatively brief period, we concluded that Patterson and Lorance posed unjustified impediments to remedying discrimination and should be overturned. We have continued to monitor the application of Wards Cove

Packing v. Atonio, 109 S. Ct. 2115 (1989), Martin v. Wilks, 109 S. Ct. 2180 (1989) and Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). We have concluded that the application of those decisions has not produced results that warrant the sweeping changes of H.R. 1.

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Second, "civil rights legislation must reflect fundamental principles of fairness that apply throughout our legal system." While legitimate civil rights claims should receive the full protection of our nation's civil rights laws, those accused of violating those laws should be presumed innocent until proven guilty. Further, consent decrees that violate Title VII or the 14th Amendment do not deserve the protection of federal law. Our

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Thank you.

FACSIMILE TRANSMITTAL SHEET

TO:	N.LUND
FROM:	Darcel Gayle
DELIVERY TIME:	04-FEB-1991 21:15:30
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SESSION:	1 - 6847
PAGES:	11 (including this page)

Office of Legislative Affairs

Office of the Assistant Attorney General — Washington, D.C. 20530

FACSIMILE TRANSMISSION COVER PAGE

TO: Nelson Lund — FAX No. 456-7979

Phone No. _____

FROM: Nick Libin — Phone No. 514-3951

DATE: 2/4/91

NUMBER OF PAGES: 9 (excluding transmittal page)

CONTENTS: _____

NOTE TO FAX CENTER: Upon receipt of this transmittal, please notify _____ at _____

NOTE: Please call _____ to confirm receipt of this transmission. Thank you.

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ID # 211169 CU
H:C010

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CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Kennetin Starr

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

Subject: The Competitiveness Council's Working Group on Federal Civil Justice Reform

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

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cu ofc	ORIGINATOR	9/102106		C	91/05/30 CS
Cuat 19	Referral Note: A	9/102106		C	91/05/30 CS
Cuat 02	Referral Note: I	910206		C	910206 CS
Calgary	Referral Note: I	91 0206		C	91 0206 CS
	Referral Note:	/ /			/ /
	Referral Note:				

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FOR OUTGOING CORRESPONDENCE.
Type of Response = Initials of Signer
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5/81

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

February 1, 1991

The Honorable C. Boyden Gray
Counsel to the President
Second Floor, West Wing
The White House
Washington, D. C. 20500

Dear Mr. Boyden Gray:

I am pleased to announce that Gordon Crovitz of the The Wall Street Journal will be attending the February 7 meeting of the Competitiveness Council's Working Group on Federal Civil Justice Reform. Mr. Crovitz will be sharing his perspective on the role of attorney's fees in the federal civil justice system. We will also be reviewing the discovery reform proposals as prepared by the Justice Department.

To give you a preview of Mr. Crovitz's thinking on the subject of federal civil justice reform, enclosed please find copies of several of his articles on the subject.

Our meeting is scheduled for 10 o'clock a.m. in Room 180 of the Old Executive Office Building. Please contact Jean Bell on 202-456-2816 by c.o.b. February 5, to arrange for building access.

Sincerely,

Kenneth W. Starr

Enclosures

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Policy Review

1986 Winter

SECTION: No. 35; Pg. 72

LENGTH: 4414 words

HEADLINE: LAWYERS ON TRIAL;
How to Take the Profit out of Suing

BYLINE: GORDON CROVITZ; GORDON CROVITZ is an editorial writer for the Wall Street Journal and a third-year student at Yale Law School. He has a law degree from Oxford University, where he was a Rhodes scholar.

BODY:

As difficult as it may now be to believe, the American legal system was once the envy of the world. The Constitution guaranteed a strong and independent judiciary that protected citizens from abuses of power by the government. The common law civilized Americans' dealings with each other. Agreements were sacred and negligent activity was punished. The law was generally predictable and most Americans, with the notable exception of blacks, perceived the rules as fair. Lawyers were held in high repute. Alexis de Tocqueville pointed to the special role of attorneys as guardians of the American political order: "The people in a democracy do not distrust lawyers, knowing that it is to their interest to serve the democratic cause, and they listen to them without getting angry."

As recently as 1931, Judge Learned Hand could tell the graduating class of the Yale Law School that they would be servants of their siciety, reflecting its values. "Despite its inconsistencies, its crudities, its delays, and its weakness, the law still embodies so much of the results of that disposition as we can collectively impose. Without it, we cannot live; only with it can we insure the future which by right is ours."

But in the past half century, the legal system that was supposed to redress wrongs has become an arena where injuries are inflicted. Over nine percent of obstetrics/gynecology specialists gave up their obstetrics practice in 1983, chiefly because they were unable to find or afford the skyrocketing malpractice premiums.

Last year, insurance premiums for Michigan day-care centers rose an average of 400 percent because of the publicity surrounding a few sex-abuse cases. One center in Washington State has to pay a 500 percent premium increase, even though it had had no claims in 10 years. Entire local governments in California, Kentucky, Massachusetts, Florida, Maryland, and New York have left office because the town could not afford liability insurance, due to rising litigation costs and settlements. Meanwhile, ambulance chasers fly to Bhopal to talk rural Indians into putting themselves at the whim of the delay-filled and unpredictable U.S. legal system.

Everyone has favorite horror stories of lawsuits where the legal system is on one side and justice is on the other.

* Thousands of pregnant women are suffering from morning sickness because the drug Bendectin is off the market. Its maker, Merrell Dow Pharmaceutical Company, could no longer afford the cost of product liability suits alleging the drug caused birth defects, although the safety of Bendectin had been repeatedly upheld by major medical journals and the Food and Drug Administration.

* In May 1984, seven chemical companies paid $180 million into a fund for veterans for alleged injuries by Agent Orange -- even though the judge presiding over the case found "no factual connection of any substance between the disease and the alleged cause."

* In 1983, the City of New York paid $650,000 to Milo Stephens, a mental patient, who had tried to commit suicide by jumping in front of a subway car in 1977. Mr. Stephens survived, though he lost an arm, a leg, and part of the other arm. He then sued the city, claiming that the subway driver should have stopped sooner. The city settled, figuring that it was safer to pay the $650,000 than to risk losing much more in court.

* In California, a man was injured when a drunk driver lost control of his car, veered into a parking lot, and crashed into a telephone booth where the man was standing. The man sued the companies that had designed, installed, and maintained the booth. In 1983, Chief Justice Rose Bird of the California Supreme Court held that these companies could be held liable for the injuries.

One result of this degradation of the law is that law-abiding citizens are demoralized by the unpredictable and often unreasonable rules of behavior under which they must live. We see a chilling effect on investigative reporters fearful of libel suits, and on doctors, manufacturers, and any defendant unlucky enough to face the choice between settling out of court or risking the possibility of huge punitive damage awards. Litigation thus poses a much greater cost on society than the two percent of the gross national product we spend directly on lawyers. The fear of lawsuits poisons Americans' relationships with each other. Even the family has been affected, with husbands and wives increasingly signing pre-nuptial contracts to protect themselves against the capriciousness of divorce courts. In at least one case, a son sued his father and mother for parental malpractice. And one man collected $4,000 from his brother for being called a "dirty louse."

Litigation Explosion

The amount of lawyering has increased as our respect for the law has declined. There are now 650,000 practicing lawyers in the United States, twice the number of a decade ago. By 1990, there may be more than 800,000. Between 1960 and 1983, the number of cases filed in the federal courts more than tripled to 280,000 from 80,000. The number of courts of appeals cases rose to 30,000 from less than 4,000.

Changes in jurisprudence are responsible for much of this litigation explosion. Activist judges have defined an increasing number and variety of "rights" -- a minor student's right to a due process hearing before he can be suspended from school; the right of mental patients to "least restrictive care" and so on. Activist judges seem to have particularly soft hearts for the most hardened criminals.

Drug-runners, for example, have benefited greatly from the expansive view of rights under the Fourth Amendment's search and seizure rules. Federal courts in New York and California ruled in the early 1980s that dogs would no longer be allowed to sniff for drugs at area airports. The problem, as one court put it, was that the "molecules of contraband emanating from the interior of the luggage are so subtle and incapable of human perception . . . that a canine's detection of them constitutes an intrusion into the owner's privacy." In another case, a prisoner claimed a constitutional right to cable television in his cell. A federal district court upheld his claim, which was later reversed.

Litigation has similarly been encouraged by the transformation of standards of liability. The law of personal injury -- torts -- is unrecognizable from just a generation ago. The rule until recently was that a defendant had to be negligent to be held liable for damages. Now "absolute" liability prevails in some states: a defendant may be liable even if his responsibility for an injury is tenuous. Gun manufacturers in Maryland have recently been found liable for wounds caused by shootings. This expansion of liability may be motivated by the desire among courts and juries to pick the deep pockets of corporate defendants. The effect is to make litigation more attractive.

The law is growing ever more complex. And complex laws, as University of Chicago law professor Richard A. Epstein noted in the Wall Street Journal, mean more litigation.

Complex rules necessarily confer a large measure of discretion upon those who enforce and interpret the law, thereby increasing the level of uncertainty and error when the rule is honestly applied, and the level of uncertainty and error when the rule is dishonestly or incompetently applied . . . Error, uncertainty, and abuse reduce the level of welfare of the people who must learn to adapt to that complex regime, and increase the likelihood that they will struggle to beat the system by finding gaps and glitches in the system.

Finally, changes in the process of litigation have created incentives to sue and go to court even where there is no reasonable case to be brought. Undoing these changes, and reducing the incentive to sue, is perhaps the best way to restore balance to our legal system and to eliminate unnecessary litigation.

Here are four reforms for Congress, the states, courts, and bar associations that would reduce the amount of unfair litigation, make the law more just, and renew confidence in the legal system.

1. Force the Losing Party to Pay the Legal and Court Fees of the Winning Party

Perhaps the most glaring injustice in the legal process is how lawyers are paid. Under what is called the "American rule," both sides pay their own lawyers. In contrast, Western European countries follow the " English rule, " which forces the losing party to pay the winner's legal bills, as well as court fees. It is no accident that Europe has avoided the American litigation explosion, or that England has only 40,000 solicitors and barristers; Washington, D.C. alone has 25,000 lawyers, or one for every 65 people.

The justification for the English rule is simple: it is unfair to make the winner, plaintiff or defendant, pay huge legal fees to vindicate his rights. Adopting the English rule would also have beneficial side effects. People would be less litigious, hesitating to run up huge legal bills out of fear

that they would have to pay twice the costs of litigation. And fee-shifting would discourage frivolous "nuisance" claims that are brought in the not-unreasonable hope that the defendant will settle out of court rather than risk the high cost of litigation. The English rule is also more fair to poor litigants who, if successful, do not pay any legal fees. Even European public interest lawyers agree that it would be a mistake to give up the English rule. "If the rule were abolished," one wrote, "there might be many cases in which the plaintiff would decide not to sue simply because a substantial part of his possible damages would be swallowed up in lawyers' fees. The game might then not seem worth the candle."

The United States originally followed the English rule; statutes requiring the losers to pay were on the books well into the 1930s. But by now the rule has withered away. One explanation for the disappearance is that lawyers disapproved of the old system: a litigant will be more generous toward his lawyer if he doesn't risk also having to pay the other side's lawyers.

Some U.S. statutes do shift legal fees, but these are not designed to make litigation more fair or to reduce the amount of litigation. On the contrary, these "one-way" fee shifting statutes have the effect of adding a burden to defendants and encouraging more lawsuits. Some 130 federal statutes force a losing defendant to indemnify the legal costs of a winning plaintiff, but do not require a losing plaintiff to indemnify a winning defendant. Congress wanted to encourage certain kinds of litigation, such as civil rights cases. The curious underlying principle is that the government pays to get itself sued. In 1984, the U.S. government paid $429 million to plaintiffs.

The results of one-way fee shifting are legendary in the legal community. In a recent case, a federal judge awarded one of New York's biggest law firms $62,000 for getting their "pro bono" client an award of $2,500. The plaintiff said the New York City police had used excessive force in arresting him after a high-speed chase. The Supreme Court is reviewing a case where the lawyers were awarded $250,000 in fees for getting their clients $33,000.

2. Make the Litigants Pay the Cost of Using the Courts by Imposing User Fees

People do not hesitate to drive along city streets, but expensive tolls for highways and bridges make them think twice. Courts are not like freely accessible streets; there are no user fees. But for civil suits between two private parties, there is no apparent reason why the general public should pick up the bill. If, as in a recent case, Coca-Cola bottlers object to the price of Diet Coke syrup, they have every right to sue to discover the costs of the ingredients and get a federal judge to order that Coke turn over its secret formula. This is a business spat between well-heeled companies that have no claim to be subsidized by the nation's taxpayers. Why not have the parties -- at least ones who aren't poor -- pay a fee for using the courts? This would deter frivolous cases, thus reducing the amount of litigation. It would also support the fairness principle that citizens should pay for the public goods (court costs) they use.

The idea of a user-fee system is hardly a modern innovation. Colonial courts charged stiff fees, and English courts still charge for all court costs except the judge's salary. Indeed, the principle that the users of the courts should have to pay for the privilege has never been officially abandoned in the United States. There are still statutes in every state and in the federal rules

demanding payment of fees for using the courts. The problem is that many of these statutes are outdated, with the real value of the fee a fraction of the current cost of administering the system.

The federal courts cost $1 billion a year to run. Litigants are required only to pay a $60 filing fee. Assuming that even this modest sum is paid for all 250,000 civil suits filed each year (the sum is waived for indigent plaintiffs), only $15 million is raised, just 1.5 percent of the federal judicial budget. In contrast, some states run surpluses by charging user fees meant to cover the full costs of the system. Not surprisingly, these states do not have the case backlogs of states that charge only nominal fees.

User fees in the federal courts and most states would have to be raised substantially to begin cutting back on litigation subsidy. The RAND Corporation's Institute for Civil Justice estimated in 1983 that the cost of administering the average tort case was $1,700. In tort cases where a jury was involved, the average case cost $9,200, not including the personal costs to the jurors. The more complicated kinds of jury cases cost an average of $15,000. In 75 percent of jury trials, the average cost of processing the case is more than the amount at stake between the parties.

Raising court fees would have many advantages. People would be less likely to bring frivolous cases if required to pay significant filing fees. Economy would be served by lifting the judicial budget burden on taxpayers. And in cases where the legal fee isn't worth the amount at stake, parties will be more likely to use alternative dispute resolution systems like small claims courts, private tribunals, or even to work out their disagreements by themselves.

3. Join the Rest of the Civilized World in Outlawing Contingency Fees and Class Action Suits

In oral argument before the Supreme Court last spring, a lawyer explained that his clients in a case against a large oil company were organized as a class action suit to protect the rights of people with small claims. Justice William Rehnquist cut in, "How does it protect them to have their claim adjudicated?" The lawyer said, "It gets your claim heard. These are small claimants and they're not going to be able to get the claim heard." Justice Rehnquist was skeptical. "I can see how the rule gets you more plaintiffs," he said. "I can't see how it protects people."

This exchange points to the distasteful problem of lawyers stirring up cases that should never have been brought. Common practices like contingency fees and class action suits are outlawed in the rest of the world as contrary to the public interest, and branded as the criminal acts of champerty, maintenance, and barrotry. These techniques amount to lawyers acquiring someone else's legal right to sue. This was originally also against the law in the United States. In 1920, the Supreme Court held that contingency fees were clearly improper. "While recognizing the common need for the services of agents and attorneys in the presentation of such claims and that parties would often be denied the opportunity of securing such services if contingency fees were prohibited," Justice Brandeis wrote, "Congress has manifested its belief that the causes which gave rise to laws against champerty and maintenance are persistent." A U.S. Court of Appeals in the 1930s repeated the warning against the then-developing champerty by way of the contingency fee, predicting it would invite "officious intermeddlers . . . stirring up strife and contention by

vexatious and speculative litigation which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of law."

Contingency fees and class action suits are relatively recent additions to legal procedure. Both began to sneak into the legal system in the 1930s and 1940s, when Congress stopped passing bills to outlaw them. Contingency fees are now usually used for personal-injury cases, with the lawyer getting up to 40 percent of the damage award (plus costs) if he wins the case or nothing if he loses. Although no figures are kept on how much legal work is done by contingency fee, it is clear that almost all mass tort and "consumer interest" cases are contingent.

Class action suits were originally conceived as shareholder derivative actions, where people with exactly the same claim against a corporation banded together to share expenses and avoid duplicative litigation. Now, however, looser standards mean that people with widely differing interests in the litigation can still be certified by judges as a class.

