Original FOIA Number: 2007-0758-S

2nd FOIA Number:

3rd FOIA Number:

4th FOIA Number:

5th FOIA Number:

FOIA MARKER

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Record Group:	Bush Presidential Records
Office:	Records Management, White House Office of (WHORM)
Series:	Subject File - General
Scanned/Unscanned:	Scanned

WHORM Category Code:	**HU010**
WHORM Category Name:	**Equality**

Document Number:	**176497 to 180433CU**	**Entire Category Processed**
Alpha File Name:		

CS

ID# 176497

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

HU 010

INCOMING

DATE RECEIVED: SEPTEMBER 21, 1990

NAME OF CORRESPONDENT: THE HONORABLE MICHAEL E. BARODY

SUBJECT: ATTACHES A LETTER TO PRESIDENT BUSH URGING THAT HE VETO THE CIVIL RIGHTS ACT OF 1990

COUNSEL'S OFFICE RECEIVED SEP 25 1990

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	90/09/21		C	90/09/25
REFERRAL NOTE: C.B. Gray - CWDSC	R	90/09/25		C	90/12/28 CS
REFERRAL NOTE: Cuato	A	90/09/26	NLO	C	90/12/28 CS
REFERRAL NOTE: MEMO FOR THE FILE					
REFERRAL NOTE:					
REFERRAL NOTE:					

COMMENTS: _____

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

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

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

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

176497

National Association
of Manufacturers

MICHAEL E. BARODY
Senior Vice President
Policy and Communications

September 19, 1990

Honorable John H. Sununu
Chief of Staff
The White House
Washington, DC 20500

Dear Governor Sununu:

I attach for your information a copy of my letter to President Bush urging that he veto the Kennedy-Hawkins bill.

If you believe it would be helpful, the National Association of Manufacturers would be pleased to assemble a group of corporate chief executives to meet with the president and assure him he has the total support of the business community in exercising the veto. Please let me know.

In closing, let me extend NAM's sincere appreciation for your efforts in trying to fashion a civil rights bill the president could sign.

Sincerely,

Michael E. Baroody

1331 Pennsylvania Ave., NW,
Suite 1500 - North Lobby
Washington, DC 20004-1703
(202) 637-3113 Fax. (202) 637-3182

National Association
of Manufacturers

MICHAEL E BARODY
Senior Vice President
Policy and Communications

September 19, 1990

The President
The White House
Washington D.C.

Dear Mr. President:

The National Association of Manufacturers commends your efforts to achieve a compromise on the Kennedy-Hawkins bill that would have produced legislation you could sign. Unfortunately, hard as you and your staff worked to forge compromise, it seems proponents labored just as hard to avoid one.

Accordingly, we urge that you veto the legislation and are joined in this by the members of the Fair Employment Coalition who are committed, with us, to full support of efforts to sustain a veto.

The U.S. business community is unalterably committed to equal opportunity in employment. We did not, therefore, take lightly our position against Kennedy-Hawkins as introduced. We held out the hope that each of the principles you enunciated on May 17th would prevail and be incorporated into the legislation. It became apparent, however, that none of these important principles would be accomodated by proponents. In the House of Representatives, the debate foundered in intense partisan division. This mirrored the divisive Senate experience, where an early cloture vote cut off debate before it had even started.

Like you, we find neither the House nor Senate passed version acceptable. It is clear that conferees cannot produce one version that is acceptable by compromising between two that are not. Despite your strenuous and persistent efforts, the chance for reasonable compromise is lost in this Congress.

You have our commitment of support in sustaining a veto of the Kennedy-Hawkins bill. We are also committed to working with you in the future on positive legislation to protect employment rights for all Americans in a way that maximizes opportunity, not quotas and litigation.

Sincerely,

Michael E. Baroody

1331 Pennsylvania Ave., NW,
Suite 1500 - North Lobby
Washington, DC 20004-1703
(202) 637-3113 Fax: (202) 637-3182

ID # 176615 CU

FULL.10 R: 9/24
8:30 R

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: John D. Nelman

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

Subject: Urges veto of the Civil Rights Bill of 1990

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 C	90/09/20		C	90/09/26 PS
CUHT10	Referral Note: A	90/09/21		C	90/09/26 PS
	Referral Note: C	/ /			/ /
	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

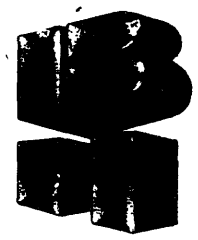
DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

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

Comments: Routed to Shirley Green

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



Brechbill & Helman

Construction Company, Inc., General Contractors

September 14, 1990

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

Dear Mr. President,

I am writing you to urge you to veto the so called Civil Rights Bill of 1990.

