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HU010

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: JUNE 05, 1991

NAME OF CORRESPONDENT: THE HONORABLE EDWARD I. KOCH

SUBJECT: FORWARDS MATERIAL ON H.R. 1 AND A COPY OF SPEECH TO ANTI-DEFAMATION LEAQUE

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
JOHN SUNUNU	ORG	91/06/05		C	91/06/07
REFERRAL NOTE: Bobbie Kilberg	A	91/06/07		C	91/06/24 LJ
REFERRAL NOTE: Shirley Green	A	91/06/24		C	91/07/05 LJ
REFERRAL NOTE:		__/__/__			__/__/__
REFERRAL NOTE:		__/__/__			__/__/__
REFERRAL NOTE:					

COMMENTS: FORMER MAYOR OF NEW YORK CITY
Draft attached for approval and POTUS signature — no resp. req - the Pres. has already seen (see his initials on ltr). sg

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: ___ ___ ___

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

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

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KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

THE WHITE HOUSE

WASHINGTON

No
Resp. req.

June 24, 1991

Dear Ed,

Thank you for your letter and continued support of our position on the pending civil rights legislation.

As the debate in Congress moves forward on this issue, I am hopeful my Administration's bill will receive the consideration it rightfully deserves.

I am committed, as you know, to equality of opportunity for all Americans. We must not, however, resort to the use of quotas or unfair preferences in employment practices. Our bill meets these objectives.

I am grateful for your help with the recent vote and appreciate your continued leadership.

Sincerely,

George Bush

P.S. Check Rec. Mgt. I think the Pres. had already answered this.

Amy:
No record in Mgmt.
SG
PPS

THE WHITE HOUSE
WASHINGTON

Date: 6/20

TO: Helen

FROM: **Katie Winkeljohn (x6797)**
Special Assistant to the Chief of Staff

- ☐ FYI
- ☐ Appropriate Action
- ☐ Let's Discuss
- ☒ Per our conversation

~~From~~
Helen

From the desk of

George Bush

cc John S

2457

ROBINSON SILVERMAN PEARCE ARONSOHN & BERMAN

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MICHAEL R. ZIENTS

WRITER'S DIRECT NUMBER:

June 11, 1991

The Hon. George Bush
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Mr. President:

It was very kind of you to send me the pictures of my recent visit with you at the White House and, of course, they now adorn my office wall. I am grateful.

I am very happy with my professions as a lawyer, a television, radio and newspaper commentator and lecturer at New York University.

I have stayed in touch with Governor Sununu on H.R.1 and am doing my best to support your position on that legislation. You are absolutely correct: H.R.1 is legislation which would encourage racial, ethnic, religious and gender quotas.

I thought you would be interested in my recent column pointing out how foolish some of the editorial writers are.

All the best.

Sincerely,

Edward I. Koch

THE WHITE HOUSE
WASHINGTON

Date: 6-7-91

TO: Helen

FROM: Katie Winkeljohn (x6797)
Special Assistant to the Chief of Staff

- ☐ FYI
- ☐ Appropriate Action
- ☐ Let's Discuss
- ☒ Per our conversation

attached is the Kock material for a POTUS letter to be drafted per Summa.
Thanks!

EDWARD I. KOCH
1290 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10104

June 3, 1991

The Hon. John Sununu
Chief of Staff to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear John:

You will be interested in my latest package on H.R.1 which was sent to the members of the New York delegation and a few others on whom it might have some impact.

I think you will also be interested in my latest speech on the Middle East which I delivered to an ADL audience yesterday.

I'm on my way to Japan this morning to speak before a group of Sony executives, so I will be out of the country while H.R.1 is being voted on in the House of Representatives. I hope my efforts have been helpful to some extent.

All the best.

Sincerely,

Edward I. Koch

enclosures

EDWARD I. KOCH
1290 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10104

May 31, 1991

The Hon. Mel Levine
U.S. House of Representatives
Washington, D.C. 20515

Dear Mel:

You will be voting on H.R. 1 shortly. In prior correspondence, I have stated that I think the legislation will encourage quotas and create reverse discrimination. For that reason, you should oppose it.

I do not believe that the new amendments will rectify the situation at all. Indeed, as succinctly stated by the President's counsel, "it explicitly authorizes all quotas that are 'in accordance with employment discrimination law' now in place." Worse still, "The definition of 'quota' specifically allows quotas to be used so long as jobs are filled with individuals who have the 'necessary qualifications to perform the job.' Therefore, an employer is specifically permitted to fill quotas with less qualified persons of a particular race, sex, or religions, so long as they are marginally qualified."

Enclosed is my statement to the American Jewish Committee. I know that you will take what you ultimately conclude is the moral position in this debate.

All the best.

Sincerely,

Edward I. Koch

encl.

THE WHITE HOUSE

WASHINGTON

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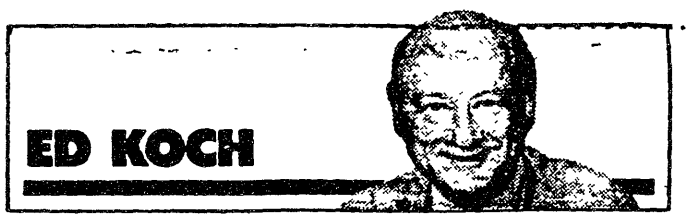
NEW YORK POST
June 7, 1991



AS Jimmy Cannon used to say, nobody asked me, but . . .

The New York Times demonstrated a lack of logic with its recent editorial supporting race norming, a race-driven test process that has been denounced across the board.

To quote columnist Carl Rowan, "I don't want anybody's formula for automatically enhancing the scores of blacks, Hispanics or any other minority. I don't want to hear anyone say, 'We'll only judge whites against whites, blacks against blacks and Hispanics against Hispanics.'" How can The New York Times say, as it continually has, that it doesn't believe in quotas, yet supports race norming?

Getting a grip on the issues of the day

■

Last week, Newsday editorially denounced President Bush for opposing the proposed civil-rights bill, saying he was engaging in "race baiting." Is it race baiting to oppose a bill that you feel will encourage racial, ethnic, religious and gender quotas?

■

Isn't it curious that Ted Kennedy felt he needed to call his lawyer three times during the two days following the alleged rape involving his nephew? Can you believe that when police asked him why he called the first time he said, ". . . to wish him happy holiday . . . Passover"?

Isn't it wonderful that Ted Kennedy is so solicitous of his lawyer's religious sensibilities?

■

David Dinkins' strong defense of Winnie Mandela after her recent criminal conviction was not duplicated in the black community in South Africa. The international press covering the trial thought it was conducted fairly, yet Dinkins rejected the verdict and announced in New York that it had not been a fair trial.

How bizarre. Remember, this is the "mother of necklacing" we're talking about.

■

Everyone who is upset with the U.S. Supreme Court ruling barring abortion advice by federally funded clinics shouldn't simply hope for Congress to change the law. They should put their money where their mouth is.

I am. Send a check to Planned Parenthood.

Is Times losing its grip on logic?

■

Did the Reagan/Bush ticket scheme with the Iranians to delay the release of American hostages until Reagan took office? Columnist Jonathan Schell has called for an investigation, while admitting it is all speculation.

If we are going to conduct investigations based on speculation, why don't we look into the rumor that Joe Kennedy stuffed ballot boxes in Chicago to elect son John, and, if true, declare Nixon the winner?

Or even more interesting, find out what state secrets, if any, John Kennedy gave the two Mata Hari-type spies he was dating.

■

Will the Democratic Party ever concede it was wrong to have opposed Contra aid and to have supported the Boland Amendment? Without the U.S. military support delivered to the Contras by Reagan, Violeta Barrios de Chamorro wouldn't have won the presidency and both Ortega and the Sandinistas would still be in power. When she recently addressed a joint session of Congress, Democrats interrupted her with thunderous cheers and applause many times.

The White House and Ollie North and company shouldn't have violated the law and subverted the Boland Amendment. Question: Whose actions saved or harmed more people?

■

When I was the congressman from the Silk Stocking District on Manhattan's East Side, my mail would overwhelmingly read, "Save the whales," "Save the dolphins," "Save the Jews," — in that order.

Now, 20 years later, we have progressed and are saving all three. Israel and the U.S. deserve enormous praise for having saved the black Jews of Ethiopia. Saving Jews was at least among the top priorities, even if it was not the first.

Thirty years ago, historian Arnold Toynbee referred to the Jews and their culture as a "fossil." Some fossil. After all, the Jews, while never numbering more than one-third of 1 percent of the world's population, produced: monotheism; Moses, the lawgiver; Jesus, God to more than a billion Christians; Marx, God to more than a billion communists, fewer each day; Freud, God to the rest of humanity with some people having multiple commitments; Einstein, God to the cerebral and 16 percent of all Nobel Prize winners.

A lively fossil indeed.

STATEMENT BY EDWARD I. KOCH

TO THE AMERICAN JEWISH COMMITTEE

TUESDAY, MAY 28, 1991

So much has been written on the subject of H.R.1. I thought I would simply provide you with what I think covers the subject most adequately and supports my view that H.R.1 encourages quotas and should be opposed.

First, let me describe the annexed documents: The first document is a letter of May 15, 1991, authored by me and sent to members of Congress urging their vote against H.R.1. Attached to that letter is an analysis of H.R.1 and an explanation of "race norming" and how H.R.1 relates to "race norming." The second, third and fourth documents are Wall Street Journal op-ed articles -- the first, authored by me, dated February 5, 1991, which discusses why H.R.1 would adversely impact on white, Jewish males; the second, dated February 20, 1991, by Gordon Crovitz discusses the relevant cases, in particular Griggs and Wards Cove; the third, dated May 22, 1991, refers to the actions I have taken in lobbying Congress and others against the civil rights

bill and why. The fifth document is a memorandum by Agudath Israel of America, dated May 3, 1991, which was sent to members of the U.S. House of Representatives which provides its views on "several of the most controversial provisions of H.R.1." And the final document is a memo from C. Boyden Gray, Counsel to the President, in which he discusses "race norming" and provides a detailed analysis of H.R.1 with the administration's reasons for opposing it.

The question to ask yourself is the following: Would you support legislation that would encourage reverse discrimination in order to eliminate current racial discrimination? If you would, then your support for H.R.1 is understandable, because H.R.1 attempts to do exactly that. However, if you believe that it is unfair, discriminatory and reverse racism to punish approximately 80% of the American population which is white by providing preferential treatment to the 20% who are minorities, and preferential treatment to women who are a majority then you

would agree with me and oppose H.R.1.

Simply put, H.R.1, in affect, by presuming a employer guilty of having practiced racial, ethnic, religious and gender discrimination by showing that his workforce in particular jobs does not statistically reflect either the racial, ethnic, religious or gender make-up in the regional workforce for those particular jobs or the applicant work pool for the jobs, places the burden upon the employer to rebut this presumption of guilt. The huge backpay and attorney fee awards that could result will encourage employers to quietly make sure their workforce mirrors the profile needed in order to avoid problems, even if that means hiring by quota.

There is a debate raging as to whether or not Griggs v. Duke Power which created the cause of action alleging that hiring practices that appear fair can still be unlawful if they disproportionately harm one group was, in fact, overturned by Wards Cove. Scholars differ on that issue. Some believe that

Wards Cove simply clarified the law and is consistent with Griggs, to wit, explaining: "(1) Plaintiffs must identify a specific hiring practice that has an adverse impact on a minority group; (2) once such a practice is identified, the employer has the burden of showing that the practice 'serves in a significant way the legitimate employment goals of the employer'; and (3) if the employer can show a legitimate justification for the hiring practice, plaintiffs can still win if they show that the employer could use other factors that don't disproportionately disqualify minorities."

Among other things, H.R.1 imposes a new burden on the employer to prove that the "business necessity" requiring that an employer's hiring criteria where the workforce doesn't reflect the required profile "must bear a significant relationship to the successful performance of the job." This is more stringent than the standard the Supreme Court used in Griggs and its subsequent disparate impact decisions. Griggs used language allowing the

employer to engage in rational choices with respect to hiring criteria by requiring that there be a "manifest relationship to the employment in question." The definition of business necessity in Wards Cove is that the employment practice "serves, in a significant way, the legitimate employment goals of the employer." This is consistent with Griggs as the Supreme Court made clear in 1979 in its New York Transit Authority v. Beazer decision. In contrast, H.R.1 defines "business necessity" as having a "significant relationship to (the) successful performance of the job." This proposed standard is clearly more onerous than the Griggs test. Moreover, because H.R.1 refers to "successful performance," it would prohibit an employer from raising standards beyond minimal ones to provide better services if to do so would result in a disparate impact.

Now let me turn to the more parochial issue of the impact on Jews and others of different religious persuasions. Jews tend to shy away from any concern that might be referred to as parochial.

The fact is that because Jews are only 2% of the population of the United States and also tend to be in appointed government positions and university faculty positions in greater numbers than their percentages of the population and because governments and universities are subject to H.R.1, anyone minimally qualified could bring an action against the university or the government alleging there were more Jews than the profile presumptively allowed and too few of the religious affiliation of the litigant represented in the workforce. Few employers would be likely to want to run the risk of the costly lawsuits that would be brought. There are very few positions in government that have a legal professional requirement e.g. doctor, engineer, architect, and I have rarely met a voter who did not believe that he or she couldn't do better than any commissioner appointed by any mayor. At universities it would be hard to justify that it was significantly related to successful job performance that there be the advanced degrees and published articles by applicants now

required for faculty positions to carry out ones duties. And the "presumed statistical profile" will become the subtle norm rather than hirings based on merit and scholarship.

There is now a willingness on the part of some large corporations to give up their opposition to the legislation in exchange for a limit to their liability by a cap on monetary damages. Under existing law only those who establish discrimination based on race may sue for compensatory and punitive damages other than two years back pay. Unlike the version of last year, this year's version of H.R.1 eliminates the cap of $150,000 imposed on all but those who suffered discrimination based on race. And there is an ongoing effort to put back the cap. I believe this approach is wrong. I believe that where intentional discrimination is established, the victim, whether white or female or black or Hispanic or Asian, and of whatever religious persuasion, should be entitled to compensatory and punitive damages and treated equally before the law. I do

believe, however, that when you create a new cause of action particularly where passions can become inflamed, you can provide that these cases shall by heard and decided solely by a judge, and I would support such an outcome. This expansion of liability is, in fact, a change on my part; equality before the law demands it.

There are two 1989 Supreme Court decisions Congress ought to overturn. First, in Patterson, the court ruled that Section 1981, banning racial discrimination in making and enforcing contracts, does not cover the terms and conditions of contracts. Thus, racial harassment on the job is not illegal under Section 1981. Congress should close that loophole. Second, Congress should overturn the Lorance decision which makes it more difficult to challenge certain intentionally discriminatory seniority systems.

These changes can be made without enacting H.R.1 with all of its other provisions encouraging quotas.

Also, let me state for the record my position on affirmative action. There are two forms of affirmative action. I support the following: Reaching out and encouraging minorities and women to apply for positions which historically have not been open to them or where the environment is seemingly hostile to them and encouraging them to apply. Particularly in the case of minorities because of historical failures in our education system I support providing mentoring services for those who need them. But when the position is filled it should be done solely on the merits with no bonus for being a member of a minority group or for being female and no handicap as a result of being white and/or male. The alternative form of affirmative action which I oppose is euphemistically described as goals, timetables and sanctions. I see no difference between that method and the use of quotas.

I have done what I said I wouldn't do -- discuss the bill in some detail rather than leave it to the accompanying documents,

but it is not possible to do otherwise and have an intelligent discussion.

I urge you to reconsider your position and withdraw your support for H.R.1

EDWARD I. KOCH
1290 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10104

May 15, 1991

SENT TO ENTIRE CONGRESS:

H.R.1 will soon be before you for a vote. I urge you to vote against it. You might ask, how can it be that I, your former colleague who voted for every civil rights bill when in Congress and as a young lawyer in 1964 went to Mississippi to defend black and white civil rights workers who were registering voters, could take such a position? The answer is simple. H.R.1 is not a civil rights bill. It is a bill which will encourage quotas based on race, ethnicity, religion and gender.

I am opposed to H.R.1 because it will adversely affect everyone in this country: The vast majority of our citizens will suffer reverse discrimination in employment, while others will be provided preferential treatment and, therefore, blamed for the resulting unfairness. Yet, tragically, this bill does nothing to assist those who need training and better education in order to compete in the labor market.

Over the years, those who now advocate H.R.1 concealed the impact of some of the legislation, court decisions and administrative agency rulings which in the past have encouraged quotas by referring to those measures benignly as affirmative action. I support affirmative action when it is defined as reaching out and encouraging minorities to apply for a position or contract, providing them with mentoring services where needed but always filling the position or awarding the contract solely on merit and never excluding any group on the basis of race, ethnicity, religion or gender. Regrettably, affirmative action pressed by the proponents of H.R.1 has too often included goals, timetables and sanctions: euphemisms for quotas.

One particularly egregious example which has treated job applicants unfairly based on race has been the little known technique of race norming. In case you are not familiar with race norming, enclosed is a memorandum describing what it is, why it's unfair and its impact in creating and encouraging quotas.

Many people fear that if they publicly oppose H.R.1 the proponents will, as some have already done, falsely and unfairly label them as racist. It takes courage, notwithstanding those false and sometimes deliberately unfair attacks, to publicly debate H.R.1 on the merits.

I recently received a letter from Ambassador Morris Abram. No one in the civil rights movement can dispute his credentials as one of the historical advocates of civil rights legislation. Let me cite his reasons for opposing H.R.1 in his own words. The legislation will:

"- rewrite twenty years of civil rights law by effectively making racial, ethnic, religious, and sex imbalance <u>alone</u> presumptively illegal;

- hold the employer guilty until proven innocent by forcing him to justify <u>any</u> racial, gender, religious, or ethnic statistical imbalance in any job in his workforce;

- eliminate the longstanding requirement that a plaintiff identify a specific employment practice causing a racial, ethnic, or gender imbalance;

- create a presumption of guilt so difficult to overcome and so costly to fight that employers will simply capitulate and hire by the numbers, impairing not only the principle of American equality but, inevitably, American efficiency and productivity;

- deny individuals their day in court by effectively barring challenges to civil rights consent decrees and litigated judgments to which they were not parties;

- in the real world of business, fear of litigation, in particular litigation with devastating publicity consequences, makes the temptation to hire by the numbers almost irresistible."

It cannot be said any better, so I won't try.

Also enclosed is a more detailed analysis of H.R.1 and some of the purported amendments that its sponsors are considering offering.

All the best.

Sincerely,

Edward I. Koch

enclosures

"Race Norming" and H.R. 1

What is "Race Norming"?

"Race norming" or "within-group scoring" refers to the practice of reporting test scores in a manner that compares test takers only with members of their own racial or ethnic group. This is done by altering raw scores so as to prevent the reported scores from reflecting the truth about disparities between the performances of various racial or ethnic groups. If, for example, a black, an Hispanic, and an Asian test taker each scored 270 points on a test, this might place the black applicant in the 53rd percentile among members of his group, the Hispanic in the 35th percentile among his group, and the Asian in the 16th percentile of the "non-minority" category. Race-normed reporting would give the black a score of 53 on a scale of 100, while the Hispanic would have a reported score of 35 and the Asian a reported score of only 16, although in truth each had an identical raw score.

Why Do Employers and Employment Agencies Use Race Norming?

Race-norming, in essence, is simply an efficient device for imposing racial quotas in cases where an employment test is used to fill jobs. The most profound pressures to engage in race-norming arise from the disparate impact theory of discrimination. Under this theory, a test used to screen applicants for jobs or promotions is presumptively illegal if members of one racial or ethnic group are selected in disproportionately lower numbers. The standard device for overcoming this presumption of illegality for written aptitude tests has been to conduct professional "validation studies" proving that the test accurately predicts job performance. Technical validation of ordinary aptitude tests, however, is often impossible; when it is possible, it is usually very expensive. Race-norming automatically eliminates disparate impact, and thereby eliminates the need to perform expensive validation studies.

The use of race-norming has been tacitly encouraged to some extent by the very existence of the disparate impact theory of discrimination. More immediate pressures, however, have been brought to bear through enforcement policies employed by the Department of Labor and the EEOC. The official statement of those policies, the "Uniform Guidelines on Employee Selection Procedures," was adopted during the Carter Administration (1978) and has not been revised since that time. In discussing "formal and scored procedures," the Guidelines provide:

> "Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either <u>modify the procedure to eliminate adverse impact</u> or

otherwise justify continued use of the procedure in accord with Federal law." 29 C.F.R. 1607.6(B)(2); 41 C.F.R. 60-3.6 (B)(2) (emphasis added).

This is an open invitation to the use of race-norming. More important, it is a tool used by the government's enforcement bureaucrats to pressure employers into adopting race-norming techniques.

In a recent public statement (copy attached), the current Chairman of the EEOC has stated that the encouragement of race-norming is not <u>now</u> agency policy. The letter, however, does not deny that it previously was agency policy. Indeed, the Chairman's letter states that "we do know that policies promoting race and gender preferences have come about in the 25 years that EEOC has enforced Title VII."