The class action system invites abuse. In products liability cases, plaintiffs who suffered severe losses are joined by those who suffered little or no injury. In the asbestos litigation, for instance, no plaintiff got more than a few thousand dollars; everyone got something, but the seriously injured were undercompensated while others were overcompensated.

Class action suits are particularly inappropriate when they are used to alter social policy. In the 1970s, class action suits were the main method for forcing desegregation of schools through busing, even though opinion polls showed that most blacks opposed forced busing.

Why is the United States alone in allowing these financing techniques for litigation? One historical explanation is the unique discretion the organized bar associations have over court procedure. The class action rules of civil procedure, for example, were written by a bar committee and approved by a judicial committee, but have never actually been approved by Congress, which is charged by the Constitution with regulating the courts. These rules of civil procedure have the legal authority of, say, an innovative law review article, but are treated by lawyers and judges as the law of the land.

In the United States, going to court has become not so much a necessary evil as just another industry. But something critical to our idea of rights has been lost: the fact that only individuals have a moral and political claim to rights; they can resort to law if necessary to protect these rights by hiring lawyers. Contingency fee arrangements change the right in question from one of the individual citizen to one jointly possessed by the plaintiff and his lawyer. The lawyer, who has a clear financial interest in what the plaintiff gets, decides whether to settle or litigate. Not only are some cases litigated that should be settled because the lawyer wants to go for the big damages award, but often lawyers actually drum up plaintiffs who had no intention to sue.

No case illustrates the champerty abuses better than the Agent Orange litigation. This defoliant, used in the Vietnam War to rob the Communists of their jungle cover, became a household word when a team of lawyers began to appear on television to tell of the illnesses vets suffered because of the dioxin-like ingredient of the spray. The publicity led about 120,000 vets to sign up as plaintiffs after being contacted by the lawyers. The class action

suit was filed against the chemical manufacturers of Agent Orange in the federal courts, with the lawyers working on a contingency-fee basis. The companies, accused under the murky product-liability law, faced possible damages in the billions. They did the only prudent thing. They settled the case, pledging $180 million.

Trouble is, the plaintiffs' lawyers had no case to bring. The lack of any bona fide claim for damages became apparent when the plaintiffs' lawyers asked federal Judge Jack Weinstein for $26 million as their share of the settlement. His response is a sharp indictment of the legal system: "I'm not going to reward attorneys for bringing a case that had no merit . . . Given the fact that I find and have found that you've shown no factual connection of any substance between the disease and the alleged cause, I do not believe it desirable to encourage cases like this." He gave them only part of what they requested.

However, the class action, contingency fee system was a complete failure. Not only did apparently wholly innocent chemical companies pay a huge extortion to avoid the vagaries of a trial, but the lawyers, Judge Weinstein suggested, did "more harm than good in exciting a lot of unnecessary fears." And in the end, no veteran wound up with more than a couple of thousand dollars "compensation," a fraction of the amount earned by any lawyer.

Congress and the state legislatures should consider ways to replace contingency fees and class action suits by other techniques that are more consistent witht eh notion that legal rights belong only to individuals and acknowledge that government-run courts cannot be regulated solely by lawyers. Worthy cases should get their days in court, with any damages going to the parties, not the lawyers.

4. Abolish Punitive Damages Except in Cases of Intentional Injury

One of the greatest incentives to sue is the widespread awarding of punitive damages, another recent addition to the American legal system. Originally reserved for punishing heinous intentional torts like assault or for punishing defendants who try to conceal their tort, punitive damages are now regularly demanded in every area of law.

In considering abuses of punitive damage claims, keep in mind that the key function of torts is to allocate the risks of accidents in such a way that people do not cause unreasonable risks to others. The idea is that the right amount of deterrence is produced by forcing a negligent injurer to make good his victim's loss. If defendants must pay more in punitive damages, too much will be spent on preventing accidents. We could all, for example, drive 25 miles per hour; this would reduce fatal accidents, but at an unacceptable cost to society. Similarly, too much caution implies an inefficient legal system.

A good example is the recent medical practice of "defensive medicine." Doctors face possible multimillion dollar punitive claims for "pain and suffering" from malpractice suits. Many doctors defend themselves by running unnecessary and expensive tests just to protect themselves from possible litigation. The immediate result of this, of course, is higher medical costs.

The American Medical Association estimates that the average number of malpractice claims filed per 100 doctors rose from five in 1975 to 16 in 1983. Forty thousand claims were filed in 1983, triple the 1975 number.

The average settlement was $5,000 in 1970, $26,000 in 1975, and is now $333,000 -- $650,000 in California, where the plaintiff need not prove the defendant acted negligently. (The California legislature has since put a cap on the amount a lawyer can make in a contingency fee malpractice suit.)

Punitive damages have occasionally boomeranged against the lawyers who worked to expand their application. In 1980, an Ohio jury awarded $2.35 million to a plaintiff in a legal malpractice case. The lawyers failed to refile a products liability and negligence case arising from an auto crash. The jury decided that if the accident case had gone to court, the plaintiff would have received $2 million in punitive damages. The jury assessed the lawyers this $2 million on the ground that the plaintiff couldn't collect against the auto company. This bizarre result illustrates how far we've come in undermining the original deterrence purpose of punitive damages. The lawyers were told to pay the amount that was supposed to deter product negligence, while the auto company paid nothing and so went undeterred.

The United States should adopt the European actuarialtable approach. Juries are told simply to find whether there has been injury and to indicate a range of the harm. The award limits are set by legislatures, so that similar injuries get similar damages. Maximum limits are also set, so that the legal system is not used as a playing ground for fortune hunters.

Time for Change

Who will defuse the litigation bomb? Not the lawyers, for whom litigation is, after all, livelihood. Even the out-of control contingency fees and class action suits seem beyond reform through the lawyers' self-regulatory system. And to be fair, the American Bar Association has little incentive to reform the legal system when those at the pinnacle of American law, the justices of the Supreme Court, seem to give little thought to the abuses that have over time crept into the law. The Supreme Court itself is guilty of acting as if there are no costs to litigation, as if all cases deserve equal attention, and as if any economizing may be for others, but not for lawyers.

If the lawyers and judges can't solve the litigation problem, who can? For one, Congress, which is charged with regulating the federal courts. So can the state legislatures, which control state legal procedure. Leadership can also come from the Justice Department. Eliminating abusive, costly litigation is a natural goal for an administration committed to the opportunity society.

The alternative to reforming the law is more demoralization. It is time to return to the legal system that Judge Learned Hand could so highly praise only 50 years ago: "The best of man's hopes are enmeshed in its success; when it fails, they must fail; the measure in which it can reconcile our passions, our wills, our conflicts, is the measure of our opportunities to find ourselves."

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

GRAPHIC: Illustration, "My ex-wife is bringing a class-action suit against me on behalf of ex-wives everywhere." Drawing by Handelsman, The New Yorker, 1984.

THE WALL STREET JOURNAL.

Absurd Punitive Damages Also 'Mock' Due Process

Oh, to be a fly on the wall at this week s Supreme Court meeting to decide which appeals to hear and which to let fall by the jurisprudential wayside In June, the justices seemed to invite cases arguing that outrageous punitive damages also are unconstitutional, but the coquettish Court has since refused to take any punitive-damages appeals Starting with Friday s conference to accept or deny cases, the justices have their pick of enticing cases

In three appeals since 1986 arguing that punitive damages can be unconstitutional, the justices have said no to one argument

Rule of Law

By L. Gordon Crovitz

and yes, maybe to another. In June's *Browning-Ferris v Kelco*, the justices said that the Eighth Amendment prohibition against excessive fines doesn't apply outside criminal cases, so is no protection against punitive damages. But a majority of justices have said that punitive damages might violate the due-process clause of the 14th Amendment

Justices O'Connor and Scalia have said that the "wholly standardless discretion" of punitive damages "appears inconsistent with due process " Justices Brennan and Marshall noted that juries "are left largely to themselves in making this important and potentially devastating decision." Justice Stevens has signed on to similar warnings about arbitrary awards

The justices are old enough to recall the once upon a time—about 30 years ago—when punitive damages rarely were assessed and then almost always only when a defendant had a quasi-criminal intent to harm the plaintiff No more Punitive damages are routine, from car accidents to commercial disputes between blue bloods such as MGM vs Walt Disney and Procter & Gamble vs Revlon In California, one tenth of jury verdicts now result in punitive damages, which averaged $3 million last year There have been at least six punitive damages awards of more than $20 million in the U S just since *Browning-Ferris* Punitive damages are paid by defendants, but ultimately raise costs to consumers and force products off the U.S. market for fear of unpredictable liability

One case the justices could decide to hear has the twin advantages of being based on an absurd tort and coming with a brilliant lower-court opinion on the due-process issue *Reserve Life Insurance v Eichenseer* is about a woman suing her medical insurance company for failing to pay her reimbursement quickly enough There was evidence that her ailment wasn't covered by her policy, but she sued in Mississippi under a new tort called "insurers' bad faith" because the fight over the $6,000 payment took three years. This "bad faith" tort left federal appeals court Judge Alex Kozinski agog in a separate case last year: "I suppose next we will be seeing lawsuits seeking punitive damages for maliciously refusing to return telephone calls or adopting a condescending tone in interoffice memos "

Whatever the novelty of the tort claim, Mississippi courts awarded Ms. Eichenseer $500,000 in punitive damages and $1,000 in actual damages to compensate her for the delay. The $500-$1 punitive-damages ratio is all the more boggling since if this had been a *criminal* case against an insurer, the top fine would have been only $1,000.

But like judges in many other cases since *Browning-Ferris*, a majority of lower-court judges who heard the Reserve case said any constitutional ruling must be left to the Supreme Court—which in a Catch-22 may be waiting for lower courts to chew over the issue. Washington lawyer Theodore Olson argues in his Supreme Court brief in the case that the lower courts are in a "state of paralysis" since they're bound by precedents denying any constitutional problem

Houston-based federal appeals Judge Edith Jones chastised her colleagues on the Fifth Circuit for ducking the due-process issue in the Reserve case. Judge Jones—often mentioned as a possible Supreme Court nominee—stressed the importance of finding a way out of the punitive-damages trap This case "mocks our notions of fundamental fairness embodied in the due-process clause," she wrote, because the insurer had no "adequate notice of the conduct that could result in punitive-damages awards "

She could find only a "non-rule of law" acting as "a predator lurking in the shadows to pounce on the unsuspecting" defendant Arbitrary punitive damages mean "punishment without moorings" so long as a "judicial hands-off policy on punitive damages assures that no unifying principle can or will emerge "

Another punitive-damages case on appeal to the Supreme Court is the gruesome case of *Hospital Authority of Gwinnett Co. v Jones* William Harold O'Kelley was involved in a head-on collision and seriously burned. He was sent by county hospital ambulance to its closest hospital, where doctors saw he had almost no chance of recovery The county tried to get him to a burn unit at a private hospital, but the helicopter crashed, killing everyone except Mr O'Kelley, who was unharmed—but who soon died because of his burns

Mr O'Kelley's estate was awarded $1 3 million in punitive damages and $5,000 in compensatory damages apparently on the theory that he should have been flown first to the private burn unit. The hospital's lawyer, former Georgia Supreme Court Chief Justice Harold Hill Jr., says the standard for liability is so "vague and indefinite" that there's "virtually no guidance" for what conduct can lead to punitive damages.

The most exotic punitive-damages case before the Supreme Court is *International Society for Krishna Consciousness v George*. Almost all the U.S assets of the Hare Krishna religion now are in the control of a court-appointed receiver to pay some $2.5 million in punitive damages A girl and her mother had argued she was "brainwashed" into joining the sect, which then hid her from her parents University of Chicago law professor Michael McConnell put a First Amendment spin on his punitive-damages argument. "A jury must be given workable standards for determining the size of a punitive-damages award" to make sure the award isn't based on "improper factors such as hostility and religious prejudice."

What process is due? Judge Jones wrote that the underlying tort must be clearly defined and that any punitive damages must be proportionate to the actual damages Last year a committee of the American College of Trial Lawyers, including Griffin Bell, Simon Rifkind and Arthur Liman, proposed punitive damages only for "conscious" and "egregious" acts Even then, the group said, punitive damages shouldn't exceed twice the actual damages.

If the justices want to rediscover the understanding of due process for punitive damages at the time of the Constitution, they might read a 1964 decision by the House of Lords. The judges said that under English common law, punitive damages were strictly limited to either an especially abusive act by a government official or where a defendant's conduct "has been calculated by him to make a profit" exceeding the harm to the plaintiff

Of the some 130 cases the justices will hear this term, 10 will be death-penalty appeals. The justices have in recent years taken appeals to nitpick how many secular Frosty the Snowmen must be included in publicly funded creches. It's not asking too much for the justices to devote some of their caseload to defusing the litigation bomb They could start by reminding judges and juries that the due-process clause protects defendants, even deep-pocketed corporations.

THE WALL STREET JOURNAL.

DATE: 6/20/90
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Lawyers Make Frivolous Arguments at Their Own Risk

Rule of Law

By L. Gordon Crovitz

There is a phrase even more horrifying to trial lawyers than Case Dismissed. This is Rule 11 of the Federal Rules of Civil Procedure. What sounds like a technicality is the country's most effective deterrent against frivolous cases. It hits abusive lawyers where it hurts—in the pocket. There's even a former attorney general among the errant lawyers fined under this rule.

The adoption of a toughened Rule 11 by the courts in 1983 was a formal admission that litigation was out of control. The rule says judges "shall" assess fines on lawyers who file court papers that are not "well grounded in fact" or "warranted by existing law" or are "to harass," "cause unnecessary delay" or "needless increase in the cost of litigation."

Wags may say this covers most cases, but it wasn't until this term that the Supreme Court issued detailed opinions on Rule 11. In one case, the court said only the lawyer who signs the offending legal paper is liable, not his law firm. The second case, earlier this month, bashed lawyers for a menswear business who filed a frivolous class-action antitrust claim against Hartmarx as part of a contract dispute. The court said the lawyers were liable for $21,000 even though they had withdrawn the lawsuit. In an 8 to 1 opinion, Justice Sandra Day O'Connor rejected the argument that Rule 11 "chills creative litigation." She said trial judges need the discretion to punish lawyers as a way of "curbing abuses of the judicial system."

This comes after the justices in May refused to hear the appeal of former Attorney General Ramsey Clark, who faces a not-yet-determined fine. Mr. Clark, who served under President Johnson, represented Libyans who sued President Reagan and Prime Minister Thatcher for their role in the 1986 bombing of Muammar Qadhafi's headquarters. Guess the alleged offense? Mr. Reagan and Mrs. Thatcher were accused of being RICO racketeers.

Not too surprisingly, the trial judge found that the "case offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it." The appeals court in Washington insisted on a fine, saying that "we do not conceive it a proper function of a federal court to serve as a forum for 'protests,' to the detriment of parties with serious disputes waiting to be heard."

Politics and the Racketeer Influenced and Corrupt Organizations law make a heady brew for Rule 11. The Christic Institute RICOed a long list of defendants, including retired Gen. John Singlaub, for running drugs, committing murder, etc., and helping the Nicaraguan Contras. Federal Judge Lawrence King of Florida last year said the case was "unsubstantiated rumor and speculation from unidentified sources." He ordered Christic and its chief conspiratorialist, Daniel Sheehan, to pay $1 million toward the defendants' legal bills.

Radical lawyer William Kunstler, a lawyer from a Christic affiliate and a law professor were fined $120,000 last year. Part of their defense of two Indians who took hostages in a North Carolina newspaper office was to accuse top state officials of various civil rights offenses and allege that a sheriff ran drugs. Judge Malcolm Howard called it all frivolous, "not to vindicate constitutional rights, but more probably to gain publicity."

Political cases aside, many Rule 11 sanctions are to punish efforts to coerce deep-pocket defendants to pay something, anything, to be rid of a nuisance case. Last year a law school graduate sued Capital Cities/ABC for $2 million plus 1,000 shares. The firm's offense? Requiring him to buy a surety bond before it replaced certificates for two shares he lost worth $243.

New York business law has long allowed firms to demand bonds to indemnify against possible claims, but the plaintiff said this amounted to "unconscionability" and even claimed emotional distress. A New York court said this was ridiculous, noted that the plaintiff had "a long history of bringing baseless claims in a variety of forums," and fined him $5,000.