As I understand, this bill in its passed form would force us as employers to implement quotas to protect ourselves against the allegations of "callas indifference" or "intentional discrimination", and the penalties are rather severe since a jury trial with punitive and compensatory damages would be involved.

This is an unnecessary burden to put on American business, and unnecessarily exposes business to legal harassment. While there are still some problems for minority employment in this country, by and large any minority who wishes to apply themselves can work and advance in a fair environment and does not need the benefit of this additional legislation.

Sincerely,

John D. Helman
Secretary

JDH/jlh

cc: Chief of Staff John Sununu
White House Counsel C. Boyden Gray

phone: 717-263-4621 82 West Queen Street, Chambersburg, Pa. 17201

ID # 176785 CU
HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Nelson Lund

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

Subject: Civil Rights - Revised Memo for Signature: Gov. Sununu Re [illegible] Bill [illegible]; Final Draft Also Attached

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

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Orig	ORIGINATOR	90/09/12		C	90/09/12 PS
	Referral Note:				
	—	/ /		—	/ /
	Referral Note:				
	—	/ /		—	/ /
	Referral Note:				
	—	/ /		—	/ /
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FOR OUTGOING CORRESPONDENCE.
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Code = "A"
Completion Date = Date of Outgoing

Comments: ______

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THE WHITE HOUSE

WASHINGTON

September 12, 1990

MEMORANDUM FOR C. BOYDEN GRAY

FROM: NELSON LUND

SUBJECT: Civil Rights - Revised Memo for Package for Gov. Sununu

Attached is the revised memo from you to accompany the package of materials for Gov. Sununu.

Attachment

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01a. Memo	Case Number 176785CU From C. Boyden Gray to Governor Sununu RE: Civil Rights -- Discussions with Bill Coleman (2 pp.)	09/12/90	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Records Management, White House Office of (WHORM)
Series: Subject File - General
Subseries: Scanned
WHORM Cat.: HU010
File Location: 176497 to 180433CU

Open on Expiration of PRA
(Document Follows)
By JR (NLGB) on 2.14.05

Date Closed: 1/3/2000	**OA/ID Number:** 00002-001
FOIA/SYS Case #: 1999-0285-F	**Appeal Case #:**
Re-review Case #:	**Appeal Disposition:**
P-2/P-5 Review Case #:	**Disposition Date:**
AR Case #:	**MR Case #:**
AR Disposition:	**MR Disposition:**
AR Disposition Date:	**MR Disposition Date:**

RESTRICTION CODES

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

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

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

PRM. Removed as a personal record misfile.

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

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

THE WHITE HOUSE

WASHINGTON

September 12, 1990

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: C. BOYDEN GRAY

SUBJECT: Civil Rights -- Discussions with Bill Coleman

Attached are copies of Bill Coleman's September 7 letter to me; my reply of September 11; and his September 11 response to my reply. I have also attached copies of the language agreed upon by you and Senator Kennedy and of the language in the bill as it was passed by the House.

The distinction between the House language, which Coleman is pressing for, and the language you agreed to with Sen. Kennedy is absolutely crucial. Under the House language, every employment practice "involving selection," which means virtually all employment practices, would have to be defended in terms of job performance even if the employer adopted it for legitimate reasons unrelated to job performance. Thus, for example, each of the following practices would be indefensible:

- In order to reduce health-care costs, an employer refuses to hire people who smoke cigarettes.

- In order to promote good relations with the community, an employer refuses to hire members of the Ku Klux Klan.

- In order to raise the efficiency of its workforce, an employer refuses to hire drug addicts who are on methadone maintenance programs. (This is the Supreme Court's 1979 Beazer decision, which Coleman wants to overrule.)

- In order to create a pool of employees capable of advancing within the organization, an employer selects entry-level workers on the basis of their potential for being promoted to more demanding jobs.

- In order to reduce "inventory shrinkage," an employer refuses to hire individuals who have been convicted of theft.

- In order to enhance the firm's image in the community, an employer gives employees credit for community service when making promotion decisions. (On June 22, 1989, the President urged all business leaders "to consider community service in hiring, compensation, and promotiion decisions.")

These and countless other legitimate and healthy business practices would become legally indefensible under the definition of business necessity on which Coleman is insisting. This alone, quite apart from other serious problems with the wording of the definition in the House bill, will inevitably lead to quotas.