In addition, the Department of Labor has for many years fostered the use of race-norming by state employment agencies that use an aptitude test developed by the Department. The justification for this program, which is still being operated despite objections from the Department of Justice, is that race-norming is an appropriate way to comply with the Uniform Guidelines without the need for validation studies. For employers anxious to achieve "goals and timetables" set by the Labor Department's Office of Federal Contract Compliance Programs, these referrals provide a low-cost mechanism for meeting their quotas. For employers who are unaware that the scores reported to them by the state employment agency are race-normed, the effect of this program is to make them unwitting accomplices in a government-sponsored quota scheme.

<u>How would H.R. 1 Increase the Use of Race Norming</u>?

H.R. 1 would support and encourage the use of race-norming in three main ways.

First, by creating new and almost insurmountable hurdles that employers would have to overcome in attempting to defend selection practices that have an adverse impact, H.R. 1 would create powerful new incentives for the use of quotas. For employers who rely on formal and scored tests, the most efficient way to meet these quotas will be through race-norming.

Second, we can expect legislative history specifically ratifying the Carter Administration's Uniform Guidelines. The House Judiciary Committee's Report on last year's bill (which was almost identical to H.R. 1) contained the following statement: "The Uniform Guidelines represent the interpretation of <u>Griggs</u> applied by the federal government in enforcing Title VII. Its provisions embody the legal principles that were accepted and applied prior to <u>Wards Cove</u>, and which the Committee intends to

restore." House Report No. 101-644, at pg. 18 (July 31, 1990). Similar language can be expected this year.

Third, it is possible that there will be legislative history specifically designed to increase the pressure for race-norming. Such legislative history would probably be slipped into a relatively technical and obscure discussion of testing and validation techniques, as it was last year. See Senate Report No. 101-315, at pg. 44 (June 8, 1990). The Committee Reports, written by sophisticated staffers and lobbyists, would likely be given great interpretive weight by the courts in this case because of the fact that race-norming is an especially apt device for employers to use in avoiding liability under the disparate impact provisions of the bill.

Can the Problem Be Solved by an "Anti-Race-Norming" Amendment to H.R. 1?

The pressures on employers to employ race-norming or equivalent devices would not be removed by an amendment specifically addressing the problem.

First, any language acceptable to the sponsors of H.R. 1 would probably include qualifiers designed to deprive the amendment of legal effect. The cosmetic and meaningless "anti-quota" language included in H.R. 1 shows that this is the preferred technique of the lawyers who control this bill.

Second, it would be difficult (though perhaps not impossible) for anyone to draft language both broad enough and precise enough to outlaw all the forms of race-norming that could possibly be imagined.

Third, even if such language were successfully drafted and then accepted by the Congress, it would do nothing to remove the pressures to adopt quotas created by the disparate impact provisions of H.R. 1. Race-norming is simply an efficient mechanism for imposing quotas when scored tests are used to screen applicants. If race-norming cannot be used, employers will simply be forced to adopt less efficient mechanisms for achieving the same result. One obvious alternative would be to switch to "multi-factor" or "whole-person" selection systems in which race plays some vague and unquantified role as a "factor" along with test scores. This is a widely used device for filling quotas at colleges and universities, as illustrated by the recent controversy at Georgetown, and it works just as well in the employment context.

Analysis of H.R.1 and Purported Amendments

I understand that, once again, proponents of H.R.1 are circulating cosmetic amendments aimed at masking the bill's quota effect. As was the case with the various proposals floated and repudiated last year, the language I have seen does not remotely solve the problem. The Wards Cove v. Antonio decision is consistent with Griggs v. Duke Power. In Griggs and subsequent Supreme Court disparate impact decisions, the Supreme Court, for example, defined "business necessity" as "manifest relationship to the employment in question." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); Albemarle Paper Co. v. Moody, 422 U.S. at 425 (1975); Dothard V. Rawlinson, 433 U.S. at 329 (1977); New York Transit Authority v. Beazer, 440 U.S. at 587 n. 31 (1979); and Watson v. Ft. Worth Bank and Trust, 487 U.S. at 997 (O'Connor plurality opinion). Even Justice Stevens' Wards Cove dissent cites the "manifest relationship" language at least three times as the applicable disparate impact standard. 109 S.Ct. at 2129, 2130 n.14.

Any change in the Griggs "manifest relationship" phrase puts pressure on employers to resort to quota hiring and promotions in order to avoid costly lawsuits. For example, I understand the proponents of H.R.1 are circulating a warmed-over definition of business necessity as meaning "substantial and manifest relationship to the requirements for effective job performance." (emphasis supplied). This definition goes well beyond Griggs. It does so by adding "substantial" to the definition -- repudiated in the Senate last year. Moreover, by tying the definition to "effective job performance," this language makes it impossible for an employer to raise standards beyond those which produce a minimally qualified (i.e. minimally effective) employee if to do so results in disparate impact.

A new subparagraph circulated by proponents of H.R.1, purportedly addressing this problem and allegedly allowing employers to rely on relative qualifications, clearly fails.

If disparate impact results from the effort to raise standards, the higher standards must meet the new, onerous definition of business necessity -- which includes the need to show substantial relationship to effective job performance. Thus, this new subparagraph is circular and, thus, meaningless.

The Wards Cove formulation, which uses language based on the Supreme Court's 1979 Beazer decision (the employment practice "serves in a significant way, the legitimate employment goals of the employer"), is fully consistent with Griggs.

Further, the proposed language does not solve H.R.1's flaw in allowing blanket challenges to an employer's practices. It does not require the plaintiff to identify a particular employment practice causing the alleged disparate impact.

I am concerned that while proponents of H.R.1 may offer these or other cosmetic changes to their bill, they will not relinquish the essential elements of the bill which will encourage quotas.

I urge you to vote no on H.R.1.

THE WALL STREET JOURNAL
February 5, 1991

Civil Rights Bill: The Way to Religious Quotas

By Edward I. Koch

Why is the newly introduced Civil Rights Bill still a quota bill?

Because, like the 1990 version known as Kennedy-Hawkins, the legislation finds that an unlawful employment practice is established when "a complaining party demonstrates that an employment practice (or group of 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 employer would have the burden of proving that the hiring practice or group of practices bear a "significant relationship to successful performance of the job." Contrary to the claims of the legislation's supporters, this standard is more stringent than the standard consistently applied in this area by the Supreme Court. The court says that employers may justify hiring practices if they bear a "manifest relationship to the employment in question."

Under the Supreme Court test, employers can justify many hiring practices as bearing a "manifest relationship" to the employment. Under the bill's proposed test, it is unlikely that employers would be able to prove that a challenged job requirement bears a "significant relationship" to "successful" job performance. To avoid potential liability under such a murky standard, employers would, of necessity, resort to quota hiring.

Cases under the disparate-impact standard have focused on racial and gender discrimination. But under the bill, disparate impact will be so easy to prove that it will be applied to alleged religious discrimination, and employers will react defensively to the threat of such lawsuits.

Proponents of the bill note that some Jewish organizations, traditionally opposed to quotas, endorse the legislation. I suggest that Jewish organizations haven't alerted their memberships to the fact that under such a law employers probably will have to justify why there are more Jews on a percentage-basis in a particular job than in the applicant job pool.

To defend themselves from suits, employers would have to justify the disparate impact. Surely that would mean keeping statistics on the number of Jews, Catholics, Protestants, Muslims, etc. It might even mean keeping track of all the subdivisions—such as Jehovah's Witnesses and Seventh Day Adventists; Sunni and Shiite Muslims; Orthodox, Conservative and Reform Jews—as well.

The proposed law would particularly create a misplaced incentive for governments and universities to hire on the basis of race, color, religion, gender or national origin. They would feel intense pressure to select the lesser-qualified individual of a group not adequately represented from a statistical standpoint—both to avoid the "disparate impact" and exposure to costly lawsuits they would be likely to lose, as well as to avoid student unrest, picket lines and adverse publicity. They will hire the statistically correct. (In New York City, those who would suffer disproportionately would be white Jewish males.)

Few employers, would be likely to want to run the risk of costly lawsuits, attorneys' fees and massive back-pay awards. The mere filing of a lawsuit could hurt sales and public acceptance of the company's product.

Nationwide, the percentage of blacks is 12%; Hispanics about 8%; Asians about 2%. Among whites, those who are Jewish would still suffer the most because they are only 2% of the population.

Many who support this bill deny they support quotas, but acknowledge supporting affirmative-action programs requiring goals, timetables and sanctions; they claim that these programs do not entail preferences and reverse discrimination. But goals and timetables quickly *become* de facto quotas when employers face sanctions if they don't achieve them, and when the burden of proof falls upon the employer to justify hiring practices.

It is not "immoral" to be for quotas, nor is it "immoral" to oppose them. New York Mayor David Dinkins publicly supports quotas, as do many other New York City leaders; they think the benefits outweigh the costs. But there is much more to be said in support of the position that this bill would create reverse discrimination and would be bad for America as a whole.

During November's election campaign, many editorials around the country denounced Sen. Jesse Helms's ad depicting a white worker losing his job as a result of quota preferences. What if his opponent, Harvey Gantt, had run an ad that showed two black hands and commentary saying, "Is it unfair for us to be given preferential treatment to catch up from the burden of slavery?" Would that ad have been denounced? I doubt it.

Will the supporters of this bill attack those of us who oppose it as racists because we honestly believe that it will foster quotas? Unfairly, they will probably do so again this year, as they did last year. False charges of racism are the refuge of those who cannot argue on the merits.

Civil-rights groups have been seeking a fig-leaf compromise with some opponents of the bill to facilitate an override of any presidential veto. Their latest ploy has been to approach some big businesses with a new offer. These civil-rights groups are hoping that if the damages available under the bill for intentional discrimination are reduced, the businesses will agree to language that, while ostensibly "solving" the quota problem, does not do so. But so long as this bill encourages quotas, and it does, it should not be acceptable no matter what compromise is offered.

Mr. Koch, former mayor of New York, writes a weekly column for the New York Post and is in private legal practice.

THE WALL STREET JOURNAL WEDNESDAY, FEBRUARY 20, 1991

Defenders of the Civil-Rights Bill Doth Protest Too Much

Rule of Law

By L. Gordon Crovitz

Actor Playing the Queen: Both here and hence pursue me lasting strife; If, once widow, ever I be wife!

Hamlet: Madam, how like you this play?

The Queen, his mother: The lady doth protest too much, methinks.

Shakespeare, whose wisdom did not end with first, let's kill all the lawyers, knew that people who issue the loudest claims also often know best that they're false. So it is with the din of assurances by its proponents that the Civil Rights Act of 1991 could never ever result in race, sex and religious quotas.

There is a lull before the battle resumes on the legislation President Bush vetoed last year as a quota bill and "lawyers' bonanza." It's a good time to stand back and parse some of the legal technicalities to see why the reintroduced legislation would still force employers to choose between quotas and ruinous lawsuits.

The civil-rights groups say they want to reverse five recent Supreme Court rulings. The Bush administration is happy to overrule two cases, which excluded some lawsuits over promotions and seniority. Mr. Bush says it would be unfair to reverse *Martin v. Wilks*, which said that people who were not parties to consent decrees can sue if they suffer from resulting racial quotas. There's also no reason to reverse *Price Waterhouse v. Hopkins*, which said an employer can somehow try to convince a court that it would have made the same promotion decision even if it hadn't used an unlawful factor such as sex.

The quota-inspiring change comes in provisions that civil-rights lawyers say would "only" reverse the case of *Wards Cove Packing Co. v. Atonio*.

To understand what's at stake here, note that the country has come so far since the 1964 Civil Rights Act that intentional discrimination is not the issue. The original law banned what civil-rights lawyers call "disparate treatment"; by now, most litigation is instead about "disparate impact." This refers to the expansion of the civil-rights laws by the Supreme Court in the 1971 case of *Griggs v. Duke Power*, which said that hiring practices that appear fair can still be unlawful if they disproportionately harm one group, such as where a utility company required educational degrees held by many fewer blacks than whites.

Wards Cove did not overturn *Griggs*. The justices still welcome disparate-impact cases based on statistical evidence without any evidence of intentional discrimination. What *Wards Cove* did was clarify that trial judges can recognize there are statistics and then there are statistics—and that only relevant numerical evidence can prove "disparate impact."

Wards Cove itself showed the slipperiness of numbers games. The family-owned firm hired seasonal workers to process and pack salmon in its Alaska plants. Several minority workers, including Frank Atonio, a Samoan, claimed discrimination. Their evidence was that half of the plant's unskilled workers were minorities, but that one-quarter of the skilled workers were minorities. They argued that half the skilled workers should also be minorities.

There were several problems with this claim. For one thing, the relevant labor market in Alaska was 10% minorities. Under a strict statistical approach, Wards Cove Packing probably hired "too many" skilled and unskilled minorities already. Also, many of the seasonal unskilled workers were hired through a minority-run local of a union, which might explain the irony of minority overrepresentation as the basis for a discrimination lawsuit.

The Supreme Court used the case to clarify the rules for numbers-based lawsuits: (1) Plaintiffs must identify a specific hiring practice that has an adverse impact on a minority group; (2) once such a practice is identified, the employer has the burden of showing that the practice "serves in a significant way the legitimate employment goals of the employer"; and (3) if the employer can show a legitimate justification for the hiring practice, plaintiffs can still win if they show that the employer could use other factors that don't disproportionately disqualify minorities.

The plaintiffs in *Wards Cove* lost, but worthy cases have won under its three-part test. John Dunne, head of the Justice Department's civil-rights division, told Congress this month about several of the winning cases. A teacher in Alabama was reinstated when a court found that minorities disproportionately failed a teacher-certification test, an almost all-white New Jersey town had to drop its residents-only rule for public employees and Jacksonville, Fla., had to change its exam for firefighters.

Employers would have to hire enough—but not too many—Catholics, Baptists, Jews, Muslims.

The proposed civil-rights bill would go far beyond reversing *Wards Cove*. Plaintiffs would not have to identify any single factor in hiring or promotion that the employer could then try to defend. The employer instead would have the entirely new task of proving the "business necessity" that all the objective and subjective requirements for employment "must bear a significant relationship to successful performance of the job." The phrase "successful performance" is especially vague.

Uncertain standards always promote litigiousness, but the problem is especially severe here because the bill would reverse the usual due-process rules to presume that the defendant is guilty until and unless he can prove himself innocent. If in doubt, a defendant is guilty of "discrimination."

No employer can prove that every requirement for a job is necessary for successful performance. No Wall Street law firm can prove that only lawyers from Ivy League-type schools can possibly do the job, for example. The law would also cover religion, so employers would have to hire enough—but not too many—Catholics, Baptists, Jews, Muslims.

The proposed bill also goes beyond the 1964 civil-rights law, *Griggs* or *Wards Cove* by replacing the ideal of mediation with the divisiveness of jury trials and punitive damages. This year's bill as introduced by Rep. Jack Brooks even put back the provision dropped last year that would allow unlimited punitive damages. The bill's section calling for punitive damages comes under the heading of damages for "intentional discrimination," but in fact no intention is required. All that's needed is "indifference to the federally protected rights of others," whatever that means.

Employers would be left in the position that Justice Sandra Day O'Connor warned against in a recent case limiting disparate-impact cases. "If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted."

During the debate on the 1964 Civil Rights Act, Hubert Humphrey said that the law guaranteed equal opportunity, and that no court could "require hiring, firing or promotion of employees to meet a racial 'quota.' " After all the lawsuits demanding goals, timetables and set-asides, any civil-rights bill should pass a simple test: Congress should be bound by its provisions. As the bill now stands, Congress is the only institution in the country that Congress would exempt.

THE WALL STREET JOURNAL WEDNESDAY, MAY 22, 1991

Hizzoner Goes to Washington to Fight the Quota Bill

Rule of Law

By L. Gordon Crovitz

You might ask, how can it be that I, your former colleague who voted for every civil-rights bill when in Congress and as a young lawyer in 1964 went to Mississippi to defend black and white civil-rights workers who were registering voters, could take such a position? The answer is simple. H.R. 1 is not a civil-rights bill. It is a bill which will encourage quotas based on race, ethnicity, religion and gender.

Ed Koch is a Democrat mugged by quotas. The former How'm I Doin'? mayor of New York City and former liberal U.S. representative has lobbied Congress against the civil-rights bill, jawboned leaders of Jewish groups and planned strategy with White House lawyers.

Mr. Koch's reaction against the bill is one reason why it will make no difference that Democrats in Congress have temporarily withdrawn their bill. After two years of claiming this is not a quota bill, the week or so the Democrats plan for going back to the blackboard will not produce a non-quota bill.

Mr. Koch recalls that he first began to look closely at the bill after he read an article in November in the Forward, a national Jewish weekly, that described how the bill would force employers for the first time either to hire by religious quotas or risk legal liability. Joseph Morris of the Chicago-based Lincoln Legal Foundation wrote that the bill would outlaw "disparate impact" not just by race and sex but also by religion and national origin. Counting by religion sounded a warning.

As Mr. Koch wrote in a Feb. 5 article on the Journal editorial page, disparate-impact analysis is best understood as a fancy legal term inviting quotas. Under a 1971 Supreme Court case, plaintiffs can prove discrimination even when there is no evidence of intentional discrimination. Only lawyers could dream up an offense called non-intentional discrimination, but here's how it works: If an employer's work force does not precisely mirror the area's labor pool of minorities, presto, the defendant is presumed guilty.

Again, only lawyers could claim that only discrimination prevents every company in every industry from hiring the statistically correct number of Hispanics, Methodists, Ukrainian-Americans. In a non-lawyer's world, of course, it would be a fluke if the employees of any single company anywhere managed to reflect perfectly every conceivable subgroup.

To be fair to the Democrats, the White House version of the bill would also continue the use of statistics alone to establish "discrimination." The big difference is that with punitive damages and other lures for contingency-fee lawyers, the Democrats' bill would create enormous incentives for companies to lock in quotas as the best and perhaps only defense to accusations of disparate impact. The bill would also water down defenses to lawsuits by making the definition of terms such as "business necessity" even more vague than the courts have left them.

Mr. Koch, soft-spoken as always, explained that his former Democratic colleagues in Congress "got out of touch because they are so frightened by militant black and white leadership in the civil-rights groups." Mr. Koch said, "It's the politically correct position that blacks need help, Hispanics need help, even Jews with Spanish surnames need help, but Asian-Americans don't. I happen to think that is insane.

"You get dragged along. Everyone wants to do the right thing, but you find that it's the wrong thing," he said. "The easy right thing to do is to give groups preferences, but this means that innocent white people are going to suffer. I do not accept that."

After he began to speak out, several Jewish groups also reconsidered their typically unblinking support for any legislation that calls itself a civil-rights bill. The groups that now most strongly oppose the bill represent Orthodox Jews, whose members follow strict dietary, dress and Sabbath observance rules that set them apart. They understand that the bill invites employers to start keeping track of the religion of workers and tempts them to hire and fire to come as close as possible to reflecting the makeup of the local community. Yet even asking someone's religion is now rightly considered out of bounds.

Ed Koch

Mr. Koch's outspokenness against the bill won him an invitation to the White House. Mr. Koch told Boyden Gray, the president's counsel, that race-norming was the smoking gun of quotas. This is the practice of grading test scores on a race and ethnic curve; a 300 on one aptitude test is reported to potential employers as a 79 for a black applicant, a 62 for an Hispanic and a 39 for a white or Asian.

Democrats now say they might try to limit test scoring by race-norming. They forget that the reason race-norming was invented in the first place in the early 1970s was as a defense to the then-new disparate-impact lawsuits. Any civil-rights bill that increases the exposure of employers to lawsuits based simply on statistics will only encourage race norming and other sleights of hand to meet quotas without admitting the deed.

"Over the years those who now advocate" this civil-rights bill, Mr. Koch said, "concealed the impact of some of the legislation, court decisions and administrative agency rulings which in the past have encouraged quotas by referring to those measures benignly as affirmative action. I support affirmative action when it is defined as reaching out and encouraging minorities to apply for a position or contract," he said, "providing them with mentoring services where needed but always filling the position or awarding the contract solely on merit and never excluding any group on the basis of race, ethnicity, religion or gender."

Most Americans probably agree with Mr. Koch's praise for voluntary affirmative action. Nor is there any serious opposition to laws that prohibit intentional discrimination—that is, what non-lawyers call discrimination. The paradox for politicians who want a new civil-rights bill is that no law can go beyond this prohibition against discrimination to also capture all the nuances of encouraging minorities without discriminating against whites. This is why we ended up with a sterile and legalistic debate about statistics.

The best civil-rights bill now probably is no civil-rights bill. If there are problems prosecuting people who discriminate, let's have a bill that deals with the issue. We do not need to legally mandate the all-but-impossible requirement of perfectly matching the race, sex, religious and ethnic makeup of the available labor pool.

There is an alternative to expanding the imperial reach of lawyers, lawsuits and judges. This is to encourage voluntary affirmative action by people of good will. Put it this way. The civil-rights groups that support this bill believe that the way to accomplish harmony is to encourage more lawyers to bring more lawsuits. As the debate over this bill shows, lawsuits and harmony remain an unlikely combination.