Here's another howler. In 1984, a lawyer sued San Francisco for violating his free speech and equal-protection rights when police officers stopped his softball game in an off-limits part of a park. "Plaintiff does not allege any facts suggesting communicative expression or symbolic conduct sufficient to fall within the scope of the First Amendment," Judge William Schwarzer ruled. "There is no indication that persons observing plaintiff playing softball in Golden Gate Park would understand his conduct to be a message 'about the right to democracy in recreation as opposed to elitism.' " He fined the plaintiff $50,000.

Only a minuscule fraction of the 250,000 civil cases filed each year in federal court (or in the 38 states with similar rules) result in sanctions. Fordham law professor Georgene Vairo found that in the four years ending in 1987, sanctions were sought in some 700 federal cases and granted in just over half. It's usually the plaintiff lawyer who's fined.

Some critics of Rule 11 say it punishes cases that should be brought. The New York Legislature threatens to suspend its version of Rule 11 partly because of fears that worthy arguments will be stifled. Last week, the New York State Bar issued a report that proposes making the test "abusive conduct" by lawyers instead of "frivolous conduct."

It's a little hard to get worked up over the prospect of chilling imaginative lawsuits. After all, it was legal creativity stamped with approval by activist judges that got us into this mess in the first place. For example, 30 years ago it would have been frivolous and/or abusive to argue that a defendant should be liable regardless of fault simply because it's a big corporation. This "enterprise liability" is now the law in many jurisdictions.

The better argument against Rule 11 is that the barn door is already closed. Who can know what case is frivolous? The breakdown in American law makes it hard to say which legal argument deserves to be punished—and which some day will be declared a winner by some judge somewhere. Remember the $10 billion judgment against Texaco by Pennzoil?

One sign that Rule 11 won't solve the problem is that plaintiffs and defendants now often preemptively—and frivolously—sue each other under Rule 11. There's an alternative. Other common-law countries don't have frivolous cases because they have the English rule on costs: Loser pays. Litigants in non-criminal cases avoid high-risk arguments for fear of having to pay the winner's legal costs. Maybe critics of Rule 11 should join the bandwagon in the U.S. to switch to the English rule.

When a Lawsuit Deserves Punishment

Rule 11 of the Federal Rules of Civil Procedure requires fines for lawyers who bring frivolous cases. This is the test for when lawyers go too far:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

THE GULF AFTER SADDAM

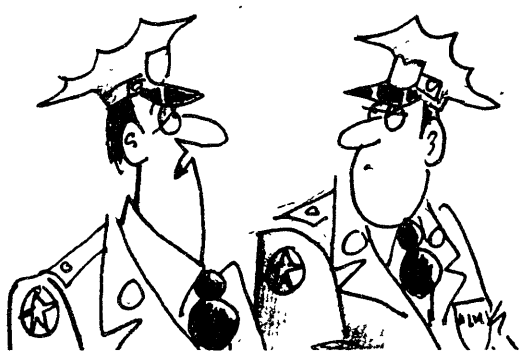
USSR: Breakdown or Crackup? • The Keating 535

NATIONAL REVIEW

HOW LAW DESTROYS ORDER

Here Comes the Problem

HOW LAW DESTROYS ORDER



Mounting crime and disorder in America are caused by more than crack, overcrowding, and poverty. Changes in our criminal, civil, and constitutional jurisprudence are the causes—and the perpetrators are judges.

L. GORDON CROVITZ

THE PHRASE "law and order" implies cause and effect. The United States is now discovering the corollary, to wit: A legal system that fails to protect order signals flaws in the law itself. We now have a legal system that creates chaos and disdains order. As a result, criminals rule urban streets and absurdities in commercial law threaten U.S. competitiveness.

Any law-and-order movement today requires a focus both wide and deep. We must recapture the most fundamental idea in our jurisprudence—the rule of law. Our laws must be fair, based on common sense, and easily understood by the citizens who are expected to live under them; they must punish the guilty and protect the innocent; and they must be molded to the needs of society and not to any group's arbitrary standards. In particular, now that the results are in, it is time to end liberalism's social experimentation through the courts. An emerging intellectual conservative majority on the highest courts marks a change in direction, but whether it will mean a renewed conservative approach to the law remains to be seen.

I. Criminal Law: Tell the Truth or Lose the Streets

RECALL HOW police officers once enforced the law. If they saw a suspicious character hanging out on the street, they would routinely haul him in on vagrancy or loitering charges. These statutes were sometimes abused to harass minorities, but when properly used they had the virtue of permitting the police to prevent the street/park/schoolyard activity that facilitates drug dealing.

The law effectively surrendered to the criminals when courts forced cops and prosecutors to fight with one arm held behind their backs. The 1972 case of *Papachristou* v. *City of Jacksonville*, written by Justice William O. Douglas, is a perfect example. Several local toughs were arrested under a city ordinance against vagrants, defined as "rogues and vagabonds, . . . common drunkards, common night thieves, . . . persons wandering or strolling around from place to place without any lawful purpose or object . . ." One of the defendants had packets of heroin; others had long criminal records. The Justices reversed all the vagrancy convictions and invalidated these laws for hundreds of cities.

"The implicit presumption in these generalized vagrancy standards—that crime is nipped in the bud—is too extravagant to deserve extended treatment," Justice Douglas wrote, despite acknowledging that "of course, vagrancy statutes are useful to the police." Instead, he wrote an essay championing the alternative lifestyle now on exhibit in every urban area.

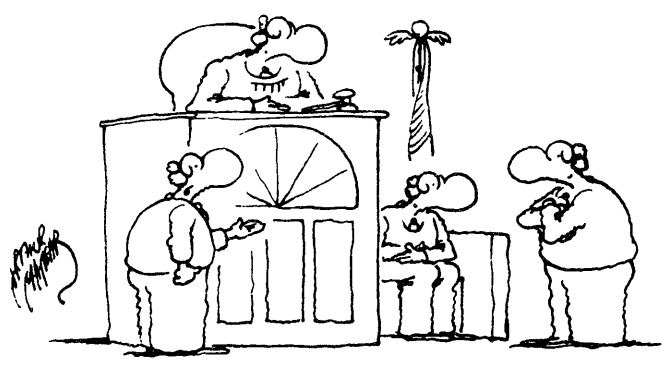
Justice Douglas cited a former governor of Puerto Rico to the effect that loafing "was a virtue in his commonwealth and that it should be encouraged." "Persons 'wandering or strolling' from place to place have been extolled by Walt Whitman and Vachel Lindsay," Justice Douglas wrote. "We know that sleepless people often walk at night, perhaps hopeful that sleep-inducing relaxation will result."

There was no evidence of the police arresting rambling poets or somnambulists. The Justices waved away evidence that from Elizabethan times such laws had been crucial to maintaining order. After years of living with the results, black community groups across the

Mr. Crovitz, a member of the New York bar, is assistant editorial-page editor of the Wall Street Journal, *where his weekly "Rule of Law" column appears.*

country are now agitating for renewed vagrancy laws as the best hope for closing down open-air drug markets. But when local leaders got Alexandria, Virginia, to pass new prohibitions on loitering, the ACLU persuaded a federal judge to invalidate the law. Legal liberalism has been reduced to fighting community empowerment.

When the police arrest a suspect and he confesses, this is now the beginning, not the end, of the case. Volumes of exclusionary rules now suppress evidence of wrongdoing, from voluntary confessions to unambiguous evidence of weapons and drugs. Remember the Shia Amal militiamen U.S. forces lured into a trap and arrested a few years ago? A federal district court suppressed the confession by one of the militiamen that he had blown up an airliner on the grounds that the *Miranda* warning he got after he was arrested in the Mediterranean had three words misspelled in Arabic. (An appeals court later allowed the confessions.)



"Of course the defendant wasn't read his rights immediately, your Honor. He was captured by a police dog!"

Many years ago, Judge Cardozo wrote that it is absurd that "the criminal is to go free because the constable blundered." Yet even the new conservative majority on the Supreme Court seems intent on expanding the exclusionary rule. In a recent opinion by Justice Anthony Kennedy, the Court quashed a confession to two murders because the defendant's lawyer was not in the room when he confessed. What began as a way to ensure that the police do not coerce confessions has become a legal game in which defendants are protected from their voluntary confessions. One-third of the time that prosecutors fail to bring drug cases, it's because of exclusionary-rule problems.

One predictable result is that we have many fewer police officers on the street. Why bother paying for police who are destined to fail? New York lawyer Adam Walinsky has collected the data. Thirty years ago there were three police officers for every violent crime; now there are three violent crimes for every police officer. The ratio of violent crimes to police officers is an excellent measure of the crime of a city. The recent ratio for San Diego is 5.4; Boston, 6.1; Atlanta, 9.6; Oakland, 10.7; and East St. Louis, 26.7.

It may be only human nature that top law-enforcement officials have reacted to their failure to control violent crime by shifting their sights to crimes they can still investigate and prosecute. At the federal level, Attorney General Dick Thornburgh speaks of "crime in the suites," implying a moral relativism between white-collar crime and violent crime. At the same time that Mr. Thornburgh announced he would disband the long-standing Strike Forces on Organized Crime, he created new Task Forces on Securities and Commodities Fraud. The frustration at the inability to confront violent crime created what Tom Wolfe's *Bonfire of the Vanities* referred to as the search for the "Great White [Collar] Defendant." Michael Milken can be brought to his knees, using the RICO law, for "crimes" that are still mysterious, but muggers, rapists, and murderers are routinely set free.

People worry more about thugs than about shady accountants. A survey by *National Law Journal*/Lexis asked which crime should rank the highest for law enforcement; 47 per cent of the respondents said drug dealing, 32 per cent said muggings and rapes, 11 per cent said racketeering, 3 per cent said white-collar crimes. The same point was made in this hypothetical: An armed robber gets away with $5,000 from a bank. So does an embezzler. What sentences are appropriate? Streets *v.* suites was no contest: Nearly half would have put the armed robber away for more than ten years, while only 12 per cent thought the white-collar embezzler should serve more than ten years. While prosecutors of course must prosecute white-collar abuses, this is no substitute for fighting against violent crime.

II. Civil Law: Robin Hoods in Judicial Robes

ALTHOUGH the Supreme Court attracts much of the public attention on legal issues, it was activist judges in state courts who caused the liability explosion by rejecting centuries-old common law. There are signs that the counterrevolution in tort (personal injury) and contract law has begun, with far-left, redistributionist judges thrown out of office in California and in Texas. But we have a long way to go before we are back to the original purpose of tort law, which was to compensate victims while deterring wrongdoers by finding liability for reasonably foreseeable harm. Our tort system has instead become a method for searching out the deepest pocket remotely related to someone's injury and then assessing huge damages. Oliver Wendell Holmes in his 1881 classic, *The Common Law*, warned:

> The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. . . . [But] unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or compel me to insure him against lightning.

Holmes would hardly believe his eyes if he read tort cases starting in the 1960s.

Peter Huber, in his *Liability: The Legal Revolution and Its Consequences*, and Yale Law professor George Priest have traced the development of the strange new ideology among academics, judges, and many lawyers. Their idea was to create ever-broader liability for defendants on the ground that even if the defendant didn't actually do anything wrong, he—or, since we're usually talking about corporations here, it—can always get insurance, and in the meantime any injured plaintiffs can be compensated.

The roots of the tort crisis are easy to trace. In 1960, the New Jersey Supreme Court effectively invalidated product-warranty exclusions, citing the "gross inequality of bargaining position occupied by the consumer" (*Henningsen* v. *Bloomfield Motors, Inc.*). In 1963, the California Supreme Court decided that courts must "ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than the injured persons who are powerless to protect themselves" (*Greenman* v. *Yuba Power Products*).

This soak-the-rich mentality was often explicit. In an infamous 1983 case, the California Supreme Court approved a lawsuit by a plaintiff who was in a telephone booth hit by a judgment-proof drunk driver. The plaintiff was allowed to sue any and all companies involved

UNITED STATES v. *SUPERMAN*

"They are trying now to make Superman vulnerable to certain things . . ."
—Curtis Swan, Superman artist

DEFENDANT Superman testified for the prosecution in *United States* v. *Luthor (XVII)*. After Luthor's acquittal, Superman was indicted for perjury, convicted, and sentenced to two years' imprisonment. He appeals to this court.

1. Superman's counsel first argues that the verdict conflicts with precedent. In *Lang* v. *FBI*, an estranged girlfriend of Superman sued for copies of government files concerning his secret identity. We denied Superman's petition to intervene in the lawsuit because, in our view, Congress intended to allow FOIA interventions by earthlings only. See generally L. Lang, *Identity: The Man of Steel and the Mild-Mannered Reporter* (concluding that Superman is actually Billy Batson).

We find no such limitation in the perjury statute. Dozens of trial judges, reaching the same conclusion, have admitted Superman's testimony under penalties of perjury. See, e.g., *United States* v. *Brainiac* (admitting testimony but reversing conviction because Superman had failed to obtain a search warrant before using telescopic vision); *United States* v. *Bizarro Superman No. 1* (admitting testimony but reversing conviction because, though Superman had obtained search warrant, he then traveled backward in time and conducted search before warrant's issuance); *United States* v. *Luthor (XIV)* (admitting testimony but reversing conviction because Superman had carried defendant to stratosphere and threatened to drop him unless he revealed whereabouts of stolen nuclear warheads; in dictum, urging defendant to seek damages for intentional infliction of emotional distress); *United States* v. *Mxyltplk* (admitting testimony but reversing conviction because indictment misspelled defendant's name).

2. Counsel goes on to note that Superman and his friends have faced certain legal difficulties in the past few years. See, e.g., *White* v. *Superman* (Superman liable for negligently failing to use X-ray vision to detect acquaintance's tumor); *Daily Times* v. *Superman* (as quasi-state actor, Superman must provide services and information to all news media and not exclusively to *Daily Planet*); *Metropolis* v. *Superman* (under pit-bull ordinance, Superman ordered to dispose of Krypto). See also *United States* v. *Justice League of America* (under Civil Rights Act, private association ordered to offer membership to Incredible Hulk).

3. In the context of this history, counsel suggests, Superman may refuse to comply with an imprisonment order.

It is true that Superman has recently disobeyed several injunctions. See *ACLU* v. *Superman* (banishment to Phantom Zone constitutes cruel and unusual punishment; Superman ordered to bring Zod, Ursa, and Non to standard prison; his claim that prisoners would escape and enslave all earthlings dismissed as purely speculative; fine set at $1 million per day until compliance); *De Beers, Inc.* v. *Superman* (payment of fine with diamonds squeezed from coal constitutes unlawful competitive practice); *United States* v. *One Arctic Cave and Improvements* (forfeiture action) (pending).

The enforcement issue may, however, prove moot: Superman disappeared shortly after his perjury conviction. Perhaps he has fled the jurisdiction. It has even been suggested that he is no longer alive. See "Mere Coincidence?" *Newsweek* (Superman has not been seen since death of Roy Cohn). Despite the uncertainties, though, we cannot rest this or any criminal judgment on the likelihood of its enforceability.

4. Finally, Superman's counsel would have us accept a defense that the jury rejected. When Luthor's counsel asked Superman whether he had ever been married, he replied: "No." Counsel then produced documentary evidence showing that Superman had, in fact, briefly been married to one Lois Lane. Were we assessing the facts *de novo*, perhaps we would conclude that, as Superman insisted, the marriage had occurred only in a dream sequence. But the jurors believed otherwise, and we cannot say that their conclusion was groundless.

Conviction affirmed.

—STEPHEN BATES

Mr. Bates, author of If No News, Send Rumors: Anecdotes of American Journalism, *is an adjunct research associate at the American Enterprise Institute.*

in "the design, location, installation, and maintenance" of the booth. Chief Justice Rose Bird dismissed traditional notions of foreseeability, and she added: "Imposition of liability would not be unduly burdensome to defendants given the probable availability of insurance" (*Bigbee* v. *Pacific Telephone & Telegraph Co.*).

The result of such edicts is a long list of valuable products and services no longer available in U.S. market. Mr. Huber identifies a "tort tax" of $300 billion a year in misallocated resources, including defensive medicine and price premiums on products to pay for legal fees. Pregnant women, for example, can no longer purchase Bendectin, an anti-nausea drug, which its maker stopped selling because of the costs of litigation. There was no proof of any harm from Bendectin, but the small profits did not justify the millions of dollars in lawsuits. Judicial experimenting with ever-widening liability rules creates a regressive liability tax; the poor are least able to pay the 30 per cent increase in the cost of a stepladder caused by the liability explosion.