In his latest letter, Coleman implies that the language you agreed to fails "to tell the courts in what circumstances we expect them to apply the standards set forth in paragraph A. of the Bill and in what circumstances we expect them to apply the standards set forth in paragraph B. of the Bill." This is nonsense. The language you agreed to is every bit as clear on this point as Coleman's preferred language -- it's just that he doesn't what you and Kennedy agreed to tell the courts to do. (Although this fact by itself completely refutes Coleman's argument, I also find it ironic that he is suddenly concerned about our "duty" to give extremely detailed instructions to the courts in a context where we are attempting to codify a judge-made doctrine.)

In sum, the latest letter from Coleman gives me very little room to hope that further discussions with him will be fruitful.

Attachments

THE WHITE HOUSE

WASHINGTON

September 12, 1990

MEMORANDUM FOR C. BOYDEN GRAY

FROM: NELSON LUND

SUBJECT: Civil Rights - Final Package for Gov. Sununu

Attached is the final version of the package for Gov. Sununu.

Attachment

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(George Bush Library)

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THE WHITE HOUSE

WASHINGTON

September 12, 1990

MEMORANDUM FOR GOVERNOR SUNUNU

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In sum, the latest letter from Coleman gives me very little room to hope that further discussions with him will be fruitful.

Attachments

O'MELVENY & MYERS

400 SOUTH HOPE STREET
LOS ANGELES, CALIFORNIA 90071-2899
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TELEX 674122 • FACSIMILE (213) 669-6407

1800 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067-1589
TELEPHONE (213) 553-6700
TELEX 674097 • FACSIMILE (213) 669-6779

610 NEWPORT CENTER DRIVE
NEWPORT BEACH, CALIFORNIA 92660-6429
TELEPHONE (714) 760-9600 • (213) 669-6900
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NEW YORK, NEW YORK 10022-4611
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TELEX 129165 • FACSIMILE (212) 326-2061

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FACSIMILE (415) 984-8701

10 FINSBURY SQUARE
LONDON EC2A 1LA
TELEPHONE 071-256 8451
TELEX 918859 • FACSIMILE 071-638 8205

AKASAKA TWIN TOWER, EAST 18TH FLOOR
2-17-22 AKASAKA, MINATO-KU
TOKYO 107, JAPAN
TELEPHONE (03) 587-2800
TELEX J23775 OMMTOKYO • FACSIMILE (03) 587-9738

AVENUE LOUISE 106
1050 BRUSSELS, BELGIUM
TELEPHONE 32 (2) 647 06 50
TELEX OMSSA 20317 • FACSIMILE 32 (2) 646 47 29

WRITER'S DIRECT DIAL NUMBER
(202) 383-5325

September
7th
1 9 9 0

OUR FILE NUMBER

COUNSEL'S OFFICE
RECEIVED
SEP 7 1990

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

Dear Boyden:

In our conversation yesterday you gave the impression that you thought racial harassment cases were now tried before the EEOC and you thought that sexual harassment cases should be added and restricted to trial before the EEOC. I told you that to the best of my knowledge that was not the way it worked and, in fact, in private racial discrimination cases the EEOC usually did little and at the end of 180 days merely issued a letter which authorized the plaintiff to sue in court.

When I returned to the office I called the Lawyers' Committee to check if I were correct and they delivered to me this morning the attached memorandum which I think bears out my statement to you.

I also indicted to you that Wards Cove was already having an adverse affect on cases and that adverse affect includes matters other than shifting the burden of proof.

In my testimony before the Senate Committee, I introduced exhibits of studies done by Yale law students which bears out my statement to you. I am also sending to you a report by the ACLU which indicates the adverse affect of Wards Cove on plaintiffs.

If you have any questions, please call me as I do think we ought to report back to Governor Sununu before the end of the day.

Sincerely,

Bill

William T. Coleman, Jr.

Enclosures

CBG/NI
CBGray
NLund
Chron

THE WHITE HOUSE

WASHINGTON

September 11, 1990

Dear Bill:

At our meeting last Thursday on the civil rights bill, I agreed to review the cases you said you would send me (and to do some research of my own) to determine whether Wards Cove had caused a wholesale dismissal of cases on grounds of the "legitimate employment goals" definition of business necessity. As you will recall, you had said that there were more than 100 cases thrown out because of the Wards Cove's definition, that is, on grounds having nothing to do with burden of proof, on which we have agreed that Wards Cove could be overruled, or on particularity, on which we have agreed to accommodate your Sledge concerns.