בס"ד

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May 3, 1991

M E M O R A N D U M

TO: Members of the United States House of Representatives

FROM: David Zwiebel, Esq., Director of Government Affairs and General Counsel
Abba Cohen, Esq., Director, Washington Office

SUBJECT: H.R. 1 (The "Civil Rights and Women's Equity in Employment Act of 1991")

We submit this memorandum on behalf of Agudath Israel of America to offer our views on several of the most controversial provisions of H.R. 1, the "Civil Rights and Women's Equity in Employment Act of 1991."

As detailed herein, Agudath Israel opposes certain aspects of the bill that are designed to make it easier to sue for violations of Title VII's anti-discrimination laws in "disparate impact" cases involving unintentional discrimination. Agudath Israel believes that those provisions could well lead employers to abandon neutral merit-based selection criteria in favor of racial and other quotas in their hiring policies. For that reason, although Agudath Israel affirmatively supports certain provisions of H.R. 1 -- particularly the section of the bill that would establish damages for acts of intentional employment discrimination -- on balance we urge the members of the House to reject the bill in its current form.

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Background: Agudath Israel and Its Commitment to the Principle of Equal Opportunity

Agudath Israel of America, founded in 1922, is the nation's largest grassroots Orthodox Jewish movement. One of its primary functions is to advocate the religious and civil rights of observant Jews.

Any bill whose title includes the noble words "civil rights" and "equity in employment," and whose purpose is to strengthen the provisions of Title VII, commands Agudath Israel's attention and respect. There is no denying that discrimination in this country still does exist. Among its victims are minorities of all kinds, including religious minorities -- especially religious minorities like Orthodox Jews whose dress, diet, and strict Sabbath and Holiday observance set them conspicuously apart from the majority, and frequently make them easy targets for discrimination. The volume of calls we receive complaining of religious discrimination on the job is ample testimony to the fact that American society still has not totally eradicated some of history's most stubborn stereotypes.

Agudath Israel and its constituents thus have a direct and substantial stake in Title VII's prohibitions against employment discrimination -- and, more generally, in a society where each individual is judged on the basis of merit rather than on the basis of his or her race, gender, religion, national origin or any other irrelevant characteristic.

However, much of what passes today as "anti-discrimination law" is in fact extremely harmful to our community. Laws and policies are frequently designed to remedy the effects of past discrimination, or to achieve diversity, or to provide new opportunities for the socially and economically disadvantaged. These are surely worthwhile, perhaps even noble, objectives. Yet, in practice, such policies as "minority set-asides," "race norming" and "proportional hiring" often create brand new forms of invidious discrimination. Again, the impact is real, not abstract: For every call Agudath Israel receives complaining of religious discrimination, another one comes in complaining of "reverse discrimination."

What is especially ironic and troubling, from Agudath Israel's perspective as a Jewish organization, is the historical context in which these developments have occurred. It has been well documented that for many years and in many settings, Jews in the United States were victimized by quotas -- quotas directed specifically at denying Jews employment and educational opportunities. These quotas resulted from the substitution of anti-Semitic religious stereotypes for neutral merit-based selection criteria.

Today, American Jews are once again being hurt by quotas. These are not necessarily motivated by anti-Semitism, or any other venal concern. Rather, modern day quotas are designed to advance the commendable goal of increasing opportunities for racial and ethnic minorities who themselves have long been the targets of discrimination. The bottom line for all too many Jewish Americans, though, remains the same: Jews are victims of quotas today no less than they were a generation or two ago.

The plight of the growing "underclass" in the United States, and especially in America's urban ghettos, is undeniably tragic. Considerations of both human compassion and economic self-interest demand creative and determined approaches toward alleviating their circumstances of abject poverty -- poverty of moral values no less than poverty of material means. Increasing educational and employment opportunities to help the underprivileged transcend their circumstances is a social objective that merits everyone's support.

Where Agudath Israel must vigorously part company from many in the civil rights community, though, is over the means to achieve that social objective. Advancing the status of underprivileged racial minorities by according them special preferences that nullify neutral color-blind considerations of merit, and discriminate on the basis of race to boot, is morally repugnant, economically inefficient and ultimately self-defeating. Yet that appears to be the road upon which many parts of American society have embarked.

Agudath Israel believes that constitutional, statutory and common law rights, as well as opportunities in the workforce, marketplace and classroom, should be enforced and made available to all Americans on a neutral, equal basis. An individual's standing in the community should turn on considerations of merit, not on considerations of race, gender, or religion. Our analysis of H.R. 1 proceeds from this foundation of fundamental fairness.

Unintentional Discrimination: "Disparate Impact" and H.R. 1

In its 1989 Wards Cove decision, the Supreme Court addressed cases of discrimination in which there is no finding of intentional discrimination or "disparate treatment." Rather, the Court dealt with the situation it had first addressed in the 1971 Griggs case, where an employer's policies, benignly motivated though they may be, are nonetheless illegal because they have a "disparate impact" on members of certain groups and are not

justified by business necessity. Emphasizing the absence of intentional discrimination, and the danger of developing legal standards that "would almost inexorably lead to the use of numerical quotas in the workplace," the Court's majority established strict guidelines with respect to the procedures governing disparate impact cases.

Specifically, and of special note with respect to H.R. 1, the Court in Wards Cove held that, in making out a "prima facie case" of disparate impact, a plaintiff has the burden of identifying the specific employment policy or practice leading to the statistical disparity, and cannot merely allege a group of policies or practices that have such impact. Once a plaintiff has established a prima facie case, the Court further held, the burden then shifts to the defendant to produce evidence that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer." Finally, the Court held that although the employer bore the burden of production in asserting a business justification defense, the ultimate burden of persuading the jury that unlawful discrimination has taken place always remains with the plaintiff.

With minor reservations, elaborated below, Agudath Israel generally supports the approach embodied in the Wards Cove decision. Although consulting statistical tables may be useful and necessary as a means of identifying otherwise elusive discriminatory practices that lead to inequitable results, it is painfully apparent that the concept of disparate impact is fraught with danger for principles of equal opportunity. The easier it is for employers to be held liable for discrimination they never intended, the more likely it is that conservative corporate counsel will advise their clients to consult a statistician and hire by racial, religious, ethnic and sexual numbers -- quotas -- rather than by merit. To help avoid that possibility, Agudath Israel believes that an employee seeking to make out a case of unintentional discrimination on the basis of disparate impact should indeed be required to shoulder a heavy burden, at least in establishing a prima facie case of discrimination; and that an employer seeking to defend such a claim on grounds of business necessity should not be forced to shoulder an excessively heavy burden.

In our view, certain parts of H.R. 1 may tilt this delicate balance in a manner that could result in employers adopting de facto employment quotas to avoid the possibility of extremely expensive disparate impact litigation and perhaps even legal liability.

Our greatest concern in this regard centers on section 202 of the bill, and specifically subsection (k)(1)(B). The general

rule of this provision is that "if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact." Only "if the court finds" -- presumably as a result of a showing by the defendant employer -- "that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact," would the burden shift back to the plaintiff to demonstrate the specific practice that led to the disparate impact.

We regard this aspect of H.R. 1 as an entirely unreasonable and potentially dangerous change in the law. It could very easily lead to "kitchen sink" complaints, in which a complaining party could point to a broad array of the employer's practices as a "group" that resulted in statistical disparity. To defend that type of "kitchen sink" complaint would be an extremely expensive proposition; the employer would be required either to prove that the information is "reasonably available" for the plaintiff to specify the practice that has resulted in a disparate impact -- hardly the type of strategy one would wish to pursue in defending a disparate impact lawsuit -- or to show that each and every practice alleged by the plaintiff in fact did not result in any disparate impact. It is entirely reasonable to assume that faced with the potential for such legal exposure, many employers may decide simply to adopt <u>de facto</u> quotas as a means of staying out of court.

Moreover, Agudath Israel is concerned that these provisions of H.R. 1 could give employers further incentive to maintain records not only about the racial and sexual makeup of their workers and applicants for employment, but also of their religious identities -- for, by so doing, an employer defending a claim of disparate impact <u>religious</u> discrimination would be in a better position to shift the burden back to the plaintiff to specify the particular practice that has led to the disparity. Like other members of the American Jewish community, we are strongly opposed to workplace inquiries about an employee's or prospective employee's religious affiliation. As several Jewish groups (including Agudath Israel) articulated the point in a recent letter to the Leadership Conference on Civil Rights, "religious record-keeping, even in a relatively enlightened milieu, often constitutes a dangerous invitation to some persons in authority to exercise inherited prejudices."

Yet another concern Agudath Israel has with respect to the bill's treatment of disparate impact cases relates to section 201's definition of business necessity. Recall that in <u>Wards</u>

Cove, the Supreme Court spoke about the challenged practice serving, "in a significant way, the legitimate employment goals of the employer." The Court emphasized that this standard represented a middle ground; the relationship between the practice and the employment goals had to be more than "insubstantial," but less than "essential" or "indispensable." We believe that in enunciating this middle ground standard, the Supreme Court struck the appropriate balance in identifying the proper test to be applied to the business necessity defense.

Section 201(o)(1) of H.R. 1, in contrast, appears to impose a more substantial burden on an employer asserting a business necessity defense. Under the proposed legislation, an employer would have to show that a challenged employment selection practice "bear[s] a significant relationship to successful performance of the job" [emphasis added]; and that any other challenged practice "bear[s] a significant relationship to a significant business objective of the employer." [Emphasis added.] It is difficult to predict how courts would interpret this new standard -- though the bill's explicit statement [in section 201(a)(3)] that it is designed to "overrule the treatment of business necessity as a defense in Wards Cove" surely suggests that the standard to be applied is more onerous upon employers than that adopted by the Supreme Court.

That is not to suggest that Agudath Israel opposes all of the changes H.R. 1 would bring to bear in disparate impact litigations. We fully support section 201(m)'s definition of the term "demonstrates" to mean meeting the burdens of both production and persuasion. This definition, which would apply not only in the context of disparate impact cases but for all purposes of Title VII, would do away with what we regard as Wards Cove's somewhat artificial distinction between the burden to produce evidence of business necessity and the burden to persuade the finder of fact with respect to the ultimate question of liability. Moreover, with respect to the issue of employment quotas, we think it extremely unlikely that employers would adopt de facto quotas simply because the burden they would have to assume once a plaintiff meets his heavy burden of establishing a prima facie case would shift from production to persuasion.

Intentional Discrimination: The Issue of Damages

Under existing statutory law, the range of options available to a court that finds intentional employment discrimination does not include the imposition of damages against the employer -- not even compensatory damages, let alone punitive damages. That is one of the main reasons many have viewed Title VII as deficient in terms of creating disincentives for employers to engage in

intentional discrimination. Section 206 of H.R. 1 would address this deficiency by allowing courts in appropriate cases of intentional discrimination to award compensatory damages; and, if such discrimination was engaged in "with malice, or with reckless or callous indifference to the federally protected rights of others," to award even punitive damages.

It is entirely appropriate, in our view, for the law to come down hard on employers who are found to have engaged <u>intentionally</u> in unlawful discriminatory employment practices. We do not believe that holding employers responsible for the full consequences of their unlawful intentions is likely to lead to the implementation of unlawful quotas; so long as an employer knows that he cannot be held liable for damages resulting from <u>unintentional</u> discrimination, he has no reason to fear a legitimate merit-based employment policy. Nor do we believe that intentionally discriminatory employment policies deserve to be shielded from the type of legal redress available to victims of other types of unlawful conduct; an individual who has suffered injury at the hands of an employer who has engaged in intentional discrimination deserves to be made whole for his loss.

In concept, therefore, Agudath Israel fully supports the principle embodied in section 206 of the bill. At the same time, however, we are sympathetic to the concerns expressed by those who have labelled this section a "lawyers' bonanza"; allowing for unlimited damages, and especially unlimited punitive damages, could lead to an unwarranted explosion of litigation. For that reason, Agudath Israel would support an amendment to this section of the bill that would discourage use of the legal system as a tool of extortion by incorporating a reasonable "cap" on damages.

<u>Conclusion</u>

H.R. 1 does include several positive features. On balance, though, Agudath Israel of America remains concerned that the bill in its totality may well lead to the imposition of odious "hire by numbers" employment policies. We accordingly urge Members of the House to reject the bill in its current form.

D.Z.
A.C.

THE WHITE HOUSE

WASHINGTON

May 20, 1991

Dear

On behalf of the President, I want to thank you for your letter of May 7, 1991.

The Administration shares your concerns about the use of "race norming." In fact, the section-by-section analysis accompanying the Administration's civil rights bill, which I have attached, clearly states (on page 4) that such practices should be understood to violate Title VII. Similarly, the Chairman of the EEOC has publicly stated in the attached letter to the Wall Street Journal that "altering test scores to favor a particular group is not a legal or 'less discriminatory alternative.'" Finally, as your letter acknowledges, the Department of Labor has begun taking steps to prevent the use of race-norming by state employment services in connection with the GATB.

What puzzles me about your letter is its apparent assumption that opposition to race-norming and racial preferences could be consistent with support for H.R. 1. Race-norming, it must be stressed, is not confined to the GATB and it certainly did not originate with the GATB. On the contrary, the pressures on employers to use race-norming come primarily from the "Uniform Guidelines on Employee Selection Procedures," the most recent version of which was adopted by the Carter Administration in 1978. Indeed, as long ago as the mid-1970's, at least one major private purveyor of standardized tests (E.F. Wonderlic & Associates) was offering race-normed "ethnic conversion tables" as a means for employers to satisfy legal scrutiny by the Department of Labor.

During our negotiations with the proponents of the Kennedy-Hawkins bill last year, it was clear that they regarded the Uniform Guidelines as an almost sacrosanct statement of the proper approach to testing and disparate impact. Lest there be any doubt about their intent with respect to race-norming and related practices, I note that the Report of the Committee on Education and Labor (No. 102-40, April 24, 1991, pg. 35) expressly endorses the Uniform Guidelines. That same Report also

includes language seemingly designed to increase the pressure for race-norming by undermining the ability of employers to defend the legality of un-race-normed tests that are in fact predictive of job performance (see id., at 41 & n. 32; similar language is included in the Judiciary Committee's Report, which was recently released in manuscript form).

Even more striking is the fact that the Judiciary Committee rejected, by a straight party-line vote, an "anti-race-norming" amendment to H.R. 1 offered by Congressman Henry Hyde. Despite an extensive discussion of race-norming in the minority views section of the recently released Committee Report, moreover, the majority section of the Report does not contain a single word questioning the use of race-norming or suggesting that it is in any way illegitimate.

Finally, it must be stressed that race-norming is simply one peculiarly efficient device for filling racial quotas. Quotas can be filled just as effectively, if less efficiently, through other means. Thus, the abolition of race-norming would accomplish little or nothing if the legal pressures on employers to adopt quotas were simultaneously increased.

The disparate impact provisions of H.R. 1 will unquestionably create extraordinary new pressures for employers to adopt defensive quotas, as the Attorney General explained in the attached memorandum analyzing the virtually identical provisions in last year's Kennedy-Hawkins bill. I think it is simply wrong to suppose that these pressures could in any way be alleviated if civil rights advocates were to assert that employers are laboring under a "misconception" about the meaning of H.R. 1 (a "misconception" shared by the Attorney General). As Justice Sandra Day O'Connor noted in 1988:

> "If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met." Watson v. Fort Worth Bank & Trust 108 S. Ct. 2777, 2788 (1988) (plurality opinion).

As you know, the President shares your strong commitment to equal opportunity and your opposition to quotas and unfair preferences. His civil rights bill, H.R. 1375, contains all the worthwhile provisions included in H.R. 1, along with carefully crafted compromises to address the issues that led to his veto of H.R. 1's predecessor bill last year. The President's bill meets all

the concerns articulated in your letter, while H.R. 1 will move the law in precisely the opposite direction.

Thank you again for writing. If I or my staff can offer additional assistance, please do not hesitate to ask.

Yours truly,

C. Boyden Gray
Counsel to the President

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

The legislation may be cited as the "Civil Rights Act of 1991."

SECTION 2. FINDINGS AND PURPOSE

The Congress finds that this legislation is necessary to provide additional protections and remedies against unlawful discrimination in employment. The purpose of this Act is to strengthen existing protections and remedies in order to deter discrimination more effectively and provide meaningful relief for victims of discrimination.

SECTION 3. DEFINITIONS

Section 3 adds definitions to those already in Title VII.

The definition of "demonstrates" requires that a party bear the burden of production and persuasion when the statute requires that he or she "demonstrate" a fact.

The definition of the term "justified by business necessity" is meant to codify the meaning of business necessity as used in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), and subsequent cases including New York City Transit Authority v. Beazer, 440 U.S. 568, 587 n. 31 (1979). Such a definition was reaffirmed by the Court in Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115, 2125-2126 (1989). Even the dissent in Wards Cove acknowledged that "Griggs made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if its serves a valid business purpose." See 109 S. Ct., at 2129 (Stevens, J., dissenting) (emphasis added).

The terms "complaining party" and "respondent" are defined to include those persons and entities listed in the Act. The definition of the term "harass" is explained in the analysis of Section 8 below.

SECTION 4. DISPARATE IMPACT CLAIMS

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court ruled that Title VII of the Civil Rights Act of 1964 prohibits hiring and promotion practices that unintentionally but disproportionately exclude persons of a particular race, color, religion, sex, or national origin unless these practices are justified by "business necessity." Law suits challenging such practices are called "disparate impact" cases, in contrast to "disparate treatment" cases brought to challenge intentional discrimination.

In a series of cases decided in subsequent years, the Supreme Court refined and clarified the doctrine of disparate impact. In 1988, the Court greatly expanded the scope of the doctrine's coverage by applying it to subjective hiring and promotion practices (the Court had previously applied it only in cases involving objective criteria such as diploma requirements and height-and-weight requirements). Justice O'Connor took this occasion to explain with great care both the reasons for the expansion and the need to be clear about the evidentiary standards that would operate to prevent the expansion of disparate impact doctrine from leading to quotas. In the course of her discussion, she pointed out:

> "[T]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. . . . [E]xtending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met." Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2787-2788 (1988) (plurality opinion).

The following year, in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989), the Court considered whether the plaintiff or the defendant had the burden of proof on the issue of business necessity. Resolving an ambiguity in the prior law, the Court placed the burden on the plaintiff.

Under this Act, a complaining party makes out a prima facie case of disparate impact when he or she identifies a particular employment practice and demonstrates that the practice has caused a disparate impact on the basis of race, color, religion, sex, or national origin. The burden of proof then shifts to the respondent to demonstrate that the practice is justified by

business necessity. It is then open to the complaining party to rebut that defense by demonstrating the availability of an alternative employment practice, comparable in cost and equally effective in measuring job performance or achieving the respondent's legitimate employment goals, that will reduce the disparate impact, and that the respondent refuses to adopt such alternative.

The burden-of-proof issue that Wards Cove resolved in favor of defendants is resolved by this Act in favor of plaintiffs. Wards Cove is thereby overruled. On all other issues, this Act leaves existing law undisturbed.

As Justice O'Connor emphasized in her Watson opinion, the use of disparate impact analysis creates a very real risk that Title VII will lead to the use of quotas. Indeed, there is evidence that the adoption of disparate impact analysis by the courts has led to the use of quotas, although the extent of this phenomenon is for obvious reasons not measurable. See, e.g., Hearings on H.R. 1, "Civil Rights Act of 1991," before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives, 102d Cong., 1st Sess., February 7, 1991 (testimony of Assistant Attorney General John R. Dunne); Hearings on S. 2104, "Civil Rights Act of 1990," before the Committee on Labor and Human Resources, U.S. Senate, 101st Cong., 2d Sess., February 23, 1990 (testimony of Professor Charles Fried); Joint Hearings on H.R. 4000, "Civil Rights Act of 1990," before the Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives, 101st Cong., 2d Sess., March 20, 1990, vol. 2, pp. 516, 625, 633 (testimony of Glen D. Nager, Esq.); Fortune, March 13, 1989, at 87-88 (reporting a poll of 202 CEOs of Fortune 500 and Service 500 companies, in which 18% of the CEOs admitted that their companies have "specific quotas for hiring and promoting"). The use of quotas, however, represents a perversion of Title VII and of disparate impact law. As the Court noted in Griggs, 401 U.S., at 431: "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

Because of the serious dangers inherent in the use of disparate impact analysis, any codification of a cause of action under the disparate impact theory must include evidentiary safeguards recognized in Justice O'Connor's Watson opinion and in Justice White's opinion for the Court in Wards Cove. The codification adopted in Sections 3 and 4 of this Act does so, and it is vital that courts and employers construe this Act in a manner that neither makes it possible to defend or justify the use of employment quotas nor encourages their use.

If an ability test, for example, has a disparate impact and the test is not justified by business necessity as defined in

Section 3 of this Act, the test should not be used. If business necessity can be shown, then the disparate impact need not be reduced or eliminated unless the complaining party demonstrates the availability of an alternative employment practice as required by Section 4 of this Act and the respondent refuses to adopt such alternative. In neither event is an employer required or permitted to adjust test scores, or to use different cut-offs for members of different groups, or otherwise to use the test scores in a discriminatory manner. Manipulating test results in such a fashion is not an alternative employment practice of the kind that an employer must adopt to avoid liability at the surrebuttal phase of a disparate impact case. On the contrary, such discrimination violates Title VII, whether practiced by an employer, an employment agency, or any other "respondent" as defined in Section 3 of this Act. Similarly, a discriminatory practice could not be defended under Title VII on the ground that the practice was necessary or useful in avoiding the possibility of liability under the disparate impact theory. Cf. Civil Rights Act of 1964, sec. 703(j), 42 U.S.C. 2000e-2(j).