The tort crisis was made possible by the death of sanctity of contract, the legal concept by which our society embodied the moral concept of personal rights and correlating duties. Disputes over contracts were supposed to be the opposite of torts. Torts typically involve strangers involuntarily brought together by accidents such as auto collisions. The purpose of contracts is to allow parties to set out in advance the risks of their planned transactions. Thanks to judicial activism, however, it is nearly impossible to draft agreements judges will leave alone. The tort crisis could be solved if people could contract around litigation—for example, by waiving rights to sue for "pain and suffering" in exchange for lower automobile-insurance premiums—but courts would probably refuse to enforce any such agreement. Indeed, the overlap between contracts and torts is now so complete that at one leading law school it's possible to study "contorts" instead of the usual separate courses in contracts and torts.

The basis for the assumption that judges somehow know better how the parties should have allocated risks than did the parties themselves is lost in the mists of time, but we have an excellent paper trail of how contracts essentially became blank slates for judges.

Pacific Gas & Electric v. *G. W. Thomas Drayage & Rigging*, a 1968 case decided by the California Supreme Court, is a wonderful example. A contract included a standard, crystal-clear indemnification provision, but the judges decided that the parties should not be held to their written agreement because words have no meaning. (I'm not making this up.) Chief Justice Roger Traynor said the idea that parties could use words to negotiate binding agreements was "a remnant of a primitive faith in the inherent potency and inherent meaning of words." Words, he assured us, "do not have absolute and constant referents," and he cited anthropologists and semanticists for this proposition. He cited his sources in this footnote: "E.g., 'The elaborate system of taboo and verbal prohibitions in primitive groups; the ancient Egyptian myth of Khern, the apotheosis of the words, and of Thoth, the Scribe of Truth, the Giver of Words and Script, the Master of Incantations; the avoidance of the name of God in Brahmanism, Judaism, and Islam; totemistic and protective names in medieval Turkish and Finno-Ugrian languages; the misplaced verbal scruples of the Précieuses; the Swedish peasant custom of curing sick cattle smitten by witchcraft, by making them swallow a page torn out of the psalter and put in dough . . .' from Ullman, *The Principles of Semantics*." Which may explain why we tend to put lawyers, not Thoth experts, on the bench. Lawyers are supposed to take words seriously.

Chief Justice Traynor's ruling may seem absurd, but it remains good law in California. Alex Kozinski, a Reagan-appointed federal judge for the Ninth Circuit Court of Appeals, recently had to rely on the *Pacific Gas* case in deciding a contract dispute, because federal judges are bound by state law, no matter how crazy. "*Pacific Gas* casts a long shadow of uncertainty over all transactions negotiated and executed under the law of California," Judge Kozinski wrote. "Even when the transaction is very sizable, even if it involved only sophisticated parties, even if it was negotiated with the aid of counsel, even if it results in contract language that is devoid of ambiguity, costly and protracted litigation cannot be avoided if one party has a strong enough motive for challenging the contract."

In another case Judge Kozinski, who has been waging a one-judge insurgency to restore freedom of contract, described the principles lost when judges started to ignore contracts: "That people have the right, within the scope of what is lawful, to fix their legal relationship by private agreement; that the future is inherently unknowable and that individuals have different visions of what it may bring; . . . and that enforcement of these agreements will not be held hostage to delay, uncertainty, the cost of litigation, or the generosity of juries."

III. The Constitution: What Ever Happened to Ordered Liberty?

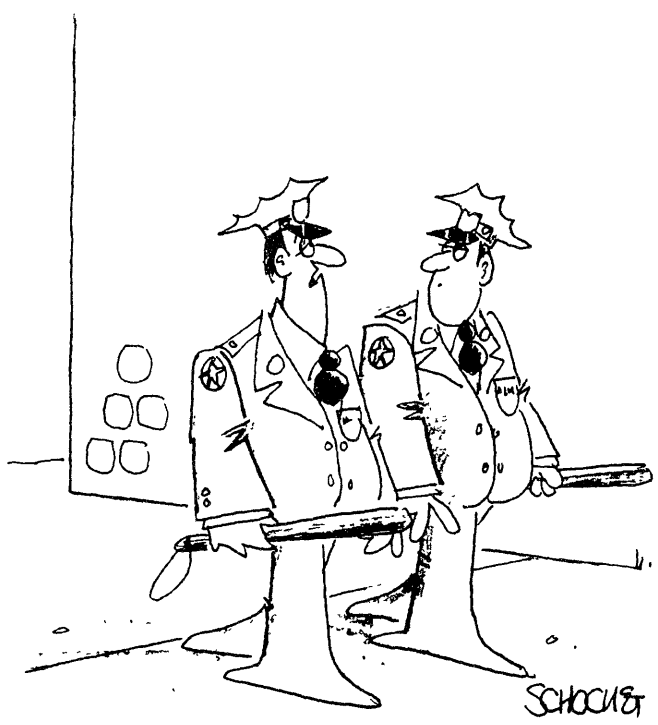
THE CONSTITUTION is the most conservative of documents, its chief function being to constitute a government of limited powers. The Founders created the twin controls of separation of powers to limit the individual powers of the legislative, executive, and judicial branches and federalism as the ultimate limit on the combined powers of the three branches of the Federal Government.

The breakdown of separation of powers is the root cause of many of our most intractable political problems. Attacks by Congress have weakened the President and paralyzed the government. The federal budget deficit, for example, grew out of control after Congress took advantage of a weakened Richard Nixon to pass the 1974 Budget and Impoundment Control Act. This took away the power used by Presidents since Jefferson to refuse to spend all the money appropriated by Congress, a power John F. Kennedy used to cut the budget by 6 per cent. The Supreme Court has never heard a

case challenging the constitutionality of the 1974 Act, despite the fundamental principle that no branch of government can usurp the inherent constitutional powers of another branch.

The same breakdown has confused foreign policy. The Boland amendments, the most recent progeny of the War Powers Resolution, paralyzed President Reagan's final years in office and institutionalized the notion that Congress can criminalize its policy differences with the White House. Despite congressional acquiescence in President Bush's policy toward Iraq, the larger trend is congressional fetters on the branch of government that the Founders assumed would be energetic in defense of national security.

The Bill of Rights, meant to be the guarantor of ordered liberty, is now the source of the greatest disorder. Consider the divisive battle over abortion, which somehow became a question of constitutional law despite the utter absence of any discussion of trimesters anywhere in the document itself. *Roe* v. *Wade* flowed directly from *Griswold* v. *Connecticut*, a test case on whether the Constitution says anything about a right to contraceptives. Justice Douglas acknowledged that the Constitution was silent on the issue, but discovered a privacy right based on "penumbras, formed by emanations" from the Bill of Rights. What a different legal world we might have if the Justices had left legislators to wrestle with public policy. Instead, we now have the related spectacle of hospitals suing to stop families from enforcing right-to-die living wills.



"Have you apprehended any alleged perpetrators lately?"

All that remains of federalism is that the Supreme Court has largely been silent as the state courts have unwound centuries of tort and contract law. This was perhaps best seen a few years ago when the Justices refused to hear an appeal of an $11-billion award against Texaco; the Texas judge, who usually handled matrimonial cases, admitted after the trial that he probably got the contract law wrong when he ruled for Pennzoil in the takeover battle over Getty.

Instead, the Court has used its limited docket in curious ways. The Justices have issued several rulings addressing the intellectually fascinating but essentially trivial issue of what kind of religious displays (if any) the government can support (or condone) on public (or private) property. The Court has said that a nativity scene on the front staircase of a county courthouse violated the establishment clause of the First Amendment, but that a menorah and Christmas tree outside a city–county building a few blocks away did not. Creches can pass constitutional muster if there is a quota of plastic Frosty-the-Snowmen to secularize the display. What any of this has to do with the First Amendment prohibition on the Federal Government establishing a religion remains hazy. Despite—because of?—so many court cases, mayors and county commissioners remain utterly confused about what they can and can't do each December. Whatever pleasure the Justices and their recent-law-school-graduate clerks get from counting the angels on the head of this pin of the Constitution, the benefit to the country is rather hard to see.

In contrast, the rights that once accounted for nearly all Supreme Court cases—rights involving commercial disputes—have nearly dropped from sight. Economic liberties are supposed to be protected by the Fifth Amendment prohibition on the government taking private property for a public purpose without paying compensation, and the Contracts Clause was supposed to prohibit state interference with contracts. Yet rent control, for example, somehow remains constitutional despite the obvious "taking" from the owner. The result of price controls on the housing supply is obvious in places such as New York City, yet courts have been loath to take the constitutional issues seriously.

American ingenuity has tried to cope with the collapse of the rule of law. Private security forces, from urban doormen to office guards, are thriving. Suburban housing developments advertise their close attention to safety. On the civil side, obstetricians avoid litigious Florida, and many waste-removal firms won't risk doing business in New Jersey.

As always, though, those who can least afford alternatives suffer the most. A line comes to mind from G. K. Chesterton's critique of anarchism in *The Man Who Was Thursday*. The poor, he wrote, "have never been anarchists; they have more interest than anyone else in there being some decent government. The poor man really has a stake in the country. The rich man hasn't; he can go away to New Guinea in a yacht."

Today, the rich limit the anarchy of self-defeating and uncertain laws by privatizing security, but the poor and middle class have fewer options. This means—if any politicians or judges are listening—that there is an enormous constituency for law that once again protects order. □

ID # 211191 CU

HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Evan Kemp Jr.

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

Subject: The Civil Rights Restoration Act of 1991

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

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuotc	ORIGINATOR	91/02/06		C	91/02/19
	Referral Note:				
Cuat 10	A	91/02/06	NLD	C	91/02/19
	Referral Note:	Memo for the File			
Cua 07	I	91/02/06		C	91/02/06
	Referral Note:				
Cuq7ay	I	91/02/06		C	91/10...
	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"
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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.
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5/81

THE WHITE HOUSE

WASHINGTON

February 19, 1991

MEMORANDUM FOR THE FILE

FROM: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: FAX from Evan Kemp Concerning the Civil Rights Act of 1991

I discussed the attached materials concerning the captioned matter with Evan Kemp orally.

The attached may be closed out.

Attachment

WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

TELECOPIER TRANSMITTAL SHEET

DATE: 2-6-91 TIME: 9:21 am

NUMBER OF PAGES + COVER SHEET 5

TO : C. Boyden Gray

OFFICE : Counsel to the President

ROOM :

REMARKS : PERSONAL / CONFIDENTIAL
"EYES ONLY"

FROM : Evan J. Kemp, Jr., Chairman

OFFICE : OFFICE OF THE CHAIRMAN

PHONE NUMBER : 663-4001

FAX NUMBER : 663-4110

CONFIRMATION REQUESTED? YES ✓ NO ___

IMMEDIATE DELIVERY REQUESTED? YES ✓ NO ___

IF THERE IS A PROBLEM WITH THIS TRANSMISSION, PLEASE CALL
Debbie AT # above.

02/06/1991 09:26 FROM OFFICE of the CHAIRMAN TO 9456627 P.01

A Bill

To amend the Civil Rights Act of 1964 to clarify the legality of using job-related employment standards with "disparate impact"

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 CIVIL RIGHTS RESTORATION ACT of 1991" amending Title VII of the Civil Rights Act of 1964.

SECTION 2. FINDINGS AND PURPOSES.

(A) FINDINGS. Congress finds that:

(1) Section 703(h) of Title VII of the Civil Rights Act of 1964 states:
"[I]t shall not be an unlawful employment practice for an employer...to give and to act upon the results of any professionally developed ability test 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."

(2) Section 703(j) of Title VII states:
"Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, State, section or other area, or in the available work force in any community, State, section, or other area."

(3) The unanimous Supreme Court in Griggs v. Duke Power Co. in 1971 cited the memorandum of understanding of the co-sponsors of Title VII that:
"There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance."

(4) The unanimous Supreme Court in Griggs v. Duke Power Co. stated: "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

(5) Notwithstanding Title VII Sections 703(h)&(j) and the Supreme Court's endorsement in Griggs, an employer who uses job-related employment standards without regard to an individual's race, color, or national origin is likely to be challenged under Title VII on account of imbalances (known as "disparate impact") which frequently result with regard to the percentage of persons referred, classified, admitted or employed in comparison with the percentage of persons of such race, color, or national origin in the available work force in any community, State, section or other area.

(6) In order to avoid Title VII "disparate impact" litigation, Title VII plaintiffs and some employers have resorted to "race norming" to eliminate the imbalances which frequently result from the use of job-related employment standards even when such standards can be justified under applicable "business necessity" principles. "Race norming" (also called "within-group scoring") compares an individual only to other members of that individual's race, color, or national origin. Typically blacks are compared only to other blacks, Hispanics only to other Hispanics, and "others" to all but blacks and Hispanics. When race-normed scores are used, it appears that minorities are as qualified as non-minorities when in fact this is only so because of "race norming." Another example of "race-norming" is a race-conscious decision making which gives "preference points" to members of groups that tend to score lower than others (or subtracts points from the higher scoring group) thus offsetting average differences in scores between groups.

(7) The Supreme Court in 1975 in Albemarle Paper Co. v. Moody stated:
"If an employer does then meet the burden or proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"

(8) Even when employers have defended the "business necessity" of job-related employment standards and use them without regard to an individual's race, color, or national origin, charging parties have identified "race norming" and/or "preference points" as a so-called "suitable alternative method of using the selection procedure that have as little adverse impact as possible" citing as their authority Section 3(B) of the Uniform Guidelines on Employee Selection Procedures issued by several Federal enforcement agencies. Clearly, the Title VII plaintiff must demonstrate that some other standard is available, and cannot make the employer "race norm" or grant "preference points" to an individual's score

when the standard has been shown to be a "business necessity." The purpose of this amendment is to make clear that once an employer has shown that its employment standards are justified as a "business necessity," a plaintiff cannot prove that the standards are pretextual because the employer did not use "race norming" or grant "preference points" to adjust the scores of individual test takers on account of that person's race, color or national origin.

SECTION 3. DEFINITIONS

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new subsection:

"(1) the term "justified by business necessity" means that the challenged practice has a manifest relationship to the employment in question."

"(2) the term "race norming" means the adjustment of the results of an ability test or other employment, referral, apprenticeship or training standard so that the test or standard will have less adverse impact on a group or groups of individuals differentiated on the basis of race, color or national origin. "Race norming" includes, but is not limited to, the use of "within-group scoring" or "preference points."

"(3) the term "within-group scoring" is a method of scoring ability tests or other employment, referral, apprenticeship or training standard by comparing individuals only with members of their own race, color or national origin rather than with all applicants."

SECTION 4. PROHIBITION OF RACE NORMING

Section 703(a)(2) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new sentences:

"It shall be an unlawful employment practice for an employer to use 'race norming' in order to limit, segregate, classify, or select employees or applicants for employment. Provided however, that an unlawful employment practice shall not be established where the employer's practice or practices have been justified by business necessity and the employer does not adjust the results of that practice or practices by the use of 'race norming'."

Section 703(b) of Title VII is amended by adding at the end thereof the following new sentences:

"It shall be an unlawful employment practice for an employment agency to refer an individual or individuals for employment by the use of 'race norming.' Provided however, that an unlawful employment practice shall not be established where an ability test

or other referral standard has been justified by business necessity and the employment agency does not adjust the results of that test or standard by the use of 'race norming.'"

Section 703(d) of Title VII is amended by adding at the end thereof the following new sentences:

"It shall be an unlawful employment practice to use 'race norming' for admission to, or employment in, any program established to provide apprenticeship or other training. Provided however, that an unlawful employment practice shall not be established where an ability test or other training program has been justified by business necessity and the results of that test or standard have not been adjusted by the use of 'race norming.'

Section 703(h) of Title VII is amended by adding at the end thereof the following new underlined language:

"(h)...nor shall it be an unlawful employment practice for an employer to give and to act upon results of any professionally developed ability test 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; provided however, that it shall it be an unlawful employment practice to administer or to take any action upon the results of such a test by the use of 'race norming;' provided further, that an unlawful employment practice shall not be established where an ability test has been justified by business necessity and the employer does not adjust the results of that test by the use of 'race norming.'"

SECTION 5. EFFECTIVE DATE

This Act and the amendments made by this Act shall take effect on the date of enactment of this Act.

-B

ID # 21196 CU

HU01

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Ede Holiday

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

Subject: Civil Rights Package - Talking Points

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuffe	ORIGINATOR	91/02/06		C	91/02/06
CUAT 10	Referral Note: A	91/02/06		C	ASAP - 91/02/06
CUAT 07	Referral Note: F	91/02/06	See Comments	C	91/02/06
Cugray	Referral Note: I	91/02/06		C	91/02/06
CUAT 02	Referral Note: I	91/02/06		C	91/02/06
	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: The CAPTIONED MATTER WAS OVERTAKEN BY EVENTS.
NELSON LUND 2-6-91

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

THE WHITE HOUSE

WASHINGTON

February 5, 1991

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: C. BOYDEN GRAY
EDE HOLIDAY

SUBJECT: Civil Rights Package

Attached for your use tomorrow is a set of talking points on the civil rights package. The talking points outline a list of initiatives which could be included in the package, as well as a summary of a proposed employment discrimination bill.