I have now had an opportunity to review the material I received late Friday afternoon, and I can find no case, from your materials or my own research (or from the Justice Department or the EEOC) to support your claim. Leaving aside the unpublished district court case from Ohio, which is unavailable on LEXIS and which seems in any event to have been decided on burden-of-proof grounds, none of the cases cited in the ACLU report was decided on the basis of the Wards Cove definition of business necessity. In each of the four cited cases, moreover, the court of appeals either affirmed a pre-Wards Cove decision for the defendant or remanded with instructions that leave completely open the possibility that the plaintiffs will ultimately prevail. Finally, your materials ignore at least 10 rulings in favor of plaintiffs after Wards Cove:

- Nash v. City of Jacksonville, No. 87-3360 (11th Cir. July 9, 1990)
- Green v. USX Corp., Nos. 86-1554 and 86-1568 (3rd Cir. Feb. 23, 1990)
- Emanuel v. Marsh, 897 F.2d 1435 (8th Cir. 1990)
- United States v. City of Buffalo, 721 F. Supp. 463 (W.D.N.Y. 1989)
- E.E.O.C. v. Andrew Corp., No. 81 C 4359 (N.D. Ill. Sept. 12, 1989)
- Richardson v. Lamar County Board of Education, Civ. A. 87-T-568-N (M.D. Ala. Nov. 30, 1989)

- Sledge v. J.P. Stevens & Co., Civ. No. 1201 (E.D.N.C. Nov. 30, 1989)

- Bridgeport Guardians, Inc. v. City of Bridgeport, Civ. B-89-547 (D. Conn. March 21, 1990)

- Ross v. Buckeye Cellulose Corp., Civ. No. 86-48 (M.D. Ga. Aug. 11, 1989)

- Mayfield v. Thornburgh, Civ. A. No. 86-435 (D.D.C. July 30, 1990)

Since your fears of massive dislocations caused by this aspect of Wards Cove appear to be unrealized, I see no reason to alter the second part of the definition as worked out in the Kennedy-Sununu agreement, which you have rejected. In light of these facts, I believe you should reconsider your rejection of this agreement -- which, I would emphasize, arguably provides if anything for a narrower definition of business necessity than one finds in Griggs or in the dissent to Wards Cove. (The Kennedy-Sununu agreement uses the term "significant" to measure the employer's interest, whereas Griggs uses the term "genuine" and the Wards Cove dissent uses the term "valid.")

Sincerely,

Original signed by CBG

C. Boyden Gray
Counsel to the President

William T. Coleman, Jr., Esquire
O'Melveny & Myers
555 - 13th Street, N.W.
Washington, DC 20004-1109

O'MELVENY & MYERS

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LONDON EC2A 1LA
TELEPHONE 071-628 3456
TELEX 949559 • FACSIMILE 071-638 6208

ARASAKA TWIN TOWER, EAST 18TH FLOOR
2-7-32 ARASAKA, MINATO-KU
TOKYO 107, JAPAN
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AVENUE LOUISE 106
1050 BRUSSELS, BELGIUM
TELEPHONE 32 (2) 647 08 50
TELEX OMSSA 20317 • FACSIMILE 32 (2) 646 47 29

OUR FILE NUMBER

September
11th
1 9 9 0

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

Dear Boyden:

After receiving your letter of September 11, 1990, I called you with the hope that I could see you this afternoon or tomorrow morning. Hoping to see you, but nevertheless here are my comments on your letter of September 11, 1990:

1. Most lawyers who are knowledgeable in the field feel that Wards Cove in effect overruled Griggs and that Wards Cove applies a lesser standard in dealing with job selection.

2. Governor Sununu and Senator Kennedy had a meeting on July 12, 1990 and both agree that they wanted the courts to apply what is in paragraph (1) of the document headed "7/12/90 Language Without Changes" when the issue dealt with job selection and they wanted the courts to apply a different standard when dealing with things other than job selection.

3. In other words, there is no dispute over the two standards. The only problem is to make specific in which cases you apply a particular standard.

4. Since Wards Cove courts have dismissed cases and plaintiffs' lawyers have refused to bring cases which they used to bring when Griggs was the law.

I state again, we are beyond trying to define what is meant by business necessity as Senator Kennedy and Governor Sununu did that in the draft of 7/12/90. Our only task is to

indicate in which situation each definition applies. I think that is a task skillful lawyers can achieve. Even more important it seems inconsistent with an Administration that accuses some federal judges of not applying the statutory language but instead writing things into the statute which the Congress did not put there.

My sole controversy with you is that we have a duty to tell the courts in what circumstances we expect them to apply the standards set forth in paragraph A. of the Bill and in what circumstances we expect them to apply the standards set forth in paragraph B. of the Bill. I do not think that that is a decision which should be left to judicial discretion when the Congress has the opportunity to state what it means.

As stated above, I would like to see you this afternoon or tomorrow morning.

Sincerely,

Bill

William T. Coleman, Jr.

xeunuu – Kennedy Compromise

The term required by business necessity means:

(1) in the case of employment practices primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to successful performance of