It should be noted that in identifying the particular employment practice alleged to cause disparate impact, it is not intention of this Act to require the plaintiff to do the impossible in breaking down an employer's practices to the greatest conceivable degree. Courts will be permitted to hold, for example, that vesting complete hiring discretion in an individual guided only by unknown subjective standards constitutes a single particular employment practice susceptible to challenge.

This approach is consistent with Wards Cove, see 109 S. Ct., at 2125, and has been employed since Wards Cove in Sledge v. J.P. Stevens & Co., 52 EPD para. 39,537 (E.D.N.C. Nov. 30, 1989). The Sledge court alluded to the difficulty of "delving into the workings of an employment decisionmaker's mind" and noted that the defendant's personnel officers reported having no idea of the basis on which they made their employment decisions. The court held that "the identification by the plaintiffs of the uncontrolled, subjective discretion of defendant's employing officials as the source of the discrimination shown by plaintiff's statistics sufficed to satisfy the causation requirements of Wards Cove." This Act contemplates that the use of such uncontrolled and unexplained discretion is properly treated, as it was in the Sledge case, as one employment practice that need not be divided by the plaintiff into discrete sub-parts.

SECTION 5. FINALITY OF JUDGMENTS OR ORDERS

In Hansberry v. Lee, 311 U.S. 32, 40-41 (1940) (citations omitted), the Supreme Court held:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in which he is not designated as a party or to which he has not been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statutes of the United States . . . prescribe, . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.

In Hansberry, Carl Hansberry and his family, who were black, were seeking to challenge a racial covenant prohibiting the sale of land to blacks. One of the owners who wanted the covenant enforced argued that the Hansberrys could not litigate the validity of the covenant because that question had previously been adjudicated, and the covenant sustained, in an earlier lawsuit, although the Hansberrys were not parties in that lawsuit. The Illinois court had ruled that the Hansberrys' challenge was barred, but the Supreme Court found that this ruling violated due process and allowed the challenge.

In Martin v. Wilks, 109 S. Ct. 2180 (1989), the Court confronted a similar argument. That case involved a claim by Robert Wilks and other white fire fighters that the City of Birmingham had discriminated against them by refusing to promote them because of their race. The City argued that their challenge was barred because the City's promotion process had been sanctioned in a consent decree entered in an earlier case between the City and a class of black plaintiffs, of which Wilks and the white fire fighters were aware, but in which they were not parties. The Court rejected this argument. Instead, it concluded that the Federal Rules of Civil Procedure required that persons seeking to bind outsiders to the results of litigation have a duty to join them as parties, see Fed. R. Civ. P. 19, unless the court certified a class of defendants adequately represented by a named defendant, see Fed. R. Civ. P. 23. The Court specifically rejected the defendants' argument that a different rule should obtain in civil rights litigation.

This Section codifies that holding. Had the rule advocated by the City of Birmingham in Wilks been adopted in Hansberry, one judicial decree in one case between one plaintiff and one defendant would have prevented an attack on the racial covenant by anyone who had ever heard of the original case. That is not how the Federal Rules of Civil Procedure operate. And there is no reason why a different rule should be devised to prevent civil rights plaintiffs, as opposed to persons bringing all other kinds of cases, from bringing suit.

SECTION 6. PROHIBITION AGAINST RACIAL DISCRIMINATION IN THE MAKING AND PERFORMANCE OF CONTRACTS

Under 42 U.S.C. 1981, persons of all races have the same right "to make and enforce contracts." In Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), the Supreme Court held: "The most obvious feature of the provision is the restriction of its scope to forbidding discrimination in the 'mak[ing] and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, [sec.] 1981 provides no relief."

As written, therefore, section 1981 provides insufficient protection against racial discrimination in the context of contracts. In particular, it provides no relief for discrimination in the performance of contracts (as contrasted with the making and enforcement of contracts). Section 1981, as amended by this Act, will provide a remedy for individuals who are subjected to discriminatory performance of their employment contracts (through racial harassment, for example) or are dismissed or denied promotions because of race. In addition, the discriminatory infringement of contractual rights that do not involve employment will be made actionable under section 1981. This will, for example, create a remedy for a black child who is admitted to a private school as required pursuant to section 1981, but is then subjected to discriminatory treatment in the performance of the contract once he or she is attending the school.

In addition to overruling the Patterson decision, this Section of the Act codifies the holding of Runyon v. McCrary, 427 U.S. 160 (1976), under which section 1981 prohibits private, as well as governmental, discrimination.

SECTION 7. EXPANSION OF RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS

Section 7 overrules the holding in Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), in which female employees challenged a seniority system pursuant to Title VII, claiming that it was adopted with an intent to discriminate against women. Although the system was facially nondiscriminatory and treated all similarly situated employees alike, it produced demotions for the plaintiffs, who claimed that the employer had adopted the seniority system with the intention of altering their contractual rights. The Supreme Court held that the claim was barred by Title VII's requirement that a charge must be filed within 180 days (or 300 days if the matter can be referred to a state agency) after the alleged discrimination occurred.

The Court held that the time for plaintiffs to file their complaint began to run when the employer adopted the allegedly discriminatory seniority system, since it was the adoption of the system with a discriminatory purpose that allegedly violated their rights. According to the Court, that was the point at which plaintiffs suffered the diminution in employment status about which they complained.

The rule adopted by the Court is contrary to the position that had been taken by the Department of Justice and the EEOC. It shields existing seniority systems from legitimate discrimination claims. The discriminatory reasons for adoption of a seniority system may become apparent only when the system is finally applied to affect the employment status of the employees that it covers. At that time, the controversy between an employer and an employee can be focused more sharply.

In addition, a rule that limits challenges to the period immediately following adoption of a seniority system will promote unnecessary, as well as unfocused, litigation. Employees will be forced either to challenge the system before they have suffered harm or to remain forever silent. Given such a choice, employees who are unlikely ever to suffer harm from the seniority system may nonetheless feel that they must file a charge as a precautionary measure -- an especially difficult choice since they may be understandably reluctant to initiate a lawsuit against an employer if they do not have to.

Finally, the Lorance rule will prevent employees who are hired more than 180 (or 300) days after adoption of a seniority system from ever challenging the adverse consequences of that system, regardless of how severe they may be. Such a rule fails to protect sufficiently the important interest in eliminating employment discrimination that is embodied in Title VII.

Likewise, a rule that an employee may sue only within 180 (or 300) days after becoming subject to a seniority system would be unfair to both employers and employees. The rule fails to protect seniority systems from delayed challenge, since so long as employees are being hired someone will be able to sue. And, while this rule would give every employee a theoretical opportunity to challenge a discriminatory seniority system, it would do so, in most instances, before the challenge was sufficiently focused and before it was clear that a challenge was necessary. Finally, most employees would be reluctant to begin their jobs by suing their employers.

This change in the law, therefore, is warranted. Indeed, it is necessary to safeguard the same principles upheld by the Supreme Court in Martin v. Wilks, 109 S. Ct. 2180 (1989), which

guarantees civil rights complainants a fair opportunity to present their claims in court.

SECTION 8. PROVIDING FOR ADDITIONAL REMEDIES FOR HARASSMENT IN THE WORKPLACE BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

This provision is designed to redress an anomaly in current law. Title VII prohibits discrimination in employment, but provides inadequate remedies for harassment in the workplace, including sexual harassment, which the Supreme Court has recognized as actionable under Title VII. See, e.g., Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). Such harassment frequently will not be so intolerable that an employee subjected to it immediately leaves. In such circumstances, the only remedy the victim of harassment can obtain under Title VII's remedial scheme as currently drafted is declaratory and injunctive relief against continuation of the harassment.

Such a rule is plainly inequitable. It effectively tells employers that the only consequence of creating an environment so hostile to an employee that he or she is forced to sue to obtain relief is a directive to refrain in the future. This defect must be corrected.

At the same time, Title VII's existing framework, with its emphasis on conciliation and mediation, has served the country well for more than a quarter of a century as a tool for combatting discrimination. It would be most unwise to jettison or rewrite this basic statute in favor of a tort-style approach including compensatory and punitive damages at a time when our tort system is widely recognized to be in crisis. President Bush has made it clear that our civil rights laws "should not be turned into some lawyer's bonanza, encouraging litigation at the expense of conciliation, mediation, or settlement."

Section 8 is designed to meet both of these concerns. It creates a new remedy for on-the-job harassment, allowing courts to make a monetary award in addition to granting declaratory and injunctive relief. The new remedy is available on the same terms for all forms of on-the-job harassment, whether based on race, color, religion, sex, or national origin.

The new remedy created by this Section is capped at $150,000. Courts are directed to make a monetary award when an additional equitable remedy is justified by the equities, is consistent with the purposes Title VII, and is in the public interest. In weighing the equities and determining the amount of any award, courts are instructed to consider the nature of compliance programs implemented by the employer; the nature of the employer's complaint procedures, if any, used to resolve

claims of harassment; whether the employer took prompt and effective remedial action upon learning of the harassment; the employer's size and the effect of the award on its economic viability (so that the maximum award would be available only against very large and financially secure employers); whether the harassment was willful or egregious; and the need, if any, to provide restitution for the complaining party.

This Section allows a court to make a monetary award "up to but not exceeding a total of $150,000." This language is intended to make clear that where there are several related incidents that could arguably be subdivided into distinct unlawful employment practices, the award that can be obtained under this new provision for all of them combined is limited to $150,000. Otherwise, plaintiffs and their lawyers will have incentives to spend resources on hair-splitting litigation over how many unlawful employment practices have occurred. $150,000 is a large enough amount to be an adequate and effective remedy for the type of conduct sought to be prevented, and no good purpose would be served by encouraging lawyers to use their inventiveness to circumvent the limitation of $150,000.

The substantive definition of harassment set out in Section 3 of this Act makes it an offense for an employer or its agents to harass any employee because of race, color, religion, sex, or national origin. The term "harass" encompasses "the subjection of an individual to conduct that creates a working environment that would be found intimidating, hostile or offensive by a reasonable person." The definition also explicitly defines sexual harassment to include certain conduct involving unwelcome sexual advances. The definition is intended to codify current law as stated by the Supreme Court. See Meritor Savings Bank, supra, 477 U.S., at 66 ("Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

The new provisions of Title VII established in this Section are designed to deter and provide restitution for harassment, and to encourage employers to adopt meaningful complaint procedures to redress harassment and to encourage employees to use them. The employer will not be found liable if the complaining party failed to avail himself or herself of an effective complaint procedure. In determining the appropriate remedy, moreover, courts will consider whether an employer took prompt and effective remedial action. The effect of these requirements will be to encourage preventive measures and prompt remedial action by employers and to minimize litigation, thus maximizing the speed and efficacy of relief.

This provision of the Act protects employers from liability only when they have established a procedure "for resolving

complaints of harassment in an effective fashion within a period not exceeding 90 days." Procedures under which victims of harassment are required to seek relief from the same supervisor who has engaged in the harassing conduct, or under which victims would otherwise reasonably expect their complaints to result in retaliation against them rather than in a fair investigation and effective resolution of their complaint, will not insulate the employer from liability. The new provisions of Title VII allow an employee, moreover, to petition a court for emergency relief, and they provide that the continued suffering of harassment shall be assumed to be sufficient irreparable harm to warrant judicial relief, whether or not the employee has fully exhausted a complaint procedure, so long as the employee has initiated a complaint.

This Section includes a provision reaffirming that Congress intends all issues to be decided by judges, as has always been the case under Title VII. Such a provision is important in avoiding the creation of an inefficient tort-style litigation system that is foreign to the purposes of employment law. Because the courts have relatively limited experience with harassment cases, because particular cases will undoubtedly raise issues requiring clarification, and because employers therefore require the information contained in written judicial opinions to assist them in conforming their conduct with the law, it is particularly important to avoid a profusion of unexplained and inconsistent jury verdicts if possible.

Because the monetary relief authorized in these amendments to Title VII is characterized as equitable, the courts should find that bench trials are consistent with the Seventh Amendment. Because the question of constitutionality is not free from doubt, however, this Section also provides that should a court hold that a jury trial with respect to issues of liability is constitutionally required, it may empanel a jury to hear those issues and no others. This ensures that the additional relief this scheme makes available will not become a dead letter should the courts conclude that the Seventh Amendment requires a jury trial on liability. See Tull v. United States, 107 S. Ct. 1831 (1987).

SECTION 9. ALLOWING THE AWARD OF EXPERT FEES

Section 9 authorizes the recovery of expert witness fees (up to but not exceeding $300 per day) by prevailing parties according to the same standards that govern awards of attorney fees under Title VII. Cf. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). The provision is intended to allow recovery for work done in preparation for trial as well as after trial has begun, with the cap applying to each witness.

SECTION 10. PROVIDING FOR INTEREST AND EXTENDING THE STATUTE OF LIMITATIONS, IN ACTIONS AGAINST THE FEDERAL GOVERNMENT

Section 10 extends the period for filing a complaint against the Federal government pursuant to Title VII from 30 days to 90 days. It also authorizes the payment of interest to compensate for delay in the payment of a judgment according to the same rules that govern such payments in actions against private parties.

SECTION 11. PROVIDING CIVIL RIGHTS PROTECTIONS TO CONGRESSIONAL EMPLOYEES

Section 11 extends the protections of Title VII to congressional employees on the same basis that they extend to Executive branch employees. The Executive branch, like private employers and state and local governments, is forbidden by law to discriminate on the basis of race, color, religion, sex, or national origin. The Congress, however, has exempted itself from the law. President Bush has stated that Congress "should live by the same requirements it prescribes for others" and that Congress "should join the Executive branch in setting an example for these private employers."

In addition to setting a helpful example, and providing congressional employees with the same rights enjoyed by other Americans, coverage under Title VII will provide the Congress with the valuable experience of living under the same rules that it imposes on other employers. This experience should prove useful in encouraging the Congress to give prompt and serious consideration to proposals for improving the law and in enabling the Congress to resist ill-considered proposals -- like the bill that President Bush vetoed on October 22, 1990 -- that would undermine the cause of civil rights and impose completely unjustified burdens on the employers of this nation.

It should be emphasized that this Section allows the Congress to create its own internal mechanisms for enforcing Title VII in the legislative branch. Like Executive branch employees, congressional employees would retain the right to judicial relief, but the Executive branch would have absolutely no role in enforcing Title VII against the Congress. For that reason, any objection to this Section on separation-of-powers grounds would not be well-founded.

SECTION 12. ALTERNATIVE MEANS OF DISPUTE RESOLUTION

This provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods.

In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums.

SECTION 13. SEVERABILITY

Section 13 states that if a provision of this Act is found invalid, that finding will not affect the remainder of the Act.

SECTION 14. EFFECTIVE DATE

Section 14 specifies that the Act and the amendments made by the Act take effect upon enactment, and will not apply to cases arising before the effective date of the Act.

* * * * *

REMARKS BY EDWARD I. KOCH
ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH
WESTPORT, CONNECTICUT
SUNDAY, JUNE 2, 1991, 8:00 P.M.

DURING A SPEECH LAST WEDNESDAY AT THE U.S. AIR FORCE ACADEMY IN COLORADO, PRESIDENT BUSH UNVEILED HIS NEW MIDDLE EAST ARMS CONTROL POLICY. IF I UNDERSTAND IT CORRECTLY, IT WOULD BAN CHEMICAL AND BIOLOGICAL WEAPONS, END SALES AND PRODUCTION OF SURFACE-TO-SURFACE MISSILES AND BLOCK THE INTRODUCTION OF NEW NUCLEAR WEAPONS TO THE MIDDLE EAST WHILE ALSO PUTTING SOME RESTRICTIONS ON THE SALE OF CONVENTIONAL WEAPONS. IN EFFECT, THIS MEANS THAT ONLY ISRAEL IN ALL PROBABILITY WOULD HAVE ANY KIND OF NUCLEAR ARSENAL. ON THE FACE OF IT, I THINK IT IS A PLAN THAT SHOULD BE SUPPORTED.

THE ARAB COUNTRIES WILL ASK: WHY SHOULD ISRAEL CONTINUE TO HAVE NUCLEAR ARMS WHEN THEY ARE PRECLUDED FROM HAVING THEM? THE ANSWER IS SIMPLE.

WHEN THE ARAB CONVENTIONAL ARMAMENTS ARE REDUCED SO THAT IN THE AGGREGATE THE CONFRONTATION STATES FACING ISRAEL, TO WIT, IRAQ, SYRIA, JORDAN AND SAUDI ARABIA ARE BROUGHT INTO PARITY WITH ISRAEL SO THAT IT DOES NOT HAVE TO DEPEND ON THE THREAT OF NUCLEAR RETALIATION, THEN IT WOULD BE APPROPRIATE TO HAVE ISRAEL DESTROY ITS EXISTING STOCKS. BUT NOT BEFORE.

THE PROBLEM THAT I HAVE WITH THE BUSH POLICY IS THAT I DOUBT, WHEN PUSH COMES TO SHOVE, THE ADMINISTRATION WILL STAND FAST ON THE POLICY OF THIS COUNTRY WHICH GOES BACK TO PRESIDENT JOHNSON AND WAS CONTINUED BY EVERY PRESIDENT SINCE, NO MATTER HOW FRIENDLY OR HOSTILE THEY WERE TO ISRAEL -- AND I CONSIDER THE BUSH ADMINISTRATION LESS THAN FRIENDLY. AND THAT LONG STANDING POLICY HAS BEEN THAT ISRAEL'S ARMED FORCES WOULD BE SUPPLIED BY THE UNITED STATES SO THAT IT WOULD BE ABLE TO

DEFEND ITSELF AGAINST THE TOTAL AGGREGATE FORCES WHICH MIGHT BE LAUNCHED AGAINST IT BY THE HOSTILE ARAB CONFRONTATION STATES. INDEED, THE U.S. LANGUAGE EMPLOYED WAS THAT ISRAEL'S MILITARY SUPERIORITY UNDER THOSE CIRCUMSTANCES WOULD BE MAINTAINED. I AM NOT CERTAIN IN MY OWN MIND THAT PRESIDENT BUSH AND SECRETARY BAKER CONTINUE TO SUPPORT THAT POLICY. IF THEY DO, THEN I WOULD SUPPORT WITHOUT ANY QUALMS PRESIDENT BUSH'S NEWLY ANNOUNCED MIDDLE EAST WEAPONS PROPOSAL.

IN GENERAL, THIS IS A TROUBLING TIME FOR SUPPORTERS OF ISRAEL. SINCE COALITION FORCES SOUNDLY DEFEATED SADDAM HUSSEIN'S ARMY IN FEBRUARY, WE HAVE HEARD ALMOST ON A DAILY BASIS THAT A UNIQUE OPPORTUNITY NOW EXISTS FOR PEACE IN THE MIDDLE EAST. THE WAY SOME IN THE MEDIA DESCRIBE IT, IT WOULD APPEAR TO BE THE LAST, BEST HOPE FOR SUCH A PEACE.

SOME PROGRESS HAS BEEN MADE IN THE LAST THREE MONTHS BY SECRETARY OF STATE BAKER. BUT TO BAKER'S DISCREDIT, AFTER RETURNING FROM HIS LAST TRIP TO THE MIDDLE EAST TWO WEEKS AGO, HE TOOK THE OPPORTUNITY TO BLAST ISRAEL BEFORE THE CONGRESS, AND IN ALL OF HIS COMMENTS VIS-A-VIS THE ARAB STATES, HE PRAISED THEM, AT WORST CHIDED THEM, BUT NEVER DENOUNCED THEM AS HE HAS ISRAEL.

TESTIFYING BEFORE CONGRESS HE SAID, "EVERY TIME I HAVE GONE TO ISRAEL IN CONNECTION WITH THE PEACE PROCESS, I HAVE BEEN MET WITH THE ANNOUNCEMENT OF NEW SETTLEMENT ACTIVITY. NOTHING HAS MADE MY JOB OF TRYING TO FIND ARAB AND PALESTINIAN PARTNERS FOR ISRAEL MORE DIFFICULT THAN BEING GREETED BY A NEW SETTLEMENT EVERY TIME I ARRIVE."

WHAT BAKER FAILED TO MENTION IN HIS RUSH TO CONDEMN ISRAEL'S ACTIONS AS OBSTACLES TO PEACE, IS

THAT ONLY THE WEEK BEFORE THE ARAB LEAGUE HAD CLEARLY DEMONSTRATED ITS TRUE FEELINGS ABOUT PEACE WITH ISRAEL BY ADDING 110 COMPANIES TO THE ARAB BOYCOTT LIST. TO HIS CREDIT, BAKER HAD ASKED THE ARAB STATES TO END THE BOYCOTT AS A CONFIDENCE-BUILDING GESTURE ON THEIR PARTS. BUT HOW DID BAKER RESPOND TO THIS EXPANSION OF THE BOYCOTT LIST? THE SILENCE ON THE POTOMAC WAS DEAFENING.