We have also attached an expanded list of items in the FY '92 budget that could be mentioned or included in the civil rights package. These initiatives are described briefly in the fact sheets OMB released in connection with the budget -- copies of the relevant pages are included.

We are convening a meeting of White House and Justice Department staff tomorrow at 2:30 to discuss which items should be included and the implementation strategy. We will make recommendations to you following that meeting.

Attachments

TALKING POINTS ON CIVIL RIGHTS AND OPPORTUNITY PACKAGE

- The Administration's civil rights bill (summary of employment discrimination provisions attached) will be announced concurrently with a package of several bills to enhance the power of individuals, families, and communities on several fronts: 1) educational choice; 2) educational flexibility; 3) Davis-Bacon reform; 4) enterprise zones; 5) empowerment opportunity areas; and 6) crime.

- Educational Choice: The President's upcoming **Educational Excellence Act** would: include $200 million to provide school districts with an incentive to allow parents to choose the public or private schools their children will attend; allow education grants under Chapters 1 and 2 to be used for choice programs; and provide $30 million for choice demonstrations.

- Educational Flexibility: The **Educational Excellence Act** would also incorporate flexibility provisions. Schools would be held accountable for achieving specific educational goals in exchange for increased flexibility in the use of their resources.

- Davis-Bacon Reform: **The Davis-Bacon Reform Act of 1991** would raise the threshold at which prevailing wage requirements apply to Federal and Federally assisted construction contracts to $250,000. Raising the threshold expands opportunities for smaller construction firms -- many of which are minority businesses -- and creates employment opportunities for those who have been denied the chance to compete for jobs on Federal construction projects.

- Enterprise Zones: **The Enterprise Zone and Jobs-Creation Act of 1991** targets tax incentives and regulatory relief to some of our nation's most economically depressed areas. These zones will attack poverty at its roots by attracting seed capital for small business start-ups, creating incentives for entrepreneurial risk taking, and reducing high effective tax rates on those moving from welfare to work.

- Opportunity Areas: **The Opportunity Area Act of 1991** would enable communities to develop "empowerment opportunities systems" to deliver a range of social services to individuals and families in a manner the community deems most appropriate. States and communities would apply for waivers from Federal statutory and regulatory requirements of various Federal programs.

- Crime: Freedom from crime is the most basic civil right and the Administration will again propose legislation to get tough on violent criminals.

Summary of Main Provisions for a Civil Rights Bill

Wards Cove.

- Defend current law or, at most, shift the burden of proof on business necessity.

Martin v. Wilks and Price Waterhouse.

- Leave current law intact.

Remedies.

- Create a new anti-harassment statute separate from Title VII and Sec. 1981. This statute would provide the exclusive Federal remedy for all claims of harassment on the basis of race, color, national origin, religion, sex, and disability.

- Remedies available under this statute would include injunctive relief, back pay, and a capped monetary award. Seventh Amendment issues would be handled as in last year's bill. To discourage inappropriate litigation that might be caused by the availability of the new monetary remedy, include provisions tightening the definition of harassment and provide affirmative protections from liability for employers who maintain strong anti-harassment policies and complaint procedures.

- This proposal establishes parity for harassment claims between women and minorities at a level that meets the criteria for new harassment remedies set forth in the President's Rose Garden speech last May.

Patterson, Lorance and Crawford Fitting.

- Overrule, as in last year's bill.

Age Act Notice of Limitations; Interest against the Federal government; Statute of Limitations against the Federal government; Alternative Dispute Resolution provision.

- Same as last year's bill.

Anti-preference provisions.

- Dole anti-quota language included in last year's bill. Perhaps also include prohibition against "race norming."

Coverage of congressional employees.

- Internal enforcement left to Congress, followed by a private right of action in court.

Retroactivity.

- Prospective coverage only.

INITIATIVES FOR POSSIBLE INCLUSION IN THE
CIVIL RIGHTS AND OPPORTUNITY PACKAGE

Legislation Required:

1. Civil Rights bill.

2. Educational Choice proposals:
   -- $200 million Certificate Program Support Fund;
   -- new authority to fund Magnet Schools of Excellence;
   -- allow education grants under Chapters 1 and 2 to be used for choice programs;
   -- $30 million for choice demonstrations.

3. Educational Flexibility bill.

4. Davis-Bacon Reform.

5. Enterprise Zones.

6. Empowerment Opportunity Areas.

7. Crime bill.

8. Increased Flexibility for Housing Programs.

9. Use of IRAs for First Home Purchases.

10. Social Security Earnings Test Liberalization.

11. Reforms to the Job Training Partnership Act (JTPA).

Legislation Not Required:

1. Child Care and Health Insurance Tax Credits.

2. Child Care Block Grant.

3. Increase for Housing Vouchers.

4. Funding for HOPE.

5. Reform of the Public Employment Service.

6. Targeted SBA Programs.

INCREASING CHOICE, EXPANDING OPPORTUNITY, AND PROVIDING HOPE TO DISTRESSED COMMUNITIES
(Chapter V. A.)

- o Child Care and Health Insurance Tax Credits: A newly expanded Earned Income Tax Credit, and a new Health Insurance Credit will make child care and health insurance more affordable for low-income families with children while assuring maximum freedom of choice over the use of the benefits. For 1992, these credits will provide $10 billion in support to working families with children, and $69 billion over the next five years. These credits were created as part of the budget agreement last fall.

- o Child Care Block Grant: The new Child Care and Development Block Grant, the first grant program of its kind to require that assistance be offered through certificates to ensure parental choice, will be funded at $732 million.

- o Educational Choice: The budget includes funding for the President's upcoming Educational Excellence Act legislative proposal which will include:

  - $200 million for a Certificate Program Support Fund to provide school districts with an incentive to allow parents to choose the public or private schools their children will attend.

  - New authority to fund Magnet Schools of Excellence in order to extend this proven choice approach to schools regardless of racial composition or the presence of a school desegregation plan. Support for magnet schools for desegregation will be maintained as well.

  - Amendments to facilitate and increase use of Local Agency Grants and Education Block Grants under Chapters 1 and 2 of the Elementary and Secondary Education Act for educational choice programs.

  - $30 million to fund nationally significant choice demonstrations.

- o Housing Choice: For 1992, $2.4 billion is requested to provide an additional 78,860 housing vouchers to low-income renters. This 41 percent funding increase over tenant-based housing subsidies appropriated for 1991 reflects the Administration's policy of assuring subsidized tenants maximum choice over where to live and how much to pay for housing.

- o Homeownership: Opportunity for low-income families to become homeowners will be expanded through HOPE (Homeownership and Opportunity for People Everywhere). For 1991, a fully-offset supplemental request for $287 million

is proposed for HOPE; for 1992, the request is $2.15 billion.

To preserve those subsidized rental properties that may be converted to other uses, $718 million is requested. The goals are to protect low-income renters, provide opportunities for low-income tenants to become homeowners, and compensate owners fairly to retain their properties as low-income rental units.

To reduce defaults and improve housing conditions for low-income renters in financially distressed, FHA-insured rental properties, a $668 million Low-Income Resident Empowerment Program is proposed for 1992. This program will assist those landlords who are willing to provide their low-income tenants an equity interest in their units.

- o Increased Flexibility: To allow grantees to use funds more effectively: certain categorical housing programs will be replaced with more flexible HOME grants; several small categorical programs for the homeless will be consolidated; legislation will be proposed to permit waivers of some Federal education program requirements for innovative programs which can demonstrate progress toward stated educational goals.

- o Using IRAs for First Home Purchases: First-time home-buyers would be permitted to withdraw up to $10,000 from tax-deferred IRAs without penalty for a down payment.

- o Enterprise Zones: To help revitalize economically distressed communities, the budget includes proposals for Federal tax incentives in up to 50 enterprise zones. A 5 percent refundable tax credit for low-income workers, favorable tax treatment for purchase of newly issued corporate stock in enterprise zones, and a zero capital gains rate for investments in zone businesses are proposed.

- o Job Training: Reforms to the $4.0 billion Job Training Partnership Act (JTPA) are proposed to target job training efforts on extremely disadvantaged adults and youth. Included is a new Youth Opportunities Unlimited (YOU) program in up to 40 high-poverty areas. Reforms of the Federal-State Employment Service also are intended to target resources on more disadvantaged workers.

- o Reform of Davis-Bacon: Recently issued Labor Department regulations would improve opportunities on Federal construction projects for workers still learning their journeyman skills and create another rung on the ladder to economic success for less-skilled workers. The threshold for application of the Davis-Bacon Act wage level provisions

for Federal construction projects would be raised to $250,000 from the present $2,000., a ceiling which has not been raised since it was imposed in 1935.

- Social Security Earnings Test: A modest liberalization is proposed for the Social Security earnings test, which reduces retirement benefits to aged recipients after their earnings reach a specified amount in any year. For 1992, the amount of earnings recipients are allowed before their benefits are affected would be increased 8 percent, to $11,000.

ID# 211285

Lee

HU10

HU10

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: FEBRUARY 07, 1991

NAME OF CORRESPONDENT: MS. MARCIA BULLARD

SUBJECT: REQUESTS THAT THE PRESIDENT COMPLETE THE ENCLOSED SURVEY ON CIVIL RIGHTS; RESULTS WILL BE PUBLISHED JUN 30 IN A SPECIAL JUL 4 91 USA WEEKEND ISSUE DEVOTED TO CIVIL RIGHTS

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
C ~~BOYDEN GRAY~~	REFERRAL NOTE:	ORG	91/02/07		C	91/02/19
CMAT 10	REFERRAL NOTE:	A	91/02/07		C	91/02/19
CMAT 04	REFERRAL NOTE:	I	91/02/07		C	91/02/19
CMGRAY	REFERRAL NOTE:	I	91/02/07	See Comments	C	91/02/07
	REFERRAL NOTE:		/ /			/ /

COMMENTS: Close out
LSK handled 2-19-91
by phone

ADDITIONAL CORRESPONDENTS: 1 MEDIA:L INDIVIDUAL CODES: 4620 ____ ____

MI 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.

USA WEEKEND
1000 WILSON BOULEVARD
ARLINGTON, VA 22229
703-276-6445

211285

C. B Gray

Feb. 4, 1991

Dear President Bush:

Will you please give 32 million Americans your thoughts on an important topic?

Civil rights is an issue of crucial importance to the United States in the 1990s.

Coretta Scott King and USA WEEKEND, the national newspaper magazine with 32 million readers, ask you to complete the enclosed survey on civil rights. The results will be published June 30 in a special Fourth of July issue devoted entirely to civil rights issues.

You are one of just 925 opinion leaders -- elected and appointed officials, politicians, artists, journalists, business leaders, athletes and many others -- being asked to participate in this special report.

Please take a moment to fill out the enclosed survey and return it by Feb. 15 in the postage-paid envelope. Your answers, and additional comments, are invaluable.

If you have any questions, please call Timothy McQuay at 1-800-872-8632, ext. 4532.

Thank you for speaking out.

Sincerely,

Marcia Bullard
Editor

Coretta Scott King
President and Chief Executive Officer
The Martin Luther King, Jr.
Center for Nonviolent Social Change

USA WEEKEND

USA WEEKEND Civil Rights Survey

1117

President George Bush

1. **Many civil rights issues compete for attention. Which three do you think deserve the most attention and action in the '90s? In other words, which should be the nation's priorities?**
(Rate them 1, 2, 3; with 1 deserving the greatest priority.)

___ Fairness in hiring, promotions and pay
___ Equality in education
___ Fairness in housing
___ Access to health care
___ Equal treatment in justice system
___ Freedom to practice religion
___ Access to political power

2. **Think back to the 1970s, the decade after the Civil Rights Act was passed. Compared to then, do you think minorities today are faring better, worse or the same in:**

	Better	*Same*	*Worse*
Employment	1☐	2☐	3☐
Education	1☐	2☐	3☐
Social status	1☐	2☐	3☐
Housing	1☐	2☐	3☐
Health care	1☐	2☐	3☐
Political power	1☐	2☐	3☐
Economic power	1☐	2☐	3☐

3. **Many are involved with protecting civil rights. As an opinion leader, tell us who you think is doing the most effective job right now?** *(Check one.)*

1☐ President
2☐ Congress
3☐ Courts
4☐ Groups (NAACP, ACLU, etc.)
5☐ State/local government
6☐ Business

4. **The least effective job?** *(Check one.)*

1☐ President
2☐ Congress
3☐ Courts
4☐ Groups (NAACP, ACLU, etc.)
5☐ State/local government
6☐ Business

5. **Ten years from now, will there be more, less or the same amount of tension between minorities and non-minorities?**

1☐ More 2☐ Same 3☐ Less

6. **Ten years from now, will there be more, less or the same amount of tension between minority groups?**

1☐ More 2☐ Same 3☐ Less

7. **Picture two job applicants with equal qualifications. One is a member of a minority group, one is not. Does a person in the following minority groups have a better, worse or same chance as a white applicant?**

	Better	*Same*	*Worse*
Black	1☐	2☐	3☐
Hispanic	1☐	2☐	3☐
Asian	1☐	2☐	3☐
American Indian	1☐	2☐	3☐

8. **For each of the following groups, please indicate how accurately media coverage reflects reality:**

	Too negative	*Fair*	*Too positive*
Black	1☐	2☐	3☐
Hispanic	1☐	2☐	3☐
Asian	1☐	2☐	3☐
American Indian	1☐	2☐	3☐
White (non-Hispanic)	1☐	2☐	3☐

9. **Should it be required that languages besides English be available for voting, schooling and government and business transactions?**

1☐ Yes 2☐ No

10. **When was the last time you felt someone treated you negatively because of your race/ethnicity?** *(Check one.)*

1☐ Within the past week
2☐ Within the past month
3☐ Within the past year
4☐ Years ago
5☐ I can't remember the last time
6☐ Never
Explain: _____

11. **If you could identify one step or policy to best improve civil rights by the year 2000 — it could concern funding, busing or other educational reforms, political change, etc. — what would it be?**

_____

_____

For our statistical analysis, please note if you are:

1☐ Black
2☐ Asian
3☐ White
4☐ American Indian
5☐ Hispanic (white)
6☐ Hispanic (black)

Also, are you: 1☐ Male 2☐ Female **Your age:** ____

PLEASE RETURN IMMEDIATELY. YOUR RESPONSE IS VITAL.

ID# 211285

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: FEBRUARY 07, 1991

NAME OF CORRESPONDENT: MS. MARCIA BULLARD

SUBJECT: REQUESTS THAT THE PRESIDENT COMPLETE THE ENCLOSED SURVEY ON CIVIL RIGHTS; RESULTS WILL BE PUBLISHED JUN 30 IN A SPECIAL JUL 4 91 USA WEEKEND ISSUE DEVOTED TO CIVIL RIGHTS

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C. ~~BOYDEN GRAY~~	ORG	91/02/07		C	91/02/12
REFERRAL NOTE:					
Cuat 10	A	91/02/07	NL	C	91/02/12
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Cuat 04	I	91/02/07		C	91/02/07
REFERRAL NOTE:					
	I	91/02/07		C	91/02/07
REFERRAL NOTE:					
		/ /			/ /
REFERRAL NOTE:					

COMMENTS:

ADDITIONAL CORRESPONDENTS: 1 MEDIA:L INDIVIDUAL CODES: 4620

MI MAIL USER CODES: (A) (B) (C)

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

February 12, 1991

MEMORANDUM FOR C. BOYDEN GRAY

FROM: NELSON LUND

SUBJECT: Request from USA WEEKEND and Coretta Scott King For POTUS to Complete Questionnaire on Civil Rights

Lee and I agree that the President should not complete this questionnaire. Because the solicitation came in a form letter, I'm inclined to think that a routine reply from the Office of Media Relations would be appropriate.

Attached is a draft memo to Media Relations asking that they respond.

CBG:NL
CBGray
NLund
Chron.

THE WHITE HOUSE

WASHINGTON

February 12, 1991

MEMORANDUM FOR DEBORAH AMEND
SPECIAL ASSISTANT TO THE PRESIDENT FOR
COMMUNICATIONS

FROM: C. BOYDEN GRAY
COUNSEL TO THE PRESIDENT

SUBJECT: Request from USA WEEKEND and Coretta Scott King For POTUS to Complete Questionnaire on Civil Rights

Attached is a request from USA WEEKEND and Coretta Scott King for the President to complete a questionnaire on civil rights. I believe this request should be declined, but that the response would most appropriately come from your office.