THE SECRETARY GIVES THE IMPRESSION THAT ONLY THE ISRAELIS ARE INTRANSIGENT AND THE VARIOUS ARAB STATES ARE BEING FLEXIBLE. INDEED, HE PRAISED THEM FOR THEIR CONCILIATORY STANCE. HOW THEY HAVE DEMONSTRATED A DESIRE FOR CONCILIATION REMAINS A MYSTERY. THIS ONE-SIDED CRITICISM ON BAKER'S PART GIVES SUPPORTERS OF ISRAEL GREAT PAUSE.

BAKER ERRS IF HE BELIEVES THAT ISRAEL WILL TAKE UNILATERAL MEASURES WHICH WILL UNDERMINE ITS

ABILITY TO DEFEND ITSELF. THE ISRAELI WILL NOT DO THAT JUST TO PLEASE THEIR CRITICS.

FROM A MILITARY POINT OF VIEW IT IS DIFFICULT TO DISPUTE THE ANALYSIS OF ISRAELI STRATEGISTS LIKE GENERAL ARIEL SHARON. WHAT SHARON AND OTHERS BELIEVE IS THAT ISRAEL SHOULD RETAIN THE WEST BANK NOT FOR RELIGIOUS REASONS OR FOR THE COVENANT WITH GOD REFERRED TO IN THE BIBLE, BUT FOR ITS STRATEGIC MILITARY IMPORTANCE. IN ORDER TO PROTECT ITSELF FROM INVASION, ISRAEL NEEDS TO CONTROL THE ROAD FROM TEL AVIV TO THE JORDAN RIVER, WITH ISRAELI SETTLEMENTS ON THE HIGH GROUND ON BOTH SIDES OF THAT ROAD PROVIDING SECURITY.

ISRAEL CAN ONLY GIVE UP THE OCCUPIED PARTS OF THE WEST BANK IF IT CAN BE ASSURED THAT THE ARABS HAVE ACTUALLY GIVEN UP THE OPTION OF WAR. OTHERWISE, IT WOULD BE MADNESS TO FORFEIT THE

SECURITY OF THE WEST BANK, WHICH ACTS AS 70-MILE BUFFER ZONE FOR ISRAEL.

JUST AS THE UNITED STATES WOULD NEVER HAVE AGREED TO UNILATERAL DISARMAMENT VIS-A-VIS THE SOVIET UNION, ISRAEL SHOULD NOT EMBRACE SUCH AN APPROACH WITH REGARD TO THE ARAB STATES.

INSTEAD, THE UNITED STATES SHOULD PROPOSE A QUID PRO QUO ARRANGEMENT BETWEEN THE ARABS AND THE ISRAELIS: IF A SPECIFIC CONFIDENCE-BUILDING MEASURE FOR PEACE IS TAKEN BY ONE SIDE, THERE WOULD HAVE TO BE A SIMULTANEOUS AND COMPARABLE ACTION ON THE OTHER SIDE.

PRESIDENT BUSH AND SECRETARY OF STATE BAKER SHOULD CONTINUE TO PRESS FOR A PROPOSAL THAT BAKER SAYS HE MADE TO THE ISRAELIS AND THE ARABS, BUT THAT THEY REJECTED; SPECIFICALLY THAT THE ARABS SUSPEND THE STATE OF BELLIGERENCY AND END THE BOYCOTT AGAINST THE ISRAELIS AND THE ISRAELIS STOP

CREATING NEW SETTLEMENTS. HE SHOULD MAKE THAT STATEMENT PUBLICLY AND ANNOUNCE IT IS PART OF OUR U.S. POLICY ON THE PENDING TALKS.

TOO LITTLE CREDIT IS GIVEN TO ISRAEL FOR THE RESTRAINT IT SHOWED IN NOT RESPONDING MILITARILY WHEN SADDAM HUSSEIN WAS LAUNCHING SCUDS AT IT AND THE PALESTININANS WERE STANDING ON THEIR ROOFTOPS APPLAUDING. GEORGE BUSH INTENTIONALLY I BELIEVE FAILED TO PUBLICLY THANK ISRAEL DURING HIS ADDRESS TO CONGRESS AFTER THE CEASE-FIRE BECAUSE HE DID NOT WANT THE CONGRESS TO ERUPT IN APPLAUSE FOR ISRAEL AND LITTLE HAS BEEN SAID ABOUT IT SINCE.

THE AMERICAN PEOPLE OVERWHELMINGLY APPROVED OF THE WAY PRESIDENT BUSH HANDLED THE PERSIAN GULF CRISIS -- AS WELL THEY SHOULD. IT IS INTERESTING TO NOTE THAT SADDAM HUSSEIN -- NOT GEORGE BUSH -- AS A RESULT OF A RISING TIDE OF ISOLATIONISM THAT HAS TAKEN HOLD OF THE DEMOCRATIC PARTY LEADERSHIP,

ALMOST WON THE VOTE IN THE UNITED STATES SENATE ON THE RESOLUTION AUTHORIZING U.S. MILITARY ACTION AGAINST IRAQ. THE VOTE SUPPORTING PRESIDENT BUSH'S RESOLUTION AUTHORIZING THE USE OF FORCE WAS 52 TO 47. IF JUST 3 SENATORS HAD VOTED NO INSTEAD OF YES, THERE WOULD HAVE BEEN NO AUTHORIZATION FOR PRESIDENT BUSH TO USE MILITARY FORCE. AND SADDAM HUSSEIN WOULD STILL BE SACKING KUWAIT.

THE DEMOCRATIC PARTY, LED BY WHAT WE CAN FAIRLY CALL NEO-ISOLATIONISTS -- CITING JUST A FEW: KENNEDY, NUNN, BENTSEN, GEPHARDT AND MOYNIHAN -- IS NOW TRYING TO FIGURE OUT HOW IT CAN WIN BACK ENOUGH PUBLIC SUPPORT SO AS TO ALLOW THE DEMOCRATIC PARTY TO RUN, IF NOT A WINNING RACE FOR PRESIDENT IN 1992, AT LEAST A CREDIBLE ONE. OF COURSE, THE ONLY WAY THEY CAN DO THAT IS TO BACK PEDDLE ON THEIR PUBLICLY EXPRESSED OPPOSITION TO OUR MILITARY ACTION AGAINST IRAQ -- HOPING AND PRAYING THE

PUBLIC WILL FORGET THEIR DEROGATORY STATEMENTS CONCERNING PRESIDENT BUSH, THE USE OF FORCE RESOLUTION AND OUR MILITARY ACTION IN THE GULF, BUT ONLY REMEMBER THEIR POSITIVE STATEMENTS SUPPORTING THE TROOPS ONCE ENGAGED IN BATTLE, AS IF THE LATTER CANCELS OUT ALL THAT CAME BEFORE.

I'M A DEMOCRAT AND PROUD OF IT. I DEFINE MYSELF AS A LIBERAL WITH SANITY. THOSE IN THE DEMOCRATIC PARTY WHO ARE HOSTILE TO ME WOULD SEEK TO LABEL ME AS A NEO-CONSERVATIVE. HOW WRONG THEY ARE.

WHEN I FIRST RAN FOR THE NEW YORK STATE ASSEMBLY IN 1962, NEARLY 30 YEARS AGO, NEW YORK STATE LAW WAS RIDICULOUS AS IT PERTAINED TO THREE ISSUES OF PERSONAL CONCERN TO MANY NEW YORKERS, ISSUES CONSIDERED SO POTENT THAT BOTH DEMOCRATS AND REPUBLICANS IN THE STATE LEGISLATURE WERE AFRAID TO DEAL WITH THEM. I TOOK ON THESE THREE ISSUES WHICH

WERE UNFAIRLY IMPACTING ON THE LIVES OF HUNDREDS OF THOUSANDS OF NEW YORKERS. THEY WERE: THE REVOCATION OF THE SODOMY LAWS WHICH MADE HOMOSEXUAL PRACTICES PUNISHABLE WITH JAIL TERMS; REVOCATION OF THE LAWS PROHIBITING ABORTION; AND AMENDMENTS TO THE LAWS GOVERNING DIVORCE WHICH WAS ALLOWED ONLY FOR ADULTERY, SO AS TO PERMIT DIVORCE BY AGREEMENT. BECAUSE OF THOSE THREE ISSUES, MY CAMPAIGN COMMITTEE BECAME KNOWN AS THE S.A.D. COMMITTEE -- SODOMY, ABORTION, DIVORCE.

SUFFICE IT TO SAY I WAS AHEAD OF MY TIME, AND I LOST IN A DEVASTATING DEFEAT. BUT I BELIEVE THAT WHEN SOMEONE SEEKING PUBLIC OFFICE OR IN PUBLIC OFFICE IS FACED WITH MATTERS OF CONSCIENCE, HE OR SHE SHOULD NEVER WAVER. IT IS BETTER TO GO DOWN TO DEFEAT THAN TO WIN WHILE LOSING YOUR PERSONAL INTEGRITY BY RETREATING ON ISSUES YOU BELIEVE TO BE MATTERS OF MORALITY AND PRINCIPLE, BUT WHICH ARE

UNPOPULAR WITH THE ELECTORATE. I HAVE NEVER REGRETTED THAT DECISION AND ALL THREE CHANGES IN THE LAW HAVE SINCE OCCURRED. I SERVED IN PUBLIC OFFICE, THE NOBLEST OF PROFESSIONS IF DONE HONESTLY AND DONE WELL, FOR NEARLY 25 YEARS: 2 YEARS AS A MEMBER OF THE NEW YORK CITY COUNCIL; 9 YEARS AS A CONGRESSMAN; AND 12 YEARS AS MAYOR.

THE PEACE PROCESS MUST CONTINUE. IT MAY BE POSSIBLE NOT TO BRING PEACE NOT ONLY TO THE PERSIAN GULF AREA WITH REGIONAL SECURITY PACTS, BUT ALSO TO THAT PART OF THE MIDDLE EAST WHERE ISRAEL SITS SURROUNDED BY LEBANON, JORDAN, SYRIA, SAUDI ARABIA AND EGYPT, ALL OF WHOM HAVE BEEN OR CURRENTLY ARE HOSTILE TO ITS VERY EXISTENCE.

TO THE GREAT CREDIT OF EGYPT, IT ENTERED INTO A PEACE TREATY UNDER PRESIDENT ANWAR SADAT WHICH HAS WEATHERED MANY STORMS. EVEN IF THERE IS NOT THE WARMEST OF RELATIONSHIPS BETWEEN THOSE TWO

STATES, EACH TRUSTS THE OTHER INSOFAR AS ITS BORDERS AND SECURITY ARE CONCERNED.

LEBANON IS NO LONGER A COUNTRY, BUT RATHER A LAND STILL DIVIDED AMONG LOCAL WARLORDS AND A PROTECTORATE OF THE SYRIANS. THERE IS AN ONGOING EFFORT IN LEBANON, WHICH HAS THE WORLD'S ONLY CHRISTIAN-MUSLIM PARTNERSHIP GOVERNMENT, TO EXTEND THE CENTRAL GOVERNMENT'S CONTROL TO LARGE PARTS OF THE COUNTRY CLEARLY NOT NOW UNDER ITS JURISDICTION. THIS EFFORT SHOULD BE SUPPORTED. WHILE THERE HAVE MANY PREVIOUS FAILED EFFORTS ALONG THESE LINES, SOME OF WHICH WERE SUPPORTED BY THE SYRIANS, OTHERS WHICH WERE NOT, ONE SHOULD HOPE FOR THE SUCCESS OF THE CURRENT EFFORT TO RESTORE LEBANON TO SOME SEMBLANCE OF NATIONAL UNITY. BUT IT WILL NOT BE HELPFUL TO PEACE IN THE REGION IF LEBANON SIMPLY BECOMES A PROTECTORATE OF SYRIA.

JORDAN IS A COUNTRY THAT HOPED FOR THE SUCCESS OF SADDAM HUSSEIN AND VIOLATED THE U.N. EMBARGO BY SECRETLY PROVIDING ARMS TO IRAQ. IN ADDITION, MORE THAN 60% PERCENT OF ITS POPULATION IS MADE UP OF PALESTINIANS WHO OPPOSED KING HUSSEIN UNTIL HE JOINED WITH THEM, NOT ONLY IN SUPPORTING SADDAM HUSSEIN, BUT ALSO IN THREATENING ISRAEL AND ALLOWING ITS BORDERS, WHICH PREVIOUSLY WERE PATROLLED BY THE JORDANIAN ARMY SO AS TO PREVENT TERRORISM AGAINST ISRAEL, TO ONCE AGAIN BECOME POROUS, ALLOWING TERRORIST INFILTRATORS TO ENTER ISRAEL. THOSE TERRORISTS HAVE HAD SOME LIMITED SUCCESS AND HAVE BEEN RESPONSIBLE FOR THE DEATHS OF ISRAELI CIVILIANS AND MILITARY PERSONNEL.

KING HUSSEIN IS A WEAK REED AND WILL BEND WITH THE WIND. HE IS NOW SEEKING TO RESTORE HIS PRE-WAR RELATIONSHIP WITH SAUDI ARABIA AND EGYPT WHO HAVE CUT OFF POLITICAL AND FINANCIAL SUPPORT TO HIM AND

THE PLO BECAUSE OF THEIR SUPPORT OF IRAQ. BASED ON ARAB HISTORY, WHERE ONE DAY YOU KISS HIM ON BOTH CHEEKS AND THE NEXT DAY YOU KILL HIM, IT IS QUITE LIKELY THAT WITH THE PASSAGE OF TIME, SOONER RATHER THAN LATER, THAT RELATIONSHIP WILL BE RESTORED.

THEN THERE IS SYRIA WHICH JOINED THE COALITION AGAINST IRAQ BECAUSE ITS HATRED FOR SADDAM HUSSEIN WAS GREATER THAN ITS HATRED FOR THE UNITED STATES. WHAT SHOULD OUR RELATIONSHIP WITH SYRIA BE? I BELIEVE IT WAS PROPER TO ALLOW SYRIA TO JOIN THE COALITION AGAINST IRAQ IN THE SAME WAY THAT IT WAS PROPER FOR THE ALLIES TO JOIN WITH STALIN AND THE U.S.S.R. IN A COMMON FRONT AGAINST HITLER AND NAZI GERMANY. BUT IT IS STILL A DANGEROUS AND HOSTILE PRESENCE AND WE SHOULD NOT FORGET THAT SYRIA'S MILITARY FORCE EQUALS IRAQ'S PRE-GULF WAR STRENGTH AND INCLUDES CHEMICAL AND BIOLOGICAL WEAPONS, AS WELL AS CHINESE-FURNISHED, MORE ACCURATE SCUDS.

NOW THAT THE BATTLE AGAINST IRAQ IS OVER, WE SHOULD USE DIPLOMATIC AND ECONOMIC PRESSURES AGAINST THE SYRIANS JUST AS WE DID DURING THE COLD WAR WITH THE SOVIET UNION, WHICH ENDED IN A HUGE SUCCESS FOR US AS WE SAW THE SOVIET SYSTEM COLLAPSE BEFORE OUR EYES. HOPEFULLY, USING THESE PRESSURES AGAINST THE SYRIANS WILL RESULT IN MAJOR POLITICAL CHANGES IN THAT COUNTRY AND GET THE SYRIANS TO UNDERSTAND THEY WILL NOT WIN ANY WAR THEY WAGE AGAINST THEIR NEIGHBORS AND, THEREFORE, SHOULD GIVE UP THEIR VIOLENT PROPENSITIES.

SAUDI ARABIA HAS COME OUT OF THIS BATTLE AGAINST IRAQ WITH A GREAT APPRECIATION OF ITS ALLIANCE WITH THE UNITED STATES. KING FAHD AND HIS AMBASSADOR PRINCE BANDAR BIN SULTAN IN WASHINGTON HAVE CONDUCTED THEMSELVES EXTRAORDINARILY WELL. INDEED, WHEN THE QUESTION WAS ASKED OF THE MAJOR MEMBERS OF THE COALITION, SAUDI ARABIA, EGYPT,

KUWAIT AND SYRIA, THEY ALL AGREED THAT IF ISRAEL RETALIATED AGAINST IRAQ BECAUSE OF THE SCUDS THE IRAQIS LAUNCHED INTO ISRAEL, IT WOULD NOT SPLINTER THE COALITION.

IT IS REGRETTABLE THAT THE UNITED STATES SUCCEEDED IN INDUCING ISRAEL TO REFRAIN FROM RETALIATORY ACTION BY CONVINCING THE ISRAELI TO ALLOW THE UNITED STATES TO TAKE ALL NECESSARY MILITARY ACTIONS IN ISRAEL'S DEFENSE PARTICULARLY AGAINST THE SCUD MISSILES. IF ISRAEL HAD ENTERED THE WAR, IN ADDITION TO THE DAMAGE ITS SOLDIERS COULD HAVE DONE TO IRAQ'S MILITARY, IT MAY ALSO HAVE BENEFITTED ON A FRATERNAL LEVEL THROUGH ITS SHARED COMMITMENT WITH COALITION FORCES IN SEEING IRAQ DEFEATED. BUT THAT PERIOD IS OVER AND THAT OPPORTUNITY LOST.

NOW IS THE TIME FOR THE UNITED STATES TO STRENGTHEN ITS RELATIONSHIP WITH ISRAEL. PUBLIC

SUPPORT FOR ISRAEL REACHED RECORD HEIGHTS DURING THE GULF CRISIS. ACCORDING TO A HARRIS POLL, 86% OF AMERICANS BELIEVE ISRAEL IS "FRIENDLY" OR A "CLOSE ALLY" UP FROM 61% IN 1988. AND 88% OF AMERICANS SURVEYED IN AN ABC NEWS/WASHINGTON POST POLL SUPPORTED ISRAEL'S APPROACH TO THE GULF WAR.

WHAT SHOULD BE DONE NOW? I BELIEVE WITHOUT QUESTION THAT THERE ULTIMATELY MUST BE TERRITORIAL COMPROMISE ON THE WEST BANK, GAZA AND GOLAN HEIGHTS. I ALSO BELIEVE THAT IF THE CONDITIONS THAT MUST PRECEDE SUCH TERRITORIAL COMPROMISE OCCURRED, LAND FOR PEACE WOULD HAVE THE SUPPORT OF AN OVERWHELMINGLY NUMBER OF ISRAELIS.

IF THE 21 ARAB STATES (OUTSIDE OF EGYPT), PARTICULARLY THE CONFRONTATION STATES, WERE TO FORSWEAR THE OPTION OF WAR AGAINST ISRAEL, REQUIRE THE ELIMINATION OF ALL TERRORIST BASES WITHIN THEIR BORDERS, AND OPEN THEIR BORDERS FOR PEACEFUL

COMMERCIAL TRADE WITH ISRAEL, THEN I BELIEVE THE NECESSARY SENSE OF SECURITY AND CONFIDENCE BUILDING MEASURES WOULD BE ESTABLISHED THAT WOULD ALLOW FOR TERRITORIAL COMPROMISE.

HOW CAN THIS BE DONE? IT CANNOT BE ACHIEVED BY PRESSURING ISRAEL TO FIRST SIT DOWN WITH THE PALESTINIANS WHO CHEERED FROM THEIR ROOFTOPS AS SCUD MISSILES FELL ON ISRAEL AND VOICED THE HOPE THAT THE SCUDS HAD POISON GAS OR BIOLOGICAL WARHEADS. OBVIOUSLY, THEY HAVE TO BE A PART OF THE PEACE PROCESS, BUT THEIR VILLAINY IS ETCHED INTO THE MINDS OF EVERY JEW IN OR OUT OF ISRAEL WHO SAW IN THE HATRED THEY DISPLAYED, WHAT ISRAELI AND JEWS ELSEWHERE IN THE WORLD COULD EXPECT IF THEY WERE EVER SUBJECT TO THEIR POWER.

YET THEY CANNOT BE EXPECTED TO LIVE UNDER ISRAELI OCCUPATION FOREVER. SELF-DETERMINATION IS A PRINCIPLE WHICH CANNOT BE DENIED OR FOREVER

PREVENTED FROM ESTABLISHING ITSELF. THE ONLY WAY TO GIVE ISRAEL SECURITY AND HAVE THE PALESTINIANS, WHO ARE CAUGHT UP IN HATE, RESTRAINED WITHOUT THE USE OF ISRAELI MILITARY FORCES, IS TO HAVE THE CONFRONTATION ARAB STATES SITTING AT THE PEACE TABLE AT THE SAME TIME AND AGREEING TO THE PRIOR PEACEFUL CONDITIONS WHICH I OUTLINED ABOVE. TO SEEK AT THE U.N. OR ELSEWHERE TO IMPOSE A SETTLEMENT ON ISRAEL THAT WOULD REQUIRE ISRAEL TO VACATE WITHOUT A PRIOR REAL PEACE WITH ITS ARAB NEIGHBOR STATES, ALONG WITH ALL THE IMPLICATIONS SUCH AN ACTION WOULD HAVE, WILL NEVER HAPPEN. ISRAEL AND ITS CITIZENS WILL NOT GO QUIETLY INTO THE NIGHT.

I DON'T BELIEVE IT IS UNREASONABLE OR IMPOSSIBLE TO GET THE ARAB STATES TO SEE THIS COMPROMISE AS REASONABLE AND RATIONAL. TO ACHIEVE IT OBVIOUSLY WILL REQUIRE THE UNITED STATES AND

PRESIDENT GEORGE BUSH TO USE ALL THEIR POWERS OF PERSUASION, BECAUSE IT CANNOT BE IMPOSED UPON THEM EITHER. IT HAS TO BE UNDERSTOOD THAT U.N. RESOLUTIONS 242 AND 338 DO NOT REQUIRE ISRAEL TO GIVE UP ITS TOTAL OCCUPATION OF THE WEST BANK, GAZA AND THE GOLAN HEIGHTS.

FIRST IT IS SUBJECT TO A PEACE AGREEMENT (SECURE BORDERS) BY THE STATES IN THE AREA WHO ARE IN A STATE OF WAR AGAINST ISRAEL. ALSO THERE IS NOT AN UNLIMITED REQUIREMENT ON THE PART OF ISRAEL TO VACATE THE ENTIRE OCCUPIED AREA. THE RESOLUTION WAS CAREFULLY DRAWN TO ALLOW FOR NEGOTIATION AND TERRITORIAL COMPROMISE. REMEMBER THE ARTICLE "THE" WAS PURPOSELY OMITTED IN THE DESCRIPTION OF THE OCCUPIED TERRITORIES TO ALLOW FOR PERMANENT CHANGES IN THE BORDERS.

ISRAEL IS NOT WITHOUT BLAME HERE. IT HAS, THROUGH ITS POLITICAL SYSTEM, CREATED MAJOR PARTIES

THAT ARE DEPENDENT ON SMALL AND, IN MANY CASES, ZEALOT RELIGIOUS PARTIES FOR ASSEMBLING AN ELECTORAL MAJORITY AND IT HAS AS ITS PRIME MINISTER YITZHAK SHAMIR, A ZEALOT HIMSELF, WHO IT WOULD APPEAR CANNOT UTTER THE PHRASE "TERRITORIAL COMPROMISE" WITHOUT CHOKING. BUT RECENTLY IN AN UNEXPECTED, MODEST BREAKTHROUGH, SHAMIR SAID IN AN INTERVIEW, AFTER STATING HIS GOVERNMENT'S POSITION THAT THE ISSUE OF JEWISH SETTLEMENT IN THE OCCUPIED TERRITORIES IS NOT UP FOR NEGOTIATION, NEVERTHELESS, HE IS WILLING TO CONDUCT TALKS WITH THE ARABS WITHOUT A FORMAL RECOGNITION OF ISRAEL BY THE ARABS AND THAT ANY PARTY CAN RAISE ANY ISSUE.

HOWEVER, I BELIEVE IF HE ULTIMATELY CANNOT AGREE TO TERRITORIAL COMPROMISE IN AN OVERALL COMPREHENSIVE PEACE AGREEMENT, MEANING A SEPARATE ENTITY INDEPENDENT OR PART OF JORDAN, SUBJECT TO THE REASONABLE PRIOR CONDITIONS AS I HAVE OUTLINED

THEM, AND RECOGNIZING THAT JEWS WOULD CONTINUE TO LIVE IN PARTS OF THE OCCUPIED TERRITORIES, WITH ISRAEL EXERCISING SOVEREIGNTY OVER THOSE AREAS, THEN THE ONLY HOPE WOULD BE HIS ELECTORAL REMOVAL WITH SOMEONE NEW IN THE LIKUD OR A REJUVENATED LABOR PARTY TAKING CONTROL. I BELIEVE HE WILL, UNDER APPROPRIATE CIRCUMSTANCES, GRASP THE NETTLE. IN ANY EVENT, A CHANGE IN THE ELECTORAL SYSTEM WITH AN ELIMINATION OF THE PARTY LISTS AND THE CREATION OF INDIVIDUAL DISTRICTS FOR MEMBERS OF THE KNESSET IS LONG OVERDUE. BEN GURION WANTED THAT TO HAPPEN. HE WAS RIGHT.

PEACE CAN HAPPEN.

THANK YOU.

ID# 243814

HU 010

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: JUNE 06, 1991

NAME OF CORRESPONDENT: MR. MICHAEL K. KASTNER

SUBJECT: SUPPORT FOR THE ADMINISTRATION'S POSITION ON
A CIVIL RIGHTS BILL

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
JOHN SUNUNU		ORG	91/06/06	NAN	C	91/06/11 DJ
	REFERRAL NOTE:					
	REFERRAL NOTE:					
	REFERRAL NOTE:					
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COMMENTS: _____

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

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

*ACTION CODES:	*DISPOSITION	*OUTGOING CORRESPONDENCE:
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS OF SIGNER
*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	* CODE = A
*D-DRAFT RESPONSE	*C-COMPLETED	*COMPLETED = DATE OF
*F-FURNISH FACT SHEET	*S-SUSPENDED	* OUTGOING
*I-INFO COPY/NO ACT NEC		
*R-DIRECT REPLY W/COPY		
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243814

NATIONAL TRUCK EQUIPMENT ASSOCIATION

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202/628-2010

June 5, 1991

THE CHIEF of STAFF
has seen

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

Dear Governor Sununu:

Now that the House vote on H.R. 1 is over, I wanted to take this opportunity to thank you for meeting with representatives of the small business community, including myself, last Friday. The President's support and leadership on this issue has been vital.

We all recognize that the President wants to sign a reasonable, yet comprehensive, civil rights bill. I believe the business community shares the President's goal. We stand ready to assist the Administration's efforts to quell bad legislation and promote good legislation. To that end, please feel free to count on our grass roots support.

Sincerely,

Mike Kastner

Michael E. Kastner
Director of Government Relations
NTEA Washington Office

MEK/jep

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R:6-3

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HU010

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CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
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Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Evan Kemp

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

Subject: For Morning News Program on May 30
re Road, Morning

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Code	Completion Date YY/MM/DD
Cuffe	ORIGINATOR	91/06/03		C	91/06/13 CS
Cuat 10	Referral Note:				CS
	A	91/06/03		C	91/06/13 CS
Cuat 07	Referral Note: ATTN: Fyi - see comments				
	=	91/06/03		C	91/06/03 CS
Cuglary	Referral Note:				
	I	91/06/03		C	91/06/03 CS
	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: The Captioned Has Been Noted By
N. Lund -- 6-13-91- CS

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5/81

06 00 1991 10:10 FROM OFFICE of the CHAIRMAN TO 9456278 P.01

OFFICE OF
THE CHAIRMAN

WASHINGTON, D.C. 20507

TELECOPIER TRANSMITTAL SHEET

DATE: June 3, 1991 **TIME:** 12:00 pm

NUMBER OF PAGES + COVER SHEET 4

TO : C. Boyden Gray, Esq.

OFFICE : Counsel to the President

ROOM : Second Floor, West Wing

REMARKS : Representative Craig Washington (D-TX) on Channel 5 stated "do away with testing altogether." (See highlighted section.)

FROM : Evan J. Kemp, Jr., Chairman

OFFICE : OFFICE OF THE CHAIRMAN

PHONE NUMBER : 663-4001

FAX NUMBER : 663-4110

CONFIRMATION REQUESTED? YES XX NO ___

IMMEDIATE DELIVERY REQUESTED? YES XX NO ___

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TRANSCRIPT

DATE May 30, 1991
TIME 6:30-9:00 AM
STATION WTTG-TV(Fox) Channel Five
LOCATION Washington, D.C.
PROGRAM The Fox Morning News

Tim White, co-anchor:

As lawmakers consider new civil rights legislation, one of the big issues they face is whether or not to ban the controversial employment practice known as "race norming." Now, under race norming, test scores of job applicants on a particular kind of test are adjusted according to race. Potential applicants are divided into three categories; black, Hispanic and others which includes whites and Asians. Even if applicants from each of the categories have identical actual scores on aptitude tests given by the state employment services, the black applicant will still score higher followed by the Hispanic and then the other test taker. Is this system fair? Well, joining us now from Capitol Hill to debate this issue are Republican Congressman Dana Rohrabacher and Democratic Congressman Craig Washington. And where ever they may disagree they do agree on a hot day, a hat is a good idea.

Gentlemen, thanks to both of you for coming in in the heat here. First of all, we just described how the race norming function works. Congressman Rohrabacher, what's the effect?

Representative Dana Rohrabacher (Republican, California): Well, there are lots of effects. One effect is that certain individuals because of their race are being judged on their race and they're being hurt in terms of their ability to provide for their families and they- you know, they are actually victimized because they're being analysed not by their abilities, not by how they do on tests and not by how they would perform but instead by what color their skin is. This is racism, pure and simple. It's wrong. But there is a side effect in this as well. And that is that it leaves a stigma on the very people that this practice is trying to help. I mean it lets people- it makes many people believe that black Americans and other Americans are incapable of doing a job and they're just there because the test results have been skewed. I think that's a horrible outcome, it's an unintended consequence. It's bad to have racism for both of the parties.

White: Congressman Washington, what's your assessment of the effect of race norming?

Representative Craig Washington (Democrat, Texas): Well, I agree with Congressman Rohrabacher that it does have some prejudicial effects as well as some prejudicial side effects. I think what we must consider however, is that it was intended

to overcome the imbalance in the test itself. And I would agree that we need to either do away with testing altogether or certainly do away with race norming because the problem is that the tests are not valid. If the test validly measured the competence of all individuals then we shouldn't have race norming, we shouldn't score the test within groups. So, we need to either find tests that are valid and able predictors for all groups and do away with race norming or do away with tests all together.

White: Take us a little further on that Congressman. What do you mean by the tests being valid? Do you mean tests that are predictors of how someone actually then performs on the job, and you're looking for a different kind of test?

Washington: No, the test doesn't accurately predict how blacks and Hispanics do compared to whites and this is why the test is weighted if you will within those groups. The person making the same score, a black person, a Hispanic person and a white person making an identical score as Congressman Rohrabacher has indicated would be grouped in categories and their percentile ranking in that groups would be reported rather than the actual raw score.

White: Well, the two of you sound as if you're in agreement on this. Congressman Hind [sp]- Henry Hind has introduced an amendment that says you can't do any more race norming, comparison of scores. Do both of you support that? Congressman Rohrabacher?

Rohrabacher: Well, I think that that amendment failed in a committee by a party line vote where the Republicans voted for it and the Democrats voted against it. Now, whether that was pure politics or fundamental difference in philosophy, I'll leave that to the viewers to decide. However, let us just note that if this test or any test is unfair I think the test should have been changed a long time ago. And there is no doubt about that if indeed- and I can't tell you whether the test is fair or not. But this idea that you're just going to change the situation by skewing the results of the test rather than trying to come up with a fair test, it leads to animosity, it leads to ill will between people. And that's just not the type of society that we want to build.

Washington: And it's fundamentally wrong. It's fundamentally wrong to do that. So, the answer is not to norm the scores, the answer is to find a test, as Congressman Rohrabacher said, that accurately predicts and measures on an equal basis among all people and let the chips fall where they may. I'm for that.

White: You suggested also Congressman Washington that maybe just doing away with the test all together.

Washington: Well, do away with the test until you find one that is an accurate predictor for blacks, Hispanics and whites alike.

White: This may be, some say, a big campaign issue in 1992. Would you think so, Congressman Rohrabacher?

Rohrabacher: Well, I think that the idea that frankly- that we have a big debate here about quota systems and it's just not dealing with race norming, it deals with a lot of other ideas in terms of jobs and education, et cetera. And to the degree that the Democratic party is tied to the idea that we're going to make up for past mistakes of the country by actually judging people on their race today and penalizing Americans of today even- by the way, even if some of them were immigrants, to the degree that the Democrats want to do that, that's to the degree that it's going to be a campaign issue because that's blatantly unfair. Americans aren't going to accept that. And what we're trying to work for is a society in which people are judged on their merit and try to get rid of the last traces of racism and there are some of those as well. However, let me note this. Those people who focus on racism and focus on quotas and things like that as solutions, I think quite often are missing some of the real solutions that we have. If you have a person who can't qualify for a job, you don't skew a test so that he does better than he's really doing. You try to help him improve his score. You try to reach out to that individual, what ever color he or she is, and say, 'Why did the education system fail you. Let's try to see if the education can provide people who can do better on the scores by better discipline, higher standards.' Let's not get a- you know, what we've heard from some people is let's do away with the standards. That's just crazy.

White: OK, thank you Congressman Rohrabacher and Congressman Washington. Congressman Washington, your belief is that- the general sense on the Hill is that something has to be done about this.

Washington: I think so. And back to your question about the campaign issue...

White: Very briefly please.

Washington: It would be despicable if the Republicans would attempt to drive a wedge between people based upon race. I hope they don't do that on a campaign. This is one America.

White: OK. Thanks to both of you for coming in. Thank you very much.

Washington: Thank you.

# # #

CS

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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Fred McClure

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

Subject: Clearance Of a Statement Of Administration Policy - draft letter from the Department of Justice regarding H.R. 1

ROUTE TO: Office/Agency (Staff Name)	ACTION Action Code	Tracking Date YY/MM/DD	DISPOSITION Type of Response	Code	Completion Date YY/MM/DD
CMOFC	ORIGINATOR	91/06/03		C	91/06/03 CS
CMAT ID	Referral Note: A	91/06/03		C	91/06/03 CS
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- S - For Signature
- X - Interim Reply

DISPOSITION CODES.
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- S - Suspended

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Comments: Cleared ABOVE THE 5 ASTERICKS on PAGE 3 CS

By N. Lund -- Phoned in By Marilyn Gossett 6-3-91

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5/81

THE WHITE HOUSE

WASHINGTON

May 30, 1991

MEMORANDUM FOR GOVERNOR SUNUNU
BOYDEN GRAY
ROGER PORTER

FROM: FRED MCCLURE

SUBJECT: Clearance of a Statement of Administration Policy

We have just received the attached draft letter from the Department of Justice regarding H.R. 1, the Civil Rights and Women's Equity in Employment Act of 1991. There is a senior advisors' veto recommendation on this bill.

Because of scheduled debate on this legislation, this letter must go to the Hill today. Therefore, we would appreciate your comments by 5:15 p.m. today.

Please direct all comments to my office at x2230.

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

DRAFT

June 3, 1991
(House)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 1 - Civil Rights and Women's Equity in Employment Act of 1991
(Brooks (D) Texas and 169 others)

If H.R. 1 were presented to the President in the form reported by the House Education and Labor Committee or in the form of the Brooks-Fish substitute or the Towns-Schroeder substitute, the President's senior advisers would recommend a veto. The Administration strongly supports enactment of the Michel substitute.

H.R. 1

The President vetoed a very similar bill last year because it did not meet the criteria he announced on May 17, 1990.

Civil rights legislation must operate to obliterate consideration of factors such as race, color, religion, sex, or national origin from employment decisions. But H.R. 1 is a quota bill in at least three respects. The disparate impact sections as drafted would virtually force employers to adopt quotas and unfair preferences. Unless an employer's bottom-line numbers are "correct," he or she will almost certainly face lawsuits in which a successful defense will be virtually impossible. If a suit is brought and a sweetheart deal is struck at the expense of innocent third parties, the Wilks section would then insulate unlawful quotas from challenge in court. And the Zipes section will subject plaintiffs unsuccessfully challenging quota settlements to attorney fees, even where their challenge was not frivolous and was brought in good faith.

By making it virtually impossible for an employer to prevail, the disparate impact sections also violate another principle stated by the President: any bill must reflect the fundamental principles of fairness that apply throughout our legal system. In addition, the Wilks section would encourage the settlement of certain cases at the expense of innocent non-parties; close the courts to many individuals whose civil rights have been violated; and insulate consent decrees that impose quotas from appropriate judicial review. Similarly, one provision would explicitly shield affirmative action, court-ordered remedies, and conciliation agreements from the neutral application of the bill's other provisions.

A civil rights bill should deter workplace harassment, but it must do so in a manner that is reasonable and does not produce a

windfall for lawyers. The damages section would provide for jury trials and the award of unlimited compensatory and punitive damages in all Title VII disparate treatment cases. This would radically transform the employment provisions of the Civil Rights Act by undermining its carefully balanced system of mediation and conciliation. This time-tested system would be scrapped and replaced with a new system modeled on our Nation's tort litigation -- which is now widely recognized to be in crisis.

The Administration believes that the protections of Title VII should be extended to employees of Congress in a meaningful way, which necessarily includes redress in the courts. It is fundamentally unfair to allow an employer to be the judge of its own case.

Other objectionable provisions include: ill-advised rules on attorney's fees; an unclear provision affecting "mixed motive" discrimination cases; unconstitutional retroactivity provisions; unreasonable new statutes of limitations; and an improper rule of construction.

The Brooks-Fish Substitute

The Brooks-Fish substitute fails to address concerns expressed by the President in vetoing similar legislation in the last Congress. The language in the amendment purporting to prohibit quotas would endorse racial preferences, not eliminate them. The substitute expressly permits plans that use racial preferences as long as the plans are labelled "voluntary." In addition, the proposed definition of business necessity would impose an onerous burden on employers. It would add the requirement that the relationship between the employment practice and the requirements for job performance be "significant" as well as manifest. Moreover, the substitute creates unlimited compensatory damages in cases of intentional discrimination and creates only a partial cap on punitive damages. Other amendments amount to only cosmetic changes which fall far short of rendering the substitute acceptable.

The Administration's concerns with the substitute were set forth in detail by the Attorney General in a May 31 report to Representative Michel.

The Administration's Proposal/Michel Substitute

The Administration's proposal (the Michel substitute) would strengthen our Nation's civil rights laws without institutionalizing reverse discrimination or subjecting American businesses and the victims of discrimination alike to endless and costly litigation. Like H.R. 1, the Administration's proposal would overturn the Lorance and Patterson decisions, and would place on the employer the burden of proving the business

necessity (as defined by past Supreme Court decisions) of an employment practice that has a disparate impact on a class of workers. The Administration's proposal also makes available new monetary remedies, with a $150,000 cap, for victims of harassment in the workplace. In sum, the Administration's bill achieves every legitimate end of H.R. 1. These important new protections for American employers should not be held hostage for measures that will produce quotas, disproportionately disadvantage small and medium-sized businesses, and unduly enrich the plaintiffs' bar.

The Towns-Schroeder Substitute

The Towns-Schroeder substitute is similar in many respects to the Brooks-Fish substitute, but is even more objectionable. In particular, it would promote expensive and prolonged litigation by allowing unlimited awards of both compensatory and punitive damages in cases of intentional discrimination. In addition, its prohibition of consideration of gender in all contracts would bar, for instance, private and parochial single-sex schools.

* * * * *

(Not to be Distributed Outside Executive Office of the President)

This draft Statement of Administration Policy was developed by the Legislative Reference Division (Ratliff), in consultation with the Departments of Justice (Wise), and Labor (McDaniel), EEOC (Kyllo), SBA (Dean), White House Counsel (Lund), Office of Policy Development (McGettigan), TCJ (Silas), and LVE (Wire).

The rule on H.R. 1 makes in order three substitute amendments. These amendments are addressed below following the description of the bill as reported by the House Education and Labor Committee.

Differences from Bill Vetoed in 1990

H.R. 1 is identical to S. 2104, a civil rights bill vetoed by the President in 1990, except for the following new provisions:

- Employers would have to demonstrate that challenged employment practices not involving selection bear a significant relationship to a "significant business objective." (S. 2104 required only a "manifest business objective.")

- An employee would only have to identify specific employment practices that result in a disparate impact if the court finds that the employee can identify the practices from reasonably available information. (S. 2104 required this identification unless the court found that

the employer destroyed, concealed, refused to produce, or failed to keep records necessary to make that showing.)

- o H.R. 1 does not include S. 2104's limit on the amount of punitive damages that may be awarded for cases of intentional discrimination.

- o In the version reported by the Education and Labor Committee, a "Glass Ceiling Commission" would be required to be established to study artificial barriers to the advancement of women and minorities to senior positions of employment, and the Department of Labor would be directed to develop a pay-equity program.

Recent Supreme Court Decisions and Related Provisions of H.R. 1

H.R. 1 is designed to reverse six recent Supreme Court decisions. These decisions and the related provisions of H.R. 1, as ordered reported by the House Judiciary Committee, are described below.

-- Wards Cove

Supreme Court Decision. In "disparate impact" cases under Title VII of the Civil Rights Act, the burden is on plaintiffs to identify a particular employment practice and show that the employment practice does not serve "in a significant way, the legitimate employment goals of the employer." (A "disparate impact" case is one in which no intentional discrimination is alleged but an employment practice is alleged to have an unjustified, though inadvertent, disparate impact based on race, color, religion, sex, or national origin.)

H.R. 1 (Sections 3 and 4) overrides the Supreme Court in three ways. First, it places the burden on the defendant to demonstrate that an employment practice is "required by business necessity" if significant numerical disparities are found. Second, Section 3 contains a lengthy definition of the term "business necessity" which states that it is intended to codify the definition of "business necessity" in the Griggs case and to overrule Wards Cove. Third, Section 4 would relieve many plaintiffs of the obligation to identify specific practices and to prove causation.