Thank you.

Attachment

USA WEEKEND
1000 WILSON BOULEVARD
ARLINGTON, VA 22229
703-276-6445

211285

C. B Gray

Feb. 4, 1991

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If you have any questions, please call Timothy McQuay at 1-800-872-8632, ext. 4532.

Thank you for speaking out.

Sincerely,

Marcia Bullard
Editor

Coretta Scott King
President and Chief Executive Officer
The Martin Luther King, Jr.
Center for Nonviolent Social Change

USA WEEKEND

USA WEEKEND

Civil Rights Survey

1117

President George Bush

1. **Many civil rights issues compete for attention. Which three do you think deserve the most attention and action in the '90s? In other words, which should be the nation's priorities?**
(Rate them 1, 2, 3; with 1 deserving the greatest priority.)

___ Fairness in hiring, promotions and pay
___ Equality in education
___ Fairness in housing
___ Access to health care
___ Equal treatment in justice system
___ Freedom to practice religion
___ Access to political power

2. **Think back to the 1970s, the decade after the Civil Rights Act was passed. Compared to then, do you think minorities today are faring better, worse or the same in:**

	Better	*Same*	*Worse*
Employment	1☐	2☐	3☐
Education	1☐	2☐	3☐
Social status	1☐	2☐	3☐
Housing	1☐	2☐	3☐
Health care	1☐	2☐	3☐
Political power	1☐	2☐	3☐
Economic power	1☐	2☐	3☐

3. **Many are involved with protecting civil rights. As an opinion leader, tell us who you think is doing the most effective job right now?** *(Check one.)*

1☐ President
2☐ Congress
3☐ Courts
4☐ Groups (NAACP, ACLU, etc.)
5☐ State/local government
6☐ Business

4. **The least effective job?** *(Check one.)*

1☐ President
2☐ Congress
3☐ Courts
4☐ Groups (NAACP, ACLU, etc.)
5☐ State/local government
6☐ Business

5. **Ten years from now, will there be more, less or the same amount of tension between minorities and non-minorities?**

1☐ More 2☐ Same 3☐ Less

6. **Ten years from now, will there be more, less or the same amount of tension between minority groups?**

1☐ More 2☐ Same 3☐ Less

7. **Picture two job applicants with equal qualifications. One is a member of a minority group, one is not. Does a person in the following minority groups have a better, worse or same chance as a white applicant?**

	Better	*Same*	*Worse*
Black	1☐	2☐	3☐
Hispanic	1☐	2☐	3☐
Asian	1☐	2☐	3☐
American Indian	1☐	2☐	3☐

8. **For each of the following groups, please indicate how accurately media coverage reflects reality:**

	Too negative	*Fair*	*Too positive*
Black	1☐	2☐	3☐
Hispanic	1☐	2☐	3☐
Asian	1☐	2☐	3☐
American Indian	1☐	2☐	3☐
White (non-Hispanic)	1☐	2☐	3☐

9. **Should it be required that languages besides English be available for voting, schooling and government and business transactions?**

1☐ Yes 2☐ No

10. **When was the last time you felt someone treated you negatively because of your race/ethnicity?** *(Check one.)*

1☐ Within the past week
2☐ Within the past month
3☐ Within the past year
4☐ Years ago
5☐ I can't remember the last time
6☐ Never
Explain: _____

11. **If you could identify one step or policy to best improve civil rights by the year 2000 — it could concern funding, busing or other educational reforms, political change, etc. — what would it be?**

_____

_____

For our statistical analysis, please note if you are:

1☐ Black
2☐ Asian
3☐ White
4☐ American Indian
5☐ Hispanic (white)
6☐ Hispanic (black)

Also, are you: 1☐ Male 2☐ Female **Your age:** ____

PLEASE RETURN IMMEDIATELY. YOUR RESPONSE IS VITAL.

LAFALC002

7-30-90

AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 4000, AS REPORTED
OFFERED BY MR. LAFALCE OF NEW YORK

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ``Civil Rights Act of 1990''.

SEC. 2. FINDING AND PURPOSE.

(a) FINDING.--Congress finds that additional protections and remedies under Federal law are needed to deter unlawful discrimination.

(b) PURPOSE.--The purpose of this Act is to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence

SEC. 3. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end the following:

``(l) The term `complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

``(m) The term `demonstrates' means meets the burden of

production and persuasion.

``(n) The term `required by business necessity' means that the challenged practice has a manifest relationship to the employment practice in question or that the respondent's legitimate employment goals are significantly served by, even if they do not require, the challenged practice or group of practices.

``(o) The term `respondent' means an employer, employment agency, labor organization, joint labor-management committee, controlling apprenticeship or other training or retraining programs, including on-the-job training programs, or those Federal entities subject to the provisions of section 717 (or the heads thereof).''.

SEC. 4. DISPARATE IMPACT CASES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end the following:

``(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.--(1) An unlawful employment practice based on disparate impact is established only when--

``(A) a complaining party identifies a particular employment practice and demonstrates by statistical evidence that that particular employment practice causes a disparate impact on the basis of race, color, religion, sex, or national origin; and the respondent fails to demonstrate that such practice is required by business

necessity; or

``(B) a complaining party identifies a combination of two or more employment practices and demonstrates by statistical evidence that that combination of two or more employment practices causes a disparate impact on the basis of race, color, religion, sex, or national origin, and that each employment practice in such combination has contributed to the exclusion; and the respondent fails to demonstrate that such combination would not cause a disparate impact but for employment practices required by business necessity.

``(2) Notwithstanding any other provision of this title (other than subsection (i)), a rule barring the employment of an individual who currently and knowingly uses or possesses an illegal drug as defined in Schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision under Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of the race, color, religion, sex, or national origin.

``(3) The mere existence of a statistical imbalance in an

employer's workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation.''.

SEC. 5. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) IN GENERAL.--Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2), as amended by section 4, is amended by adding at the end the following:

``(l) DISCRIMINATORY PRACTICE NEED NOT BE SOLE CONTRIBUTING FACTOR.--Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a major contributing factor for any employment practice, even though other factors also contributed to such practice.''.

(b) ENFORCEMENT PROVISIONS.--Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) is amended by inserting before the period in the last sentence the following: ``or, in the case where a violation is established under section 703(l), if the respondent establishes that it would have taken the same action in the absence of discrimination.''.

SEC. 6. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING

LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2), as amended by sections 4 and 5, is amended by adding at the end the following:

``(m) FINALITY OF LITIGATED OR CONSENT JUDGMENTS OR ORDERS.--(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice specifically required by a litigated or consent judgment or order resolving a claim of employment discrimination under this title may not be challenged in a claim under the United States Constitution or Federal civil rights laws by a person who, at the time of the entry of such judgment or order, was an applicant for employment with or an employee of the entity covered by such decree, whose interests would likely be affected by the consent decree, and who had--

``(A) actual notice that such judgment or order would likely affect the interests of such person and that later challenge by such person would be barred; and

``(B) a reasonable opportunity to challenge such judgment or order.

``(2) Nothing in this subsection shall be construed--

``(A) to alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure;

``(B) to apply to the rights of parties to the action in which the litigated or consent judgment or order was

entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal government; or

``(C) to prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, is transparently invalid, or was entered by a court lacking subject matter jurisdiction.''.

SEC. 7. EXPANSION OF RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended by adding at the end the following: ``For purposes of this section, an alleged unlawful employment practice occurs when a seniority system is adopted, when an individual becomes subject to a seniority system, or when a person aggrieved is injured by the application of a seniority system, or provision thereof, that is alleged to have been adopted by an intentionally discriminatory purpose, in violation of this title, whether or not that discriminatory purpose is apparent on the face of the seniority provision.''.

SEC. 8. PROVIDING FOR ADDITIONAL EQUITABLE RELIEF IN CERTAIN CASES OF INTENTIONAL DISCRIMINATION.

Section 706 of the Civil Rights Act of 1964 (42 U.S.C.

2000e-5) is amended--

(1) in subsection (g)--

(A) by inserting ``(1)'' after ``(g)''; and

(B) by adding at the end the following:

``(2) In fashioning equitable remedies for an unlawful employment practice or group of unlawful employment practices (other than an unlawful employment practice established in accordance with section 703(k) and other than an unlawful employment practice for which back pay may be awarded under this title), the court may require the respondent to pay the complaining party an amount not to exceed $100,000 if the court finds that--

``(A) an additional equitable remedy beyond those otherwise available is needed to deter the respondent from continuing to engage in such unlawful employment practices; and

``(B) such an award is otherwise justified by the equities.

In no event shall the complaining party recover in excess of $100,000 for either an unlawful employment practice or a group of unlawful employment practices to which this paragraph applies.

``(3) Notwithstanding any other provision of this section, if a person is aggrieved by an unlawful employment practice to which paragraph (2) applies, then such a person

may commence a civil action in an appropriate district court of the United States for temporary or preliminary injunctive relief, without regard to any waiting period that would otherwise prevent the commencement of a civil action under this title.

``(4) All issues in cases arising under this title shall be heard and determined by a judge, as specified in subsection (f).''.

SEC. 9. ALLOWING THE AWARD OF EXPERT FEES.

Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended by striking ``as part of the'' and inserting ``(including expert fees) and''.

SEC. 10. EXPANSION OF PROTECTIONS AGAINST ALL RACIAL DISCRIMINATION IN THE PERFORMANCE OF CONTRACTS.

Section 1977 of the Revised Statutes of the United States (42 U.S.C. 1981) is amended--

(1) by inserting ``(a)'' before ``All persons within''; and

(2) by adding at the end the following:

``(b) The rights protected by this section are protected against impairment by nongovernmental discrimination as well as against impairment under color of State law. This section affords the same protection against discrimination in the performance, breach, modification or termination of a contract and in the enjoyment of all benefits, privileges,

terms, and conditions of the contractual relationship, as it does in the making or enforcement of that contract.''.

SEC. 11. PROVIDING CIVIL RIGHTS PROTECTIONS TO CONGRESSIONAL EMPLOYEES.

Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) is amended by adding at the end the following:

''**SEC. 719. CONGRESSIONAL COVERAGE.**

''Notwithstanding any other provision of this title, this title shall apply to the Congress of the United States. The means for enforcing this title as this title applies to each House of Congress shall be as determined by the House of Congress.''.

SEC. 12. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected thereby.

SEC. 13. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.--This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICATION OF AMENDMENTS.--The amendments made by this Act shall not apply with respect to claims arising

1 before the date of the enactment of this Act.

Walk this over. Deliver directly.

THE WHITE HOUSE
WASHINGTON

Date 8/1/92 AUG -1 AM 8:44

TO: Jim Miccioni

FROM: NICHOLAS E. CALIO
Deputy Assistant to the President
for Legislative Affairs

Jim,

As discussed, a good, brief, hard-hitting explanation of why this is a quota bill (H.R. 4000, that is) and why the suggested fix is no fix would be helpful.

Nick

P.S. Here is the new bill.

CS

ID # 212475 CU

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

HUCIC

R 2-14
8.30

- [ ] O - OUTGOING
- [ ] H - INTERNAL
- [ ] I - INCOMING

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

Name of Correspondent: Marshall Breger

- [ ] **MI Mail Report**

User Codes: (A) ____ (B) ____ (C) ____

Subject: Lincoln Briefs, an article written by former Mayor Ed Koch regarding the Civil Rights Bill.

ROUTE TO: Office/Agency (Staff Name)	ACTION: Action Code	ACTION: Tracking Date YY/MM/DD	DISPOSITION: Type of Response	DISPOSITION: Code	DISPOSITION: Completion Date YY/MM/DD
Cuote	ORIGINATOR	91/02/08		C	91/03/05
Cuat 10	A	91/02/09		C	91/03/05
	Referral Note: See comments				
Ungtaug	I	91/02/09		C	91/02/09
	Referral Note:				
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CS CS CS

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 C. Lund 3-5-91 - CS

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5/81

Burglar 212475 Cal
Have you seen this?
Player Rock can be
very helpful on
this issue - he knows
already been
working
w/ the Jewish
groups to make
the point
MJB

WITH COMPLIMENTS OF

MARSHALL J. BREGER
CHAIRMAN

ADMINISTRATIVE CONFERENCE
OF THE UNITED STATES

2120 L STREET, N W, SUITE 500
WASHINGTON, D C. 20037
(202) 254-7020

LINCOLN BRIEFS

Notes and Commentary on Law and Public Policy from THE LINCOLN LEGAL FOUNDATION

No. LB-91-2

THE LINCOLN LEGAL FOUNDATION
100 WEST MONROE STREET
CHICAGO, ILLINOIS 60603
(312) 606-0951

February 4, 1991

KENNEDY-HAWKINS IS A QUOTA BILL, NOT A CIVIL RIGHTS BILL -- AND IT WILL DO SERIOUS HARM TO AMERICA

By

EDWARD I. KOCH*

The Kennedy-Hawkins Bill -- which would have become the "Civil Rights Act of 1990" and which has been reintroduced in the 102d Congress as H.R. 1 -- is not a civil rights bill at all. Let there be no misunderstanding. Kennedy-Hawkins is a bill that will lead to quotas and, if passed, would create incentives for employers to hire based on quotas and would do tremendous harm to the socioeconomic structure of America, especially in its large cities.

The Bill's Window Dressing

The drafters of the legislation have provided much window dressing to the bill in their attempt to sell it as a "civil rights" bill. First it is titled a "Civil Rights Act". Second, perhaps to respond to anticipated challenge to the bill as a quota bill, Section 13 states that the Act shall not be "construed to require or encourage" an employer to adopt hiring or promotion quotas. Third, Section 2 of the Act states that the purpose of the

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* Edward I. Koch, the former Mayor of New York and a former United States Representative (D-N.Y.), is now in private legal practice in the New York firm of Robinson, Silverman, Pearce, Aronsohn & Berman.

Act is, in part, to respond to the Supreme Court's recent decisions -- most notably *Wards Cove Packing Co.* v. *Atonio*[1] -- by restoring the civil rights protections that purportedly were dramatically limited by those decisions.[2]

Against this rhetorical backdrop, the bill's crucial language allegedly "restoring" the burden of proof in disparate impact cases, reads as follows:

> An unlawful employment practice based on disparate impact is established...when...a complaining party demonstrates that an employment practice (or a group of employment practices) results in a disparate impact on the basis of race, color, religion, sex or national origin, and the respondent fails to demonstrate that such practice is required by business necessity....

The term, "required by business necessity", has been the subject of much debate with the bill's final definition being an employment practice or group of practices having a "significant relationship to successful performance of the job".

The bill's proponents urge that this burden of proof for disparate impact cases and the proposed "business necessity" standard are consistent with earlier Supreme Court cases beginning with the seminal case in this area, *Griggs* v. *Duke Power Co.*,[3] which allegedly has been eroded by recent Supreme Court decisions, including *Wards Cove*. This is just not the case.

Burdens and "Business Necessity" as They Currently Stand

One must look beyond the rhetoric and the arguments of the bill's proponents to get to the truth of the matter. First, neither *Griggs* nor its progeny altered the standard allocation of

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[1] 490 U.S. _____, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989).

[2] The bill would amend Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) *et seq*.

[3] 401 U.S. 424 (1971).

the burdens of proof in Federal civil actions set forth in Federal Rule of Evidence 301. Under *Wards Cove*, for example, a disparate impact case proceeds in three stages. Initially, the plaintiff identifies the specific employment practice (or practices) and shows that it causes a disparate impact on his or her group -- the prima facie case. Next, the employer has the burden of production to produce evidence justifying the use of the employment practice in question -- the "business necessity". Under consistent Supreme Court precedent since *Griggs* in 1971, "business necessity" means "manifest relationship to the employment in question". Lastly, the plaintiff (employee) has the burden to persuade the fact finder and to prove that the employer's evidence is unpersuasive -- that the employer discriminated or that the employer could employ another rule of hiring that would cause less of a disparate impact.

The Supreme Court in *New York City Transit Authority* v. *Beazer*[4] made clear that the "ultimate burden of proving" a case under Title VII rests with the plaintiff. *Wards Cove* was nothing new, just a restatement by the Supreme Court of the fact that the burden of proof in disparate impact cases, as it has since *Griggs*, rests with the plaintiff. This has always been true in Title VII intent cases, as well.

Moreover, *Wards Cove*'s discussion of "business necessity" is fully consistent with *Griggs*. Indeed, the Supreme Court in its 1979 *Beazer* decision used virtually the same language which is now being criticized in its 1989 decision in *Wards Cove*. Yet no one, so far as I know, complained in 1979.

How Kennedy-Hawkins Would Radically Change the Law

The new bill would severely alter this state of affairs. The plaintiff under Kennedy-Hawkins need only identify a statistical

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[4] 440 U.S. 568, 587, n.31 (1979).

imbalance in a job, without identifying even a single, specific employment practice allegedly *causing* the imbalance. Then, the plaintiff would rest his or her case. The employer would then have the burden of production *and* persuasion and would therefore have to prove an affirmative defense -- a result inconsistent with the Federal Rules of Evidence and with prior case law, such as *Beazer*. The new burden of proof would have the effect of presuming an employer guilty with the virtually insurmountable burden of proving its defense -- that the challenged practice is justified by "business necessity."

And what of the new definition of "business necessity"? The proponents of the bill urge that the Act would revive the disparate impact test set forth in *Griggs*. However, the *Griggs* standard, applied in many cases following *Griggs*, is that a hiring requirement is a "business necessity" if it has a "manifest relationship to the employment in question." *See Watson* v. *Ft. Worth Bank and Trust*,[5] *Connecticut* v. *Teal*,[6] *New York City Transit Authority* v. *Beazer*,[7] and *Albemarle Paper Co.* v. *Moody*.[8] In contrast, the proposed bill defines "business necessity" as having a "significant relationship to successful performance of the job". As any lawyer would quickly perceive, the proposed standard would clearly be more onerous than the *Griggs* test. It would be much more difficult under the new standard to define what hiring criteria would pass muster as a "business necessity".

The proposed bill would further amend existing law by allowing juries to award compensatory damages and punitive damages in cases

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[5] 487 U.S. 977 (1988).

[6] 457 U.S. 440 (1982).

[7] 440 U.S. 568 (1979).

[8] 422 U.S. 405 (1975).

of intentional discrimination in addition to the backpay available under existing law. It would also change Title VII in a variety of ways making it more difficult to settle cases. Thus, if the plaintiff is charging intentional discrimination, the consequences of the employer's failure to prevail could be jury awards of compensatory damages (unlimited in amount) and punitive damages (with a "limit" being the greater of $150,000 or the sum of compensatory damages, backpay and other equitable monetary relief).

How Kennedy-Hawkins Would Lead to Quotas

Why, then, is Kennedy-Hawkins really a bill leading to quotas? To answer this question one must look at the practical effects of such a bill on employers. Because "business necessity" is so hard to define, and because the burden of proof would be so onerous under the new act, employers will do everything in their power to avoid lawsuits under Kennedy-Hawkins. This will undoubtedly cause an extreme reaction by employers in one of two forms: The employer will either move out of town or will use a quota hiring system. In either case, the only absolute protection an employer will have is in the numbers, because "business necessity" defenses will be so hard to prove.

An employer may resort to hiring a team of statisticians to analyze the relevant labor market where the business is located and to develop percentages based on categories of race, color, religion, gender, and national origin. The possibilities are endless and in some cases absurd. For example, with respect to religion, employers will have to keep count of the number of Jews, Christians, Muslims, etc., and perhaps subdivisions, *e.g.*, Lutherans, Catholics, Seventh-Day Adventists, Sunni and Shiite Muslims, Orthodox, Conservative and Reform Jews.

Exporting Jobs to Markets With Fewer Minorities

I believe that if the algorithm gets too complex, an employer is likely to move to an area of the country that reflects the national applicant pool on the basis of race, religion, gender, and national origin. For example, nationally, Blacks are about 12% of the population; Hispanics are about 8%; Asians are approximately 2%; and whites make up the balance. In New York City, for example, Blacks and Hispanics together comprise about 50% of the population. Obviously, relocating would give the employer far greater options in hiring and less fear of lawsuits -- and of the large backpay awards and the legal fees that might be taxed in any case and the compensatory and punitive damages that might be awarded in an intentional discrimination case. I believe multi-national and national corporations would do exactly that. In addition, it may be that these corporations could hire nationally and internationally in their principal offices and send their people to cities like New York rather than hiring locally. If that is legally permissible, who would suffer? Obviously, the local labor pool.

And what if employers remained in their locations and were subject to Kennedy-Hawkins? Employers would feel forced to hire on the basis of the numbers and not the most qualified persons on job-related qualifications. The equal employment opportunity that the civil rights laws were to afford to all people qualified for a particular job will now be transformed into equal employment numbers for all groups of people without regard to differences in qualifications. For example, a well-qualified white male in New York City could be rejected by many employers because the applicant pool would be at least 50 percent Black and Hispanic and 25 percent white female. In order to avoid disparate impact, a presumptively illegal outcome, employers will, in many cases hire Blacks, Hispanics and white women, in proportion to the application pool, even if they are less qualified, over better qualified applicants

then being considered in order to avoid costly disparate impact litigation they are almost certain to lose. How could an employer hope to justify hiring in many of these situations a more qualified white male over a minimally qualified Black, Hispanic, white female or other nationality applicant as a "business necessity" under Kennedy-Hawkins?

In addition, the threat of a plaintiff's charge of intentional discrimination and the monetary consequences of a jury's findings of liability and award of compensatory and punitive damages, would be a further incentive to employers to use quota hiring. Wouldn't employers simply hire on the basis of race, national origin, gender, and religion, filling the required percentages, so as to avoid compensatory and punitive damages awards set by a jury?

For example, with Jews constituting only 3% of America's total population, would they not be subject, as they were in the Soviet Union and other anti-Semitic regimes elsewhere in Europe, to a type of *numerus clausus* provision which limited entry of Jews to the universities to a percentage roughly reflecting their percentages of the general population? Haven't we agreed -- and didn't Martin Luther King, Jr., dream -- that someday each individual would be judged on his or her own merits without regard to race, religion, gender or national origin? What I believe we should seek to do in assisting minorities who have indeed suffered from discrimination is to open the blocked avenues and end the invidious discrimination without imposing new such discriminations on others.

Nightmares for Big Employers -- Such as Cities and Schools

Can you imagine what would happen to a corporation accused of intentional discrimination against Hispanics or Blacks in the Bronx and tried by a jury in that borough? Can you conceive the damage awards such a jury would render? If you can't, then do a little research with the Corporation Counsel of the City of New York on

simple negligence cases that are tried, with the City as defendant, in the Bronx. You will find that the judgments in many cases are grossly excessive. New York's Corporation Counsel rarely tries a case to conclusion in that borough, preferring to settle rather than depend on a fair jury outcome in a milieu where jurors see New York City as Mr. Deep Pockets without realizing that monies taken from the city treasury for such judgments make for less monies available to provide essential city services. But that consideration is a fact of life, and I suspect there would be even worse outcomes when the juries are judging major corporations as defendants and find intentional discrimination.

Kennedy-Hawkins would apply not only to the private commercial sector but also to universities and to government as well. So, when it is enacted (and the danger of enactment is real: The Senate came within one vote of overriding the President's veto of Kennedy-Hawkins in the last Congress) you can expect a new assault upon the universities and local governments.

In the case of the universities, the objective would be to have the professors mirror the national population of post-secondary instructors or applicant pool in skin tone, gender, nationality and religion. In the case of local government, all appointed positions from Commissioner on down would be made within the statistical hiring requirements so as to avoid disparate outcome. Is this what America is all about? I hope not.

<u>How Kennedy-Hawkins Would Injure the Economy and Poison Society</u>

Even worse, this so-called "civil rights" act will, in application, do more harm to our already suffering economy by reducing private and public sector efficiency (not having the most qualified employees) and will also exacerbate existing social problems in the communities where preferential affirmative action has actually caused problems.

With respect to efficiency, employers will consider either relocating or hiring less qualified individuals to fill the jobs and to meet the implicit numbers requirement of the bill. The weakening economies of the cities which employers are likely to leave (*e.g.*, New York City, Los Angeles, and Chicago) would suffer with a further loss of jobs, reductions in corporate tax collections and a reduction in economic activity in general. However, the relocation costs would ultimately be borne by all of us in these central cities in the form of reduced services and higher taxes.

As to the already existing social problems caused by preferential affirmative action programs several scholars, including noted sociologist Thomas Sowell, have observed that racial quotas and discriminatory affirmative action programs have not helped the intended beneficiaries. Those who are often preferred are the very ones who could have competed with the best.

Kennedy-Hawkins misses the mark on all counts. If we are to uphold our commitment to civil rights -- as we should -- we must set in motion programs to ensure that all deprived persons -- without regard to race, color, religion, gender, or national origin -- have the opportunity to achieve their full potential. Yes, in the words of *Griggs*, the employer should use employment criteria bearing a "manifest relationship to the employment in question". As the Court there added: "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and gender become irrelevant."[9] Kennedy-Hawkins is in direct conflict with these principles.

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[9] 401 U.S. at 436.

Help *All* the Disadvantaged; Don't Discriminate

We should focus our efforts on assisting minorities who have suffered from unequal opportunity by providing additional and better education and vocational training for these individuals, never excluding from these programs others equally poor or deprived simply because they are white. The solution is not to place unqualified minority workers, or others of different national origins, in jobs for which they are not adequately trained as a band-aid to end discrimination. If anything, this is the way to destroy the self-esteem of many workers, heightening anger and discrimination among fellow employees when some members of the workforce are unable to carry their fair share of the load.

Furthermore, such practices often unfairly reflect adversely upon the many minority members who were hired because they were qualified and are better than other applicants. They unfairly become judged, not as individuals, but as members of a protected class, not able to compete with others.

Opposition to Kennedy-Hawkins (which, as H.R. 1 is even *more discriminatory* than it was as passed in the last Congress) must continue. Although many proponents of the bill will insist that to oppose this so-called "civil rights" bill is racist, I urge them to take a closer look at the damage their bill would do if passed. And I urge those who in good conscience have concluded the proposed legislation is bad for everyone concerned, not to be intimidated by false charges of racism.

###

CS

ID # 212826 CU

WHITE HOUSE HU010 LSC ... 2-15
CORRESPONDENCE TRACKING WORKSHEET

- ☐ O - OUTGOING
- ☐ H - INTERNAL
- ☐ I - INCOMING

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

Name of Correspondent: Evan J. Kemp, Jr.

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

Subject: Encloses speech regarding Gary Franks' talk at Heritage, in particular, about Civil Rights; also encloses introduction to "Equality Transformed"

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	91/02/12		C	91/02/26
	Referral Note:				
CUAT 07	A	91/02/12		C	91/02/26
	Referral Note:		See comments		
CUGRAY	I	91/02/12		C	91/02/12
	Referral Note:				
CUAT 10	I	91/02/12		C	91/02/12
	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: Close out - 2-26-91
Data Only--Info Copy Retained CS

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

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
1801 L STREET, N.W., WASHINGTON, D.C. 20507
(202) 663-4001

I thought you might
find the enclosed of interest

Evan J. Kemp, Jr., Chairman

EVAN J. KEMP, JR.
Chairman

U. S. Equal Employment
Opportunity Commission
1801 L St N W.
Washington, DC 20507

(202) 663-4001
(202) 663-4141 (TDD)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

2128260a

February 7

To: Robert Funk, Chief of Staff

From: Ken Masugi

Subject: Gary Franks' talk at Heritage

This black Republican congressman from Connecticut had a certain charm to him, but he wasn't particularly impressive. He is engaging and attractive, but he needed to articulate his positions with more precision--or else he could find himself in big trouble. (Much of the session was q. and a.) Especially since he sits on the Small Business committee, EJK may have the opportunity to meet with him. (Armed Services is his other committee.)

His remarks were wide-ranging. Regarding civil rights, he firmly opposed the 1990 Act as a quota bill. He did, however, support affirmative action and goals and timetables, as long as they did not result in quotas. He opposes quotas, for among other reasons, because they encourage the flight of industries from predominantly black inner cities. (I don't know whether he bases this on any studies; do you know of anything?) He suggested, quite tentatively, some sort of shifting of burdens of proof in discrimination cases, based on whether the employer has an aggressive affirmative action program in place. (Sounds to me like this would produce quotas.)

He staunchly defended black participation in the military, as largely voluntary and not necessarily coerced by economic need. He related the difficulty of getting other blacks (even some relatives) to vote for him as a Republican. But blacks are naturally conservative on a variety of issues which should make more of them vote Republican. This they will do if they have confidence in the candidate; those who make the effort will be rewarded with black votes. (Easy for him to say; his district is largely white.) He was clearly more interested in bread-and-butter approaches to winning over blacks than civil rights appeals, which he appeared to be weary of.

EQUALITY
TRANSFORMATION
FORMULAE

SOCIAL PHILOSOPHY & POLICY CENTER

EQUALITY TRANSFORMED

A Quarter-Century of Affirmative Action

Herman Belz

transaction

Transaction Publishers
New Brunswick (USA) and London (UK)

Contents

Introduction

When the Supreme Court modified the legal doctrines supporting race-conscious affirmative action in a series of decisions in 1989, leaders of the civil rights establishment denounced the rulings as a repudiation of the Civil Rights Act of 1964 and an attack on the principle of equality itself. The Court "in its mischievousness . . . gutted Title VII of the Civil Rights Act," said Althea Simmons of the National Association for the Advancement of Colored People.[1] Eleanor Holmes Norton, Chairman of the Equal Employment Opportunity Commission (EEOC) in the Carter Administration, wrote: "During the Court's last term, for the first time in memory those seeking equality lost repeatedly." Referring to the damage done by the Court, she declared: "This can only be fixed by a Congress with a commitment to Title VII."[2] On the other side of the issue, critics of affirmative action were encouraged by the decisions. According to former federal judge Robert Bork, the Court merely insisted on the traditional rule that discrimination must be proved, not assumed.[3] William Bradford Reynolds, Assistant Attorney General for Civil Rights in the Reagan Administration, stated that the Court's decisions "remove invidious racial preferences from affirmative action."[4]

As these reactions indicate, the basic meaning of the anti-discrimination principles of Title VII of the Civil Rights Act of 1964 remains legally contested and politically controversial a full generation after its enactment. Statutory language that was intended to confer an individual right to equal opportunity in employment without distinguishing by color has for many years been interpreted as authorizing government officials and

private employers to adopt preferential practices benefiting designated racial and ethnic groups. A similar transformation has occurred in the second major source of employment discrimination policy, the federal contract program, in which the government through executive orders establishes the conditions of doing business with it. Labor Department officials have changed President Kennedy's 1961 executive order requiring contractors to take affirmative action to ensure equal employment opportunity—intended as a procedural guarantee of nondiscriminatory recruitment and hiring practices—into a substantive demand for employment of minorities in accordance with numerical goals that make race and ethnicity decisive considerations.

This transformation of employment discrimination law under Title VII and the federal contract program, and its parallels in other areas of civil rights policy, was effected by administrative regulations and court decisions based on the disparate impact theory of discrimination. Although rejected by Congress in the Civil Rights Act, this theory was asserted by the EEOC as soon as Title VII went into effect and adopted by the Supreme Court as the authoritative interpretation of the law in *Griggs v. Duke Power Co.* in 1971. The theory holds that discrimination is not an individual act of injury or denial of rights caused by racial prejudice (as it had traditionally been conceived of in civil rights law), but is rather the sum of the unequal effects of employment procedures and business practices on racial groups. Persistent and widespread application of disparate impact theory after the *Griggs* decision gave employers a powerful incentive to engage in hiring quotas in order to avoid liability and costly litigation.

Race-conscious affirmative action developed under both Democratic and Republican administrations from 1961 to 1980; it was approved by the Supreme Court in a series of reverse discrimination cases in the late 1970s. The Reagan Administration, in contrast, challenged the system of racial group preference in significant respects and tried to enforce Title VII in accordance with the original understanding of equal employment opportunity. In the mid-1980s the Supreme Court, rejecting the anti-quota interpretation of Title VII advanced by the Department of Justice, gave broad approval to race and sex employment preferences. At the end of the decade, however, in yet another round of cases dealing with the meaning of discrimination and the propriety of race-conscious remedies, the Court began to reconsider the affirmative action settlement reached only a few years earlier. The affirmative action controversy thus continued: attention redounded upon Congress, where legislation to override the comparatively recent decisions was introduced.