-- Price Waterhouse

Supreme Court Decision. Where an employment decision is proven to have been based in part on race, color, religion, sex, or national origin, Title VII has not been violated if a defendant can show that the same decision

would have been reached if such factors had not been considered.

H.R. 1 (Section 5) provides that a violation of Title VII is proven if a contributing factor in an employment decision is shown to have been a complainant's race, color, religion, sex, or national origin. The term "contributing factor" is not defined, and it may not mean "causal factor." However, a court could not order a hire, promotion, or reinstatement if the defendant showed that complainant would have not been hired, promoted, or retained even if discrimination had not been a factor.

-- Wilks

Supreme Court Decision. Persons not party to, but adversely affected by, consent decrees mandating unlawful racial preferences can challenge them in court.

H.R. 1 (Section 6) bars challenges to such consent decrees by non-parties if: (1) they had notice of the proposed judgment; (2) their interests were "adequately represented" by another person who challenged the decree; or (3) a court determines that "reasonable efforts" were made to provide notice to them.

-- Lorance

Supreme Court Decision. The statute of limitations with respect to a discriminatory seniority system begins to run on the date it is adopted by the employer, not the date the complainant is adversely affected by it.

H.R. 1 (Section 7) specifies that where a seniority system has been adopted "with the intent to discriminate," the "application" of the system constitutes an unlawful practice throughout the period that it is in effect.

-- Patterson

Supreme Court Decision. The statutory guaranty of the right to "make and enforce contracts" regardless of race ("Section 1981") applies only during the formation of a contract.

H.R. 1 (Section 12) specifies that the right to "make and enforce contracts" regardless of race extends beyond the formation of the contract to "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." H.R. 1 would further specify that the prohibition applies to private as well as governmental discrimination.

-- Shaw

Supreme Court Decision. Prevailing plaintiffs in job discrimination cases against the Federal Government may not recover interest to compensate for delays in obtaining relief.

H.R. 1 (Section 10) permits plaintiffs prevailing in Title VII discrimination cases against the Federal Government to recover "the same interest to compensate for delay in payment" as would be available in cases involving non-public parties, "except that prejudgment interest may not be awarded on compensatory damages."

Other Provisions of H.R. 1

In addition, H.R. 1 would:

-- Amend the current requirement that an employment discrimination complaint be filed within 180 days after "the alleged unlawful employment practice occurred" to permit complaints to be filed within two years after the practice "occurred or has been applied to affect adversely the person aggrieved, whichever is later." (Section 7)

-- Authorize jury trials and compensatory damages for intentional violations of Title VII and punitive damages when violations are committed with malice or callous indifference to the rights of others. (Section 8)

-- Authorize awards of expert witness fees to prevailing parties in Title VII cases. (Section 9)

-- Authorize prevailing parties to recover attorneys fees in addition to other costs, even for work performed after they have rejected a settlement offer more favorable than the final judgment. H.R. 1 would also guarantee plaintiffs' lawyers a fee unless the parties or their counsel attest that waivers of attorney fees were not "compelled as a condition of settlement." (Section 9)

-- Authorize prevailing parties, where judgments or orders granting relief are subsequently challenged, to recover from the original defendants the costs of defending (as a party, intervenor, or otherwise) the judgment or order. If the party attacking the judgment prevails, then the defendant must pay those costs. (Section 9)

-- Lengthen the statute of limitations from 30 to 90 days for filing suits against the Federal Government following final agency actions. (Section 10)

-- Specify, with respect to Federal laws protecting the civil rights of persons, that: (1) all such laws shall be "broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies;" (2) that no such laws shall "be construed to repeal or amend by implication any other Federal law protecting such civil rights;" and (3) agencies and courts, in interpreting such laws, shall not use this bill as "a basis for limiting the theories of liabilities, rights, and remedies available" under such laws unless the law has been specifically amended by this bill. (Section 11)

-- Specify that the bill shall not be construed to "require or encourage an employer to adopt hiring or promotion quotas," provided that the bill shall not "be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law." The bill does not forbid quotas. (Section 13)

-- Provide that H.R. 1 shall apply to Congress, but that the means for its enforcement shall be determined by each House. (Section 16)

Administration Bill/Michel Substitute

On March 1, 1991, the Justice Department transmitted an Administration bill that was subsequently introduced as H.R. 1375/S. 611. Like H.R. 1, the Administration bill would place the burden of proof on the employer to demonstrate "business necessity," overruling a contrary ruling in Wards Cove. However, the bill's definition of business necessity would be closer to the Wards Cove definition than H.R. 1. The bill would also reverse Lorance and Patterson, consistent with H.R. 1.

The bill does not contain the provision in H.R. 1 that would bar certain challenges to consent decrees by non-parties. Instead, the bill expressly provides that the Federal Rules of Civil Procedure apply in determining who is bound by employment discrimination decrees.

The bill would make available new monetary remedies for victims of sexual harassment in the workplace. The provision provides for bench trials, and caps awards at $150,000. H.R. 1, by contrast, would grant women and religious minorities the right to jury trials and unlimited monetary damages for intentional discrimination.

The Brooks-Fish Substitute

The Brooks-Fish substitute closely tracks many provisions of H.R. 1, including those on expert witness and attorney fees, the "Glass Ceiling Commission," and the Department of Labor pay-equity program. The substitute differs from H.R. 1 in the following principal ways:

- Its definition of business necessity would require that a challenged employment practice bear a "significant and manifest relationship to the requirements for effective job performance." Employers would be allowed to rely upon "relative qualifications or skills" in making employment-related decisions; but if such reliance resulted in a disparate impact, the employer would have to demonstrate that the reliance was required by business necessity.

- The substitute would require an employee, after the completion of the discovery process, to identify the specific employment practices alleged to have resulted in a disparate impact. The employee would not be required to make this demonstration if the court found that the employee could not do so from the records of the employer.

- It provides that a violation of Title VII is proven if a motivating factor in an employment decision is shown to have been a complainant's race, color, religion, sex, or national origin. A court could not order a hire, promotion, or reinstatement if the defendant demonstrated that the employee would have not been hired, promoted, or retained even if discrimination had not been a factor.

- It would increase the statute of limitations for filing a Title VII claim from 180 days to 540 days.

- It would allow unlimited awards of compensatory damages in cases of intentional discrimination. It caps punitive damages at the greater of $150,000 or "an amount equal to the sum of compensatory damages awarded and equitable monetary relief."

- It would require that certain employment tests "validly and fairly" predict the ability of test takers to perform the job for which the test is used. Section 116 prohibits the adjustment of test scores on the basis of the race, color, religion, sex, or national origin of the test taker.

- It states that it shall not be construed "to require, encourage, or permit" an employer to adopt hiring or promotion quotas. It also approves the lawfulness of voluntary or court-ordered affirmative action.

The Towns-Schroeder Substitute

Justice advises that the Towns-Schroeder substitute is similar in most respects to the Brooks-Fish substitute. However, it would allow unlimited awards of both compensatory and punitive damages in cases of intentional discrimination.

Administration Position to Date

The Attorney General in a May 31, 1991, report to Representative Michel stated that he and other senior advisers would also recommend a veto of the Brooks-Fish substitute. A Justice Department report of March 12, 1991, on H.R. 1 stated that the Attorney General "and other senior advisers" would recommend a veto of the bill.

1990 Presidential Statement

On May 17, 1990, the President stated that he would support civil rights legislation which met three stated principles. These principles were restated in the President's October 22, 1990, veto message.

The first principle was that legislation must operate to obliterate considerations of factors such as race, color, religion, sex, or national origin from employment decisions. In this regard, the President said, "I will not sign a quota bill," and expressed concern that quotas could be an unintended consequence of legislation.

Second, the legislation must reflect fundamental principles of fairness. Specifically, individuals who believe their rights have been violated are entitled to their day in court, and an accused is innocent until proved guilty.

Third, the civil rights laws should provide an adequate deterrent against workplace harassment. They should not, however, benefit lawyers by encouraging litigation at the expense of conciliation or settlement.

The President also stated that Congress "should live by the same requirements it prescribes for others."

The President affirmed his desire to strengthen employment discrimination laws "without resorting to the use of unfair preferences" in the State of the Union address on January 29, 1991.

Scoring for the Purpose of Pay-As-You-Go and the Caps

According to TCJ (Silas), H.R. 1 is not subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990 because it would not require any direct spending.

Legislative Reference Division Draft
6/3/91 -- 3:00 P.M.

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H4610

DOMESTIC OFFICE
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JUN 10 '91

DATE RECEIVED: JUNE 07, 1991

NAME OF CORRESPONDENT: THE HONORABLE EDWIN J. FUELNER JR.

SUBJECT: FORWARDS A COPY OF THE HERITAGE FOUNDATION'S EXECUTIVE MEMORANDUM, "WHY THE SO-CALLED 'CIVIL RIGHTS' BILL WOULD STILL MEAN QUOTAS"

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 cwos	ORG	91/06/07		C	91/06/12 CS
REFERRAL NOTE:					
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COMMENTS: CC5, "ED"

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KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

THE WHITE HOUSE

WASHINGTON

June 21, 1991

Dear Mr. Feulner:

Your recent letter to the President, enclosing Bill Laffer's Executive Memorandum on civil rights, has been referred to me for reply.

All of us here thought that Bill's analysis was terrific. I agree that the memo was useful in the House debate, and I believe that Heritage can be an influence for good in the Senate as well.

On behalf of the President, thank you for your kind words about his leadership on this issue. And thank you for your help in educating the Congress and the public.

Very truly yours,

Nelson Lund
Associate Counsel to the President

Mr. Edwin J. Feulner, Jr.
President
The Heritage Foundation
214 Massachusetts Avenue, N.E.
Washington, D.C. 20002-4999

24736

The Heritage Foundation

A tax-exempt public policy research institute

June 4, 1991

George H. W. Bush
Office of the President
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. President:

Bravo for your forthright stand on the much-revised "Civil Rights Act of 1991." I know it is most unpleasant to be accused of racism, particularly given your demonstrated commitment to civil rights over the years. You are clearly doing the right thing in resisting a quota bill, and the American people, including many thoughtful civil rights advocates, support you.

I thought you would be interested in our Executive Memorandum, "Why The So-Called 'Civil Rights' Bill Would Still Mean Quotas," which was distributed before the House vote on H.R. 1.

"H.R. 1 remains a quota bill," richly deserving a presidential veto, argues William G. Laffer III in the memo, "despite its revisions, emendations and explanations." While the latest version claims to prohibit quotas, powerful incentives in the bill would force employers to use what would amount to quotas in order to avoid "disparate impact" suits. Furthermore, Laffer explains, the bill's quotas would be locked in by a section restricting legal recourse available to those individuals harmed by the bill.

I believe that this memo was useful in the context of the House debate, and we look forward to continuing to work with you as the civil rights discussion continues. The House vote is a tribute to your leadership in this area, and I urge you to continue your firm opposition to any quota legislation.

Sincerely,

Edwin J. Feulner, Jr.
President

214 Massachusetts Avenue, N.E. • Washington, D.C. 20002-4999 • (202) 546-4400

THE WHITE HOUSE

WASHINGTON

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Comments:

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Executive Memorandum

The Heritage Foundation 214 Massachusetts Avenue N.E. Washington, D.C. 20002-4999 (202) 546-4400

6/03/91 Number 302

WHY THE SO-CALLED "CIVIL RIGHTS" BILL WOULD STILL MEAN QUOTAS

George Bush last year vetoed a so-called "civil rights" bill because it would encourage employers to adopt racial quotas in employment decisions. This year's version of the bill, the "Civil Rights Act of 1991" (H.R. 1), was introduced in the House by Representative Jack Brooks, the Texas Democrat. Again there is a debate over whether this legislation promotes quotas, and again the proponents of the legislation claim that it does not. By the end of last week, the bill had seen several revisions, each an attempt to allay the fears that the bill is a quota bill. Yet there are still solid grounds for such fears. It is still a quota bill that deserves a presidential veto.

Useless Provision. The latest version of H.R. 1 ostensibly would prohibit the use of quotas. Its definition of a "quota" is so narrow, however, and it has so many loopholes, that the provision would be useless. While employers would supposedly be prohibited from setting aside a fixed number or percentage of positions for people of a particular race, color, religion, sex or national origin, they would be free to engage in other forms of preferential treatment. Example: Employers could give job applicants extra credit on employment tests for being black or Hispanic, and could adopt a policy of always choosing a minority whenever two applicants are otherwise equally qualified. Moreover, an employer could use quotas as long as everyone hired met the minimum necessary qualifications to perform the job. And while it might be illegal for an employer to fire a department head for failing to meet a hiring quota, the employer could make department heads' bonuses, raises and promotions contingent on achieving quota targets.

Current civil rights law allows individuals to sue an employer over legitimate and nondiscriminatory hiring practices if such practices happen to produce a racial or ethnic mix in the employer's work force different from that found in the general population. This is called a "disparate impact." Section 102 of H.R. 1 would alter the standards in disparate impact suits, making it more likely that employers will lose, and more expensive for them even when they win. This would encourage employers to try to avoid being sued in the first place by giving special preferences to any groups that might otherwise be under-represented in the employer's work force.

Among the changes H.R. 1 would make:

1) It would not require plaintiffs to identify the specific employment practices that produce a disparate impact. Under the current language of the bill, all a plaintiff would have to do is to allege that all of the defendant's employment practices taken together produce a disparate impact. The burden of proof would then shift to the defendant to identify which of his employment practices, if any, actually produced the disparate impact, and to show that every one of these practices is "required by business necessity" – an enormously difficult, if not impossible, task.

2) It would change the standard for deciding whether an employment practice that produces a disparate impact is "required by business necessity." The current standard is whether a challenged practice serves any legitimate employment goals of the employer in any significant way. The new standard would require that challenged practices bear "a substantial and manifest relationship to the requirements for effective job performance," thus making the standard much more difficult for employers to meet.

3) It defines its standard of business necessity solely in terms of "effective job performance," thereby precluding consideration of other nondiscriminatory factors that can legitimately bear on employment-related decisions. For example, if a manufacturer were to close an unprofitable plant with a high percentage of minority workers, and the workers whose jobs were eliminated were to challenge the plant-closing decision based on its disparate impact, H.R. 1 would require the manufacturer to defend its decision solely in terms of the affected workers' performance, attendance, punctuality, and so on – even though such factors had nothing to do with the closing, and even though the real reason clearly was non-discriminatory.

Many employers almost surely would conclude that defending against disparate impact suits simply is not worth the effort and would instead alter their hiring procedures to produce the "right" mix of race and sex within their work force. That is, the employer would adopt quotas.

Ignoring Provisions. Even if the anti-quota language in H.R. 1 were to prohibit any form of racial preference, it would not change other aspects of the bill which create powerful incentives to promote quotas in the first place. Several sections of the Civil Rights Act of 1964, meanwhile, already prohibit quotas; yet the courts have generally ignored these provisions. And if the H.R. 1 anti-quota provision were effective, it would put employers in an impossible situation: They could be held liable if they failed to adopt quotas and their work force happened to become imbalanced, but they also could be held liable if they used quotas in an effort to keep their work force numbers in line.

In addition, Section 104 of H.R. 1 also would restrict severely the right of individuals harmed by quotas or other race-conscious "remedies" imposed by consent decrees or court orders to seek redress through an anti-discrimination lawsuit of their own. Thus, for example, if an employer is ordered by a court to give half of all promotions to blacks, better qualified Asians or Hispanics who are denied promotions because of the new quota could be denied a day in court. The real point of Section 104 is to lock in quotas by protecting them from subsequent challenge.

Despite its revisions, emendations and explanations, H.R. 1 remains a quota bill. It thus still deserves a presidential veto.

William G. Laffer III
McKenna Fellow in Regulatory
and Business Affairs

TA

ID# 244432

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: JUNE 10, 1991

NAME OF CORRESPONDENT: THE HONORABLE AMO HOUGHTON

SUBJECT: SHARES WITH THE PRESIDENT HIS VIEWS ON THE CIVIL RIGHTS BILL

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
FREDERICK MCCLURE	ORG	91/06/10	[illegible]		__/__/__
REFERRAL NOTE:					
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COMMENTS: ENCLOSURE

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 1240 ____ ____

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*ACTION CODES:	*DISPOSITION	*OUTGOING CORRESPONDENCE:
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*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	* CODE = A
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*F-FURNISH FACT SHEET	*S-SUSPENDED	* OUTGOING
*I-INFO COPY/NO ACT NEC		
*R-DIRECT REPLY W/COPY		
*S-FOR-SIGNATURE		
*X-INTERIM REPLY		

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

June 12, 1991

Dear Congressman Houghton:

Thank you for your recent note to the President stating your position on Civil Rights and the Brooks-Fish Amendment.

We appreciate being apprised of your specific views on this issue. I have shared your comments with the appropriate officials for their review.

Thank you again for your interest in writing.

With best regards,

Sincerely,

Frederick D. McClure
Assistant to the President
for Legislative Affairs

910621

DATE MAILED

The Honorable Amory Houghton, Jr.
House of Representatives
Washington, D.C. 20515

FDM:TBA:

bcc: w/ copy of inc to Counsel's Office - for Appropriate Action
bcc: w/ copy of inc to Office of Economic and Domestic Policy - FYI
bcc: w/ copy of inc to Dept. of Labor - FYI

244432

Fm. Clare

AMO HOUGHTON
34TH DISTRICT
NEW YORK

HOUSE OF REPRESENTATIVES
WASHINGTON, D. C. 20515

6/5/91

MR. PRESIDENT —

I TRY AND I THINK

I AM LOYAL TO YOUR PROGRAMS, BUT ON

CIVIL RIGHTS I FELT (AS LAST YEAR)

I HAD TO TAKE ANOTHER COURSE.

(SEE ATTACHED)

AMO

BEST,

AMO

THE WHITE HOUSE

WASHINGTON

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Comments:

Mr. Chairman:

I am somewhat reluctant to speak on the issue of Civil Rights. It is highly charged -- lots of emotion, and few minds will be changed -- at least at this late date.

However, since I did vote against the first Civil Rights Bill last year, and now support the Brooks-Fish amendment, I ask your indulgence in permitting me to spell out one or two issues which I think need to be clarified.

First -- I am not a lawyer, but when a piece of Congressional legislation says that nothing in it shall REQUIRE, ENCOURAGE, OR PERMIT HIRING OR PROMOTION QUOTAS -- I must believe that.

When the bill further says that quotas are an ILLEGAL EMPLOYMENT PRACTICE -- I must believe that. And when a group of my business friends say that quotas as spelled out are not a big issue -- I believe them. You can assign any interpretation you want, make the words mean something else, but business men and women must deal in facts. They can't work with scores of interpretations, and these are the facts. That's Point #1.

Point #2 concerns the so-called DAMAGE ISSUE. I feel this has become something of a red herring. It is interesting to see the people who brushed aside all the horror stories on the future of Mexican trade as mere fantasies now creating fantasies of their own -- the "what if" syndrome -- conjuring up deep plots by women and the disabled to attack the very life blood of American business, draining our corporations dry through prolonged law suits.

Now let me share with you the facts. The facts are that without caps, mind you, for the last ten plus years (since 1980) there have been reported only 70 minority suits involving payment

of damages. This means that one 200,000th percent of our population have been involved. There were three payments over $200,000; the average being $40,000. That's a total of less than $3 million.

If you add this number of racial minorities to the total of 60 million working women and 40 million disabled people, this amounts to a 5 fold increase. So 5 X $3 million = $15 million + the $3 million that is already out there -- it all adds up to $18 million -- or less than $2 million a year. To put this all into perspective, in the ongoing "asbestos" suit -- an issue of about the same dimension -- the costs to corporations so far have been over $350 million.

So the facts, Mr. Chairman, at least tell me that the stories of gloom and doom are far exaggerated. The facts say also that --

* The Brooks-Fish Amendment is not a quota bill;
* History tells us that it will produce a limited exposure to damages;
* Employers will have the right to set requirements for a job when they relate to that job;
* The amendment most importantly reaches out to women and the disabled -- two groups who up to this time have been unprotected against discrimination.

This bill is not evil. It is positive, it clarifies. You cannot go back to a world that no longer exists. Today we live with safety, financial, environmental, trade requirements -- all issues we didn't have to live with when I entered business. This should stand proudly beside them as we look over the hill into the 21st century.

TA

ID# 244434

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

HU010

INCOMING

DATE RECEIVED: JUNE 10, 1991

NAME OF CORRESPONDENT: THE HONORABLE DANIEL K. INOUYE

SUBJECT: LOOKS FORWARD TO MEETING WITH THE PRESIDENT TO DISCUSS THE STATUS OF LEONARD PELTIER, WHOSE INCARCERATION HAS BECOME THE FOCUS OF AN INTERNATIONAL HUMAN RIGHTS EFFORT

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SCHEDULING
OFFICE

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COMMENTS: ENCLOSES A COPY OF A LETTER FROM JUDGE GERALD HEANEY WHO WROTE THE OPINION IN U.S. VS. PELTIER

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 1210 ____ ____

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KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

June 11, 1991

Dear Senator Inouye:

Thank you for your recent letter regarding the possibility of a meeting with the President to discuss the incarceration of Mr. Leonard Peltier.