This book seeks to illuminate this continuing conflict by studying the redefinition of equality that has resulted from over two decades of race-conscious affirmative action. Examining the path of the law reveals the tension not only between rival theories of discrimination and equal opportunity, but also between forward-looking and backward-looking conceptions of social change. At one level, everyone involved in the affirmative action controversy agrees that progress toward a non-racist society requires Americans to overcome their past. Like earlier generations of American reformers inspired by the revolutionary principles of liberty and equality, the twentieth-century civil rights movement long believed that the best way—indeed, the only realistic way—to overcome the past was to create equal opportunity for individuals. Civil rights reform aimed at the removal of discriminatory racial barriers so that individuals could exercise their rights and pursue their interests, according to their personal talents, abilities, and qualities. The removal of barriers and impediments was remedial, but the remedy concerned the present and looked to the future. Social reform was not backward-looking: it did not focus on historical wrongs and injustices as a source of inspiration, but rather on the principles of liberty and equality. Even less was reform backward-looking in the sense of being designed to compensate for specific acts of injury and wrongdoing; it did not focus on giving individuals—not to mention entire racial and ethnic groups—the material benefits and status they would have had if they had not been injured or oppressed. Reform calculated to correct the errors, contingencies, and prejudices of the past was not attempted because it was not liberating and progressive, and because it was believed impossible to attain. Better to work for change in the future than to try to alter the past, which it was thought could not be changed.

Fundamentally, however, race-conscious affirmative action is oriented towards and based on the past. It attempts to do what the Supreme Court, in a major employment discrimination decision in the 1970s, said federal courts were required to do in enforcing Title VII: namely, to "recreate the conditions and relationships that would have been had there been no unlawful discrimination." Referring to the details of a specific employment situation involving thousands of employees, the Court modestly conceded: "This process of recreating the past will necessarily involve a degree of approximation and imprecision."[5] Applied broadly in judicial doctrines and agency regulations, affirmative action elevates "approximation" and "imprecision" into a national policy for rectifying the past. Courts and administrative agencies assume that they can order virtually any policy they please on the theory that it is a remedy for some wrong or injustice in the past. Moreover, the idea

of re-creating and correcting the past, when used as the basic rationale for civil rights policy, reinforces categorical assumptions of guilt and innocence that undermine progress toward the goal of racially impartial equal rights.

Such is the appeal of the equal rights principle in public opinion that proponents of racial preference are forced to agree, in a highly abstract and superficial sense, with the opponents of affirmative action on the proposition that race is an unsound principle of political and social organization. For example, Eleanor Holmes Norton observes: "There is no denying that, however necessary, race and sex-conscious remedies are inherently problematic."[6] Yet in terms of concrete political and social attitudes, the historical justification of affirmative action—the argument that it is "simple justice" needed to compensate for the effects of slavery—perpetuates the racial thinking of the past.[7]

The removal of exclusionary racial barriers in the Civil Rights Act of 1964 and the Voting Rights Act of 1965 was politically motivated in a positive sense: the desire of the majority to promote its interests led it to protect the rights of the minority and thus to promote the public interest. Moreover, insofar as the laws were intended to place civil rights protection on an impartial, racially neutral basis, they were also intended to remove the legal process of rights enforcement from the controlling influence of political partisanship and ideology. Under race-conscious affirmative action, however, civil rights policy has been politically motivated in a negative sense: it has been based on irrelevant and superficial racial characteristics. It is used to promote partisan interests at the expense of the common good; it is in patent contradiction of the ideal of common citizenship. Measures that confer benefits on groups according to race and ethnicity reflect obvious political choices, rather than recognition of a standard of common citizenship that guarantees individual rights on an impartial basis, as required by the Constitution and the civil rights laws.

As racial barriers fell in the 1960s, blacks gained access to the political, social, and economic institutions and associations through which individuals participated or were represented in the design of public policy. By reason of occupation, profession, or market situation in an economic sense, and by virtue of citizenship in a political sense, the black minority was in a position to be integrated into the system of interest-group pluralism that characterizes twentieth-century American government. The pluralist solution in some respects can itself encourage tendencies that challenge the constitutional ideal of general policies or legislation based on common citizenship and directed toward the good of the community as a whole. However, whereas pluralistic class legisla-

tion, such as that relating to labor organizations in the 1930s, arguably had a defensible economic rationale, race-conscious affirmative action has transformed blacks into a monolithic racial interest group that can claim no rational justification or functional purpose. Indeed, affirmative action is dysfunctional to the extent that it perpetuates racial stereotypes that invert the relationship between the individual and the group that characterizes pluralism in the United States. Any argument for the historical justice of affirmative action is contradicted by this basic fact.

Instead of the individual being the primary social unit, on the basis of which groups are formed, under affirmative action policies the group becomes primary and is the source of rights for the individual. Moreover, blacks were *the* prototype for the proliferating assertions of group rights that in the 1970s and 1980s introduced a debilitating factionalism into American politics and government. As the original "discrete and insular minority," to use the language of constitutional law, blacks' claim to preferential treatment based on the collective victimization of slavery has become politically entrenched, making reform of contemporary minority group factionalism all the more difficult. A critic of affirmative action asked in 1967: "Once the special interests of racial and ethnic groups in preferential employment are recognized, will our political leaders have the courage to abandon the program, particularly since it is called a 'fair employment practice' program . . . ?"[8] A supporter of preferential remedies worried in 1973 that government Equal Employment Opportunity agencies, and the civil rights lobbyists and legal professionals bound to them in a symbiotic relationship, might have an incentive to perpetuate the problem of discrimination rather than end it.[9] The politics of affirmative action in the 1980s tends to confirm the accuracy of these warnings.

Affirmative action is viewed as a temporary policy needed to wipe out the effects of past societal discrimination. Defenders of the policy such as Eleanor Holmes Norton continue to assert that race-conscious remedies "will . . . remain transitional and fall into disuse once the job is done."[10] After more than two decades, however, it is pertinent to ask what conception of civil rights and what kind of society affirmative action is a transition to. The rhetoric of affirmative action professes the goal of a color-blind society, but the political and social reality is increasingly that of a racially balanced society, regulated by courts and administrative agencies enforcing systems of proportional representation.

More than we care to acknowledge, preferential policies have been adopted in the belief that individual rights and equal opportunity do not lead to social progress and sustained in the fear that civil rights policy

based on these principles will result in "social and racial chaos."[11] Motivated by these convictions, civil rights policy makers—in the words of a former government official who helped establish affirmative action in the early 1970s—have undertaken an "illusive" search "to develop a doctrine that accommodates the paradox of using race or sex considerations to achieve a color- or gender-blind society."[12] This book is an analysis of that illusive search, which has so profoundly altered the meaning of American equality.

ID # 212847 CU

HU016

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Alonzo L. Coose, Jr.

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

Subject: Letter to POTUS — Disabled Veteran barred from working for Exec. Office of President by Phillip D. Larsen; claims discrimination

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOFC	ORIGINATOR	91/02/11			91/02/12
CUAT 19	A	91/02/12	J-E	J	91/03/26
		1 1			1 1
		1 1			1 1
		1 1			1 1
		1 1			1 1

Referral Note: _____
Referral Note: _____
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

March 6, 1991

MEMORANDUM FOR PHILLIP D. LARSEN
DIRECTOR, PERSONNEL MANAGEMENT
OFFICE OF ADMINISTRATION

FROM: JAY S. BYBEE
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: EEO Complaint

Attached for appropriate action by your office is a letter from Alonzo Coose, who claims that he was denied employment as a result of a service related medical condition. Mr. Coose has requested EEO review. Also attached is a copy of my response to Mr. Coose.

Thank you for your attention to this matter.

cc: Bruce Overton

212847cu

25
Legal
Counsel

ALONZO L. COOSE, JR.
7718 Hayfield Road
Alexandria, VA 22310

1 February 1991

President George Bush
The White House
Washington, DC 20500

Dear Mr. President:

I am a disabled Vietnam veteran, West Point Graduate, holder of two masters degrees, recipient of a Silver Star, Purple Heart and seven other awards for valor in combat. I was retired medically after 17 years of Army service. I went through the application and interview process in July of this year and was offered a position in the Executive Office of the President by Mr. Phillip D. Larsen. On my revealing that my disability was for a "nervous breakdown condition" although service connected and completely controlled by medication, the offer was withdrawn and I was denied the position. This is the most blatant act of discrimination for this type of handicap that I have ever witnessed against a citizen of this country much less a disabled veteran. I have been an ardent admirer and supporter of yours for a number of years and campaigned extensively for you in the last election throughout the Missouri Ninth District which is my original home. I know that you personally abhor this type of activity and will not tolerate it under any conditions. This situation was particularly disturbing because it was perpetrated by responsible personnel in the Executive Office of the President in the face of the recent legislation protecting the handicapped in the workforce.

I ask to present the facts of this incident to the EOP EEO Council and have the unfortunate situation corrected. I seek an appointment in EOP or DOD at grade 15 or higher commensurate with my qualifications, experience and potential for significant further contributions to our Government. I very much appreciate your attention to this matter which I feel very strong about and know that it will be equitably resolved in a timely fashion.

I add my prayers to those of all other Americans in support of your courageous actions in the current crisis and wish you Godspeed.

Sincerely,

Alonzo L. Coose, Jr.
LTC, USA (Retired)

THE WHITE HOUSE

WASHINGTON

March 6, 1991

Dear Mr. Coose:

Your letter to the President of February 1, in which you request EEO review of your employment application, has been referred to me for response.

You claim that last July you were offered employment in the Executive Office of the President, but that such offer was subsequently withdrawn when it was revealed that you suffer from a service related medical condition. You have now requested EEO review by the Executive Office of the President. I have referred your request and a copy of this letter to the appropriate office.

Thank you for writing.

Sincerely yours,

Jay S. Bybee
Associate Counsel to the President

Alonzo L. Coose, Jr.
7718 Hayfield Road
Alexandria, Virginia 22310

ID# 213231

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: FEBRUARY 14, 1991

NAME OF CORRESPONDENT: MS. JUDY KREBS

SUBJECT: URGES THE PRESIDENT TO SIGN AN EXECUTIVE ORDER RESCINDING THE DEFENSE DEPARTMENT'S DIRECTIVE WHICH DISCRIMINATES AGAINST LESBIAN, GAY AND BISEXUAL PEOPLE

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
MARIANNE MCGETTIGAN	ORG	91/02/14			91/03/06
REFERRAL NOTE:					
	A	91/02/25	[illegible]	C	91/02/25
DOD REFERRAL NOTE:					
	R	91/02/28	[illegible]	A	91/03/05
REFERRAL NOTE:					
		__/__/__			__/__/__
REFERRAL NOTE:					
		__/__/__			__/__/__
REFERRAL NOTE:					

COMMENTS: _____

ADDITIONAL CORRESPONDENTS: 3 MEDIA:L INDIVIDUAL CODES: 4900 4610 ____

MI 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 OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C 20301-4000

FORCE MANAGEMENT
AND PERSONNEL

05 MAR 1991

Ms. Judy Krebs
Student Association of the State
University of New York, Inc.
300 Lark Street
Albany, New York 12210

Dear Ms. Krebs:

Thank you for your letter of January 10 to President Bush concerning the exclusion of homosexuals from military service. I have been asked to reply.

It has long been Department of Defense (DoD) policy that homosexuality is incompatible with military service. There are numerous reasons for this policy, including the necessity to maintain good order, morale, and discipline; foster mutual trust and confidence among Service members; recruit and retain members of the Military Services; and maintain the public acceptability of military service.

Federal courts have upheld the military's homosexual exclusion policy and accepted its rational relationship to legitimate military purposes. In fact, since the current DoD policy on homosexuality became effective in 1982, every court that has ruled finally on the issue has held that the homosexual exclusion policy is constitutional. We do not plan to reassess the Department's policy on homosexuality.

Sincerely,

T. D. Keating
Captain, JAGC, USN
Director, Legal & Legislation Policy
(Requirements and Resources)

J-30389

T H E W H I T E H O U S E O F F I C E

REFERRAL

91 MAR -1 AM 7:27

FEBRUARY 28, 1991

TO: DEPARTMENT OF DEFENSE

ACTION REQUESTED:
DIRECT REPLY, FURNISH INFO COPY

DESCRIPTION OF INCOMING:

ID: 213231

MEDIA: LETTER, DATED JANUARY 10, 1991

TO: PRESIDENT BUSH

FROM: MS. JUDY KREBS
PRESIDENT
STUDENT ASSOCIATION OF THE STATE
UNIVERSITY OF NEW YORK, INC.
300 LARK STREET
ALBANY NY 12210

SUBJECT: URGES THE PRESIDENT TO SIGN AN EXECUTIVE ORDER RESCINDING THE DEFENSE DEPARTMENT'S DIRECTIVE WHICH DISCRIMINATES AGAINST LESBIAN, GAY AND BISEXUAL PEOPLE

PROMPT ACTION IS ESSENTIAL -- IF REQUIRED ACTION HAS NOT BEEN TAKEN WITHIN 9 WORKING DAYS OF RECEIPT, PLEASE TELEPHONE THE UNDERSIGNED AT 456-7486.

RETURN CORRESPONDENCE, WORKSHEET AND COPY OF RESPONSE (OR DRAFT) TO:
AGENCY LIAISON, ROOM 91, THE WHITE HOUSE, 20500

SALLY KELLEY
DIRECTOR OF AGENCY LIAISON
PRESIDENTIAL CORRESPONDENCE

W30389

Student Association of the State University of New York, Inc.
*300 Lark Street, Albany, New York 12210 * (518) 465-2406*

January 10, 1991

Mr. George Bush
United States President
The White House
Washington, D.C.

Dear Mr. President,

Greetings. SASU is a state-wide student union representing and advocating for New York State's 404,000 SUNY students. We are very concerned about the Department of Defense's policy to exclude lesbian, gay and bisexual people from its activities. People's vocational performance should be based on related-criteria, *not sexual orientation*. This policy perpetuates homophobia and heterosexism. It goes against the notions that founded this great nation, "that all men [and women] are created equal." You have a responsibility to ensure that this is a nation of equal opportunity, from which the U.S. Armed Forces are not exempt. This policy is extremely offensive and exclusionary, in short it is unjust discrimination.

Therefore, we urge you to sign an Executive Order rescinding immediately Department of Defense Directive 1332.14, which discriminates against lesbian, gay and bisexual people. Thank you very much.

Sincerely yours,

Judy Krebs
President

Mary Kate Cullen,
Executive Vice President

Anita Eliot
Vice President for Campus Affairs

Glenn D. Magpantay
Vice President for Campus Affairs

cc. Dan Quayle, Vice President
Richard Cheney, Secretary of Defense
enclosure.

Resolution on the Department of Defense' Discriminatory Policy

submitted on January 19th, 1991 at SUNY College of Optometry, New York City, to the Student Association of the State University of New York, (SASU) Board of Directors
Accepted by unanimous acclamation.

WHEREAS *SASU represents and advocates for the needs and interests of 404,000 SUNY students and*

WHEREAS SASU has and continues to support lesbian, gay and bisexual students and an agenda working to defeat homophobia/heterosexism and oppression and,

WHEREAS the Department of Defense (DoD) Directive 1332.14 is a discriminatory policy stating that,

> *"homosexuality is incompatible with military service...[and it] impairs that accomplishment of the military mission. The presence of such members adversely affects the ability of the Armed Forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among service-members; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide development of servicemembers...; to recruit and retain members of the armed forces; to maintain the public acceptability of military service; and to prevent breaches of security. Homosexual acts are crimes under the Uniform Code of Military Justice."*

WHEREAS SUNY has a policy not to discriminate on the basis of sexual and affectional orientation, and that outside agencies cannot use campus facilities if they discriminate and

WHEREAS this policy is selectively enforced running the gamut from conducting internal student "witch-hunts" to completely neglecting the policy and disproportionately applies to women, people of color and differently-abled people and

WHEREAS DoD statistics show that since 1983 women have been discharged because of homosexual acts at a rate almost ten (10) times that of military men, many being students and,

WHEREAS the U.S. Armed Forces have discriminated against students who they themselves have recruited because they are lesbian, gay or bisexual, discharged lesbian, gay and bisexual people who are currently serving, denied diplomas to lesbian, gay and bisexual cadets, rescinded military educational scholarships and demanded a refund from those who have served and are now attending school and,

THEREFORE BE IT RESOLVED *that SASU strongly encourages President George Bush to sign an Executive Order to immediately rescind Department of Defense Directive 1332.14 which excludes lesbian, gay and bisexual people from the U.S. Armed Forces and be it,*

RESOLVED that SASU strongly encourages the SUNY Chancellor and Board of Trustees to ban the U.S. Armed Forces from recruiting on campus and ROTC Programs at least until they change their policy and be it further