We appreciate knowing of your interest in this regard and have asked the appropriate Administration officials to carefully consider this request. You will be hearing further just as soon as a determination can be made.

Thank you again for your interest in writing.

With best regards,

Sincerely,

Frederick D. McClure
Assistant to the President
for Legislative Affairs

The Honorable Daniel K. Inouye
United States Senate
Washington, D.C. 20510

FDM:TBA:

bcc: w/ copy of inc to Dept. of Justice, Office of the Pardon Attorney - for Appropriate Action
bcc: w/ copy of inc to Presidential Scheduling - FYI
bcc: w/ copy of inc to Intergovernmental Affairs - FYI

United States Senate

SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, DC 20510-6450

June 7, 1991

The Honorable George H.W. Bush
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

As we have earlier discussed, I am looking forward to meeting with you regarding the status of a Native American, Leonard Peltier, whose incarceration has become the focus of an international human rights effort.

I am writing to share with you a letter I received from Eighth Circuit Judge Gerald W. Heaney, regarding Mr. Peltier's case. This letter, when viewed in the context of the West 57th broadcast that I left with you and exculpatory evidence that has subsequently come to light, may well warrant your consideration of a number of options that I would like to discuss with you.

I hope that we can arrange a time in the near future to discuss this matter in more depth.

Sincerely,

DANIEL K. INOUYE
Chairman

Enclosure

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

CHAMBERS OF
GERALD W HEANEY
UNITED STATES SENIOR CIRCUIT JUDGE
FEDERAL BUILDING
DULUTH, MINNESOTA 55802

April 18, 1991

Senator Daniel K. Inouye
United States Senate
Select Committee on Indian Affairs
Washington, D.C. 20510-6450

Re: Leonard Peltier

Dear Senator Inouye:

Unfortunately I did not receive your letter of February 1, 1991 until April 13, 1991. When I did receive your letter, I was visiting your state. Thus, this is my first chance to reply.

As you know, I wrote the opinion in United States v. Peltier, 800 F.2d 772 (8th Cir. 1986), and I sat as a member of the court in an earlier appeal, United States v. Peltier, 731 F.2d 550 (8th Cir. 1984). In the case I authored, our court concluded:

> There is a possibility that the jury would have acquitted Leonard Peltier had the records and data improperly withheld from the defense been available to him in order to better exploit and reinforce the inconsistencies casting strong doubts upon the government's case. Yet, we are bound by the Bagley test requiring that we be convinced, from a review of the entire record, that had the data and records withheld been made available, the jury probably would have reached a different result. We have not been so convinced.

United States v. Peltier, 731 F.2d at 779-80. No new evidence has been called to my attention which would cause me to change the conclusion reached in that case.

There are, however, other aspects of the case that the President may see fit to consider in determining whether he should take action to commute or otherwise mitigate the sentence of Leonard Peltier. My thoughts on these other aspects result from a very careful study of the records of the Peltier trial and the post-trial evidence and from a study of the record in the Robideaux-Butler trial before Judge McManus in Iowa, a trial which resulted in the acquittal of Robideaux and Butler.

First, the United States government over-reacted at Wounded Knee. Instead of carefully considering the legitimate grievances of the Native Americans, the response was essentially a military one which culminated in a deadly firefight on June 26, 1975 between the Native Americans and the FBI agents and the United States marshals.

Second, the United States government must share the responsibility with the Native Americans for the June 26 firefight. It was an intense one in which both government agents and Native Americans were killed. While the government's role in escalating the conflict into a firefight cannot serve as a legal justification for the killing of the FBI agents at short range, it can properly be considered as a mitigating circumstance.

Third, the record persuades me that more than one person was involved in the shooting of the FBI agents. Again, this fact is not a legal justification for Peltier's actions, but it is a mitigating circumstance.

Fourth, the FBI used improper tactics in securing Peltier's extradition from Canada and in otherwise investigating and trying the Peltier case. Although our court decided that these actions were not grounds for reversal, they are, in my view, factors that merit consideration in any petition for leniency filed.

Fifth, Leonard Peltier was tried, found guilty, and sentenced. He has now served more than fourteen years in the federal penitentiary. At some point, a healing process must begin. We as a nation must treat Native Americans more fairly. To do so, we must recognize their unique culture and their great contributions to our nation. Favorable action by the President in the Leonard Peltier case would be an important step in this regard. I recognize that this decision lies solely within the President's discretion. I simply state my view based on the record presented to our court. I authorize you to show this letter to the President if you desire to do so.

Again, I am sorry your letter was not delivered to me at an earlier date.

Sincerely,

GERALD W. HEANEY

GWH:bn

COPY

Senator Daniel K. Inouye
722 Hart Office Bldg
Washington, D.C. 20510

June 2, 1990

Dear Senator Inouye --

RE: LEONARD PELTIER

Dear Senator Inouye -

I much regret that I cannot join the meeting in your office on June 12 at 4 P.M. (unless I can get myself released from jury duty -- a possibility) but I did want to report to you as promised on my meeting this winter with the man who actually killed the two FBI agents on June 26, 1975, on the Pine Ridge Reservation, in the hope this will strengthen your determination to help us obtain justice for a man who has worked most of his life to help his people.

The man in question feels badly that Peltier has already served 13 years for two killings he did not commit, and he has told us that we could accuse him by name if that would help Leonard (it wouldn't, except to strengthen the resolve of all of us, including the producer and director of the proposed film of IN THE SPIRIT OF CRAZY HORSE, which perhaps you have now had an opportunity to look at) but that he would deny it, since he feels that the agents instigated a shoot-out that threatened the lives of women and chidren in the Jumping Bull community; he states furthermore that he killed both men in self-defense when one of them fired his handgun while this man was trying to take them prisoner. He considers himself one of the many victims of an episode that the FBI brought down upon itself; he considers himself a decent man who has " never betrayed a friend", never been a criminal, never been to jail.

The man wore a hood and dark glasses and black gloves throughout our interview, and I did not (and do not) know his name. However, the mutual friend who introduced us has known him for many years, long before the shoot-out, and says he has always worked for his people and is still doing so, and that everything he says about himself is true.

As for me, I questionned him hard for five hours in every detail of the episode -- I know the scene and the details of the shoot-out very well, and do not believe he could fake so many details, even if I could imagine a reason why he would endanger himself by this self-implication--and asked him as well to re-enact the killing(s), which he did. Everything he said rang true, including his fear of the future, and his bitterness that he, too, is suffering a life sentence.

I am utterly convinced, and can assure you, that this man, not Leonard Peltier, killed the two agents, and that you can help Peltier find justice with even more confidence than you

felt in February, when we met in your office.

Another evidence, if any is needed, that Leonard Peltier deserves our help was this man's reflection that in all the thirteen years he has been in prison, Peltier has never once hinted or brought even indirect pressure on him to come forward.

I much appreciate your attention to this letter and to this exceptionally disturbing case.

With respectful regards,

Sincerely-

Peter Matthiessen

Box 392
Sagaponack, New York, 11962

TA

ID# 244434

HU010

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: JUNE 10, 1991

NAME OF CORRESPONDENT: THE HONORABLE DANIEL K. INOUYE

SUBJECT: LOOKS FORWARD TO MEETING WITH THE PRESIDENT TO DISCUSS THE STATUS OF LEONARD PELTIER, WHOSE INCARCERATION HAS BECOME THE FOCUS OF AN INTERNATIONAL HUMAN RIGHTS EFFORT

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C	DISPOSITION COMPLETED YY/MM/DD
FREDERICK MCCLURE	ORG	91/06/10	EM	A	91/06/11 LJ
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SC Supe	E	91/06/19	LJ	C	__/__/__
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[illegible]	E	91/06/19		C	__/__/__
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Assistant to the President
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The Honorable Daniel K. Inouye
United States Senate
Washington, D.C. 20510

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United States Senate

SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, DC 20510-6450

June 7, 1991

The Honorable George H.W. Bush
President of the United States
The White House
1600 Pennsylvania Avenue. N.W.
Washington, D.C. 20500

Dear Mr. President:

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Chairman

Enclosure

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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There are, however, other aspects of the case that the President may see fit to consider in determining whether he should take action to commute or otherwise mitigate the sentence of Leonard Peltier. My thoughts on these other aspects result from a very careful study of the records of the Peltier trial and the post-trial evidence and from a study of the record in the Robideaux-Butler trial before Judge McManus in Iowa, a trial which resulted in the acquittal of Robideaux and Butler.

First, the United States government over-reacted at Wounded Knee. Instead of carefully considering the legitimate grievances of the Native Americans, the response was essentially a military one which culminated in a deadly firefight on June 26, 1975 between the Native Americans and the FBI agents and the United States marshals.

Second, the United States government must share the responsibility with the Native Americans for the June 26 firefight. It was an intense one in which both government agents and Native Americans were killed. While the government's role in escalating the conflict into a firefight cannot serve as a legal justification for the killing of the FBI agents at short range, it can properly be considered as a mitigating circumstance.

Third, the record persuades me that more than one person was involved in the shooting of the FBI agents. Again, this fact is not a legal justification for Peltier's actions, but it is a mitigating circumstance.

Fourth, the FBI used improper tactics in securing Peltier's extradition from Canada and in otherwise investigating and trying the Peltier case. Although our court decided that these actions were not grounds for reversal, they are, in my view, factors that merit consideration in any petition for leniency filed.

Fifth, Leonard Peltier was tried, found guilty, and sentenced. He has now served more than fourteen years in the federal penitentiary. At some point, a healing process must begin. We as a nation must treat Native Americans more fairly. To do so, we must recognize their unique culture and their great contributions to our nation. Favorable action by the President in the Leonard Peltier case would be an important step in this regard. I recognize that this decision lies solely within the President's discretion. I simply state my view based on the record presented to our court. I authorize you to show this letter to the President if you desire to do so.

Again, I am sorry your letter was not delivered to me at an earlier date.

Sincerely,

GERALD W. HEANEY

GWH:bn

Copy

Senator Daniel K. Inouye
722 Hart Office Bldg
Washington, D.C. 20510

June 2, 1990

Dear Senator Inouye --

RE: LEONARD PELTIER

Dear Senator Inouye -

I much regret that I cannot join the meeting in your office on June 12 at 4 P.M. (unless I can get myself released from jury duty -- a possibility) but I did want to report to you as promised on my meeting this winter with the man who actually killed the two FBI agents on June 26, 1975, on the Pine Ridge Reservation, in the hope this will strengthen your determination to help us obtain justice for a man who has worked most of his life to help his people.

The man in question feels badly that Peltier has already served 13 years for two killings he did not commit, and he has told us that we could accuse him by name if that would help Leonard (it wouldn't, except to strengthen the resolve of all of us, including the producer and director of the proposed film of IN THE SPIRIT OF CRAZY HORSE, which perhaps you have now had an opportunity to look at) but that he would deny it, since he feels that the agents instigated a shoot-out that threatened the lives of women and chidren in the Jumping Bull community; he states furthermore that he killed both men in self-defense when one of them fired his handgun while this man was trying to take them prisoner. He considers himself one of the many victims of an episode that the FBI brought down upon itself; he considers himself a decent man who has " never betrayed a friend", never been a criminal, never been to jail.

The man wore a hood and dark glasses and black gloves throughout our interview, and I did not (and do not) know his name. However, the mutual friend who introduced us has known him for many years, long before the shoot-out, and says he has always worked for his people and is still doing so, and that everything he says about himself is true.

As for me, I questionned him hard for five hours in every detail of the episode -- I know the scene and the details of the shoot-out very well, and do not believe he could fake so many details, even if I could imagine a reason why he would endanger himself by this self-implication--and asked him as well to re-enact the killing(s), which he did. Everything he said rang true, including his fear of the future, and his bitterness that he, too, is suffering a life sentence.

I am utterly convinced, and can assure you, that this man, not Leonard Peltier, killed the two agents, and that you can help Peltier find justice with even more confidence than you

felt in February, when we met in your office.

Another evidence, if any is needed, that Leonard Peltier deserves our help was this man's reflection that in all the thirteen years he has been in prison, Peltier has never once hinted or brought even indirect pressure on him to come forward.

I much appreciate your attention to this letter and to this exceptionally disturbing case.

With respectful regards,

Sincerely-

Peter Matthiessen

Box 392
Sagaponack, New York, 11962

Name	Dat
Dave Alsobrook for NSC	2/26/92

ID # 244726 CU
R: 6-12 11:15 A

CS

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

HU010

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

Name of Correspondent: David Mason

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

Subject: Ed Fuelner, Jr Letter to the President re, civil rights

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuoco	ORIGINATOR	91/06/07		C	91/06/17 CS
Cuoco	Referral Note: cont. correspd.				
Cuoco	A	91/06/08		C	91/06/17 CS
Cuoco	Referral Note:				
Cuoco	I	91/06/08		C	91/06/08 CS
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				

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

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

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

Comments: No Further Action Required Per N. Lund 6-17-91 Close out - 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

MEMO

The Heritage Foundation

To: The Honorable Boyden Gray

From: **David M. Mason**
Director of Executive Branch Liaison

COUNSEL'S OFFICE
RECEIVED
JUN 7 1991

Date: June 6, 1991

Subject: Ed Feulner's letter to President Bush

Ed Feulner's letter to President Bush on the Civil Rights bill was inadvertently left out of the envelope which was delivered to you yesterday.

A copy is attached. I apologize for the error.

214 Massachusetts Avenue • N.E • Washington, D C. 20002 • (202) 546-4400

The Heritage Foundation

A tax-exempt public policy research institute

June 5, 1991

The Honorable Boyden Gray
Counsel to the President
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Boyden:

I wanted to make sure you saw a copy of my letter to the President on the "Civil Rights Act of 1991." The President and the entire Administration are to be commended for a courageous and forthright stand on this critical issue.

Sincerely,

Edwin J. Feulner, Jr.
President

214 Massachusetts Avenue, N.E. • Washington, D.C. 20002-4999 • (202) 546-4400

The Heritage Foundation

A tax-exempt public policy research institute

June 4, 1991

George H. W. Bush
Office of the President
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. President:

Bravo for your forthright stand on the much-revised "Civil Rights Act of 1991." I know it is most unpleasant to be accused of racism, particularly given your demonstrated commitment to civil rights over the years. You are clearly doing the right thing in resisting a quota bill, and the American people, including many thoughtful civil rights advocates, support you.

I thought you would be interested in our Executive Memorandum, "Why The So-Called 'Civil Rights' Bill Would Still Mean Quotas," which was distributed before the House vote on H.R. 1.

"H.R. 1 remains a quota bill," richly deserving a presidential veto, argues William G. Laffer III in the memo, "despite its revisions, emendations and explanations." While the latest version claims to prohibit quotas, powerful incentives in the bill would force employers to use what would amount to quotas in order to avoid "disparate impact" suits. Furthermore, Laffer explains, the bill's quotas would be locked in by a section restricting legal recourse available to those individuals harmed by the bill.

I believe that this memo was useful in the context of the House debate, and we look forward to continuing to work with you as the civil rights discussion continues. The House vote is a tribute to your leadership in this area, and I urge you to continue your firm opposition to any quota legislation.

Sincerely,

Edwin J. Feulner, Jr.
President

214 Massachusetts Avenue, N.E. • Washington, D.C. 20002-4999 • (202) 546-4400

The Heritage Foundation

Executive Memorandum

RUSH!

214 Massachusetts Avenue N.E. Washington, D.C. 20002-4999 (202) 546-4400

6/03/91 Number 302

WHY THE SO-CALLED "CIVIL RIGHTS" BILL WOULD STILL MEAN QUOTAS

George Bush last year vetoed a so-called "civil rights" bill because it would encourage employers to adopt racial quotas in employment decisions. This year's version of the bill, the "Civil Rights Act of 1991" (H.R. 1), was introduced in the House by Representative Jack Brooks, the Texas Democrat. Again there is a debate over whether this legislation promotes quotas, and again the proponents of the legislation claim that it does not. By the end of last week, the bill had seen several revisions, each an attempt to allay the fears that the bill is a quota bill. Yet there are still solid grounds for such fears. It is still a quota bill that deserves a presidential veto.

Useless Provision. The latest version of H.R. 1 ostensibly would prohibit the use of quotas. Its definition of a "quota" is so narrow, however, and it has so many loopholes, that the provision would be useless. While employers would supposedly be prohibited from setting aside a fixed number or percentage of positions for people of a particular race, color, religion, sex or national origin, they would be free to engage in other forms of preferential treatment. Example: Employers could give job applicants extra credit on employment tests for being black or Hispanic, and could adopt a policy of always choosing a minority whenever two applicants are otherwise equally qualified. Moreover, an employer could use quotas as long as everyone hired met the minimum necessary qualifications to perform the job. And while it might be illegal for an employer to fire a department head for failing to meet a hiring quota, the employer could make department heads' bonuses, raises and promotions contingent on achieving quota targets.

Current civil rights law allows individuals to sue an employer over legitimate and nondiscriminatory hiring practices if such practices happen to produce a racial or ethnic mix in the employer's work force different from that found in the general population. This is called a "disparate impact." Section 102 of H.R. 1 would alter the standards in disparate impact suits, making it more likely that employers will lose, and more expensive for them even when they win. This would encourage employers to try to avoid being sued in the first place by giving special preferences to any groups that might otherwise be under-represented in the employer's work force.

Among the changes H.R. 1 would make:

1) It would not require plaintiffs to identify the specific employment practices that produce a disparate impact. Under the current language of the bill, all a plaintiff would have to do is to allege that all of the defendant's employment practices taken together produce a disparate impact. The burden of proof would then shift to the defendant to identify which of his employment practices, if any, actually produced the disparate impact, and to show that every one of these practices is "required by business necessity" – an enormously difficult, if not impossible, task.

2) It would change the standard for deciding whether an employment practice that produces a disparate impact is "required by business necessity." The current standard is whether a challenged practice serves any legitimate employment goals of the employer in any significant way. The new standard would require that challenged practices bear "a substantial and manifest relationship to the requirements for effective job performance," thus making the standard much more difficult for employers to meet.

3) It defines its standard of business necessity solely in terms of "effective job performance," thereby precluding consideration of other nondiscriminatory factors that can legitimately bear on employment-related decisions. For example, if a manufacturer were to close an unprofitable plant with a high percentage of minority workers, and the workers whose jobs were eliminated were to challenge the plant-closing decision based on its disparate impact, H.R. 1 would require the manufacturer to defend its decision solely in terms of the affected workers' performance, attendance, punctuality, and so on – even though such factors had nothing to do with the closing, and even though the real reason clearly was non-discriminatory.

Many employers almost surely would conclude that defending against disparate impact suits simply is not worth the effort and would instead alter their hiring procedures to produce the "right" mix of race and sex within their work force. That is, the employer would adopt quotas.

Ignoring Provisions. Even if the anti-quota language in H.R. 1 were to prohibit any form of racial preference, it would not change other aspects of the bill which create powerful incentives to promote quotas in the first place. Several sections of the Civil Rights Act of 1964, meanwhile, already prohibit quotas; yet the courts have generally ignored these provisions. And if the H.R. 1 anti-quota provision were effective, it would put employers in an impossible situation: They could be held liable if they failed to adopt quotas and their work force happened to become imbalanced, but they also could be held liable if they used quotas in an effort to keep their work force numbers in line.

In addition, Section 104 of H.R. 1 also would restrict severely the right of individuals harmed by quotas or other race-conscious "remedies" imposed by consent decrees or court orders to seek redress through an anti-discrimination lawsuit of their own. Thus, for example, if an employer is ordered by a court to give half of all promotions to blacks, better qualified Asians or Hispanics who are denied promotions because of the new quota could be denied a day in court. The real point of Section 104 is to lock in quotas by protecting them from subsequent challenge.

Despite its revisions, emendations and explanations, H.R. 1 remains a quota bill. It thus still deserves a presidential veto.

William G. Laffer III
McKenna Fellow in Regulatory
and Business Affairs

CS

ID # 244726 CU

HU010 R: 6-12 11:15

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: David Mason

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

Subject: Ed Feulner's letter to the President on 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
CUOFC	ORIGINATOR	91/06/06 TC		C	91/06/17 CS
CUAT10	A	91/06/06 TC		C	91/06/17 CS
CUAT02	I	91/06/06	See Comments	C	91/06/17 CS
		/ /			/ /
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Referral Note: _____
Referral Note: _____
Referral Note: _____

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Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: No Further Action Required Per G. Lund 6-17-91 Closed out CS

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5/81

Executive Memorandum

RUSH!

The Heritage Foundation 214 Massachusetts Avenue N.E. Washington, D.C. 20002-4999 (202) 546-4400

6/03/91 Number 302

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William G. Laffer III
McKenna Fellow in Regulatory
and Business Affairs

The Heritage Foundation

A tax-exempt public policy research institute

June 5, 1991

John Schmitz
Deputy Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Schmitz:

I wanted to make sure you saw a copy of Ed Feulner's letter to the President on the "Civil Rights Act of 1991." The President and the entire Administration are to be commended for a courageous and forthright stand on this critical issue.

Sincerely,

David Mason
Director of Executive Branch Liaison

214 Massachusetts Avenue, N.E. • Washington, D.C. 20002-4999 • (202) 546-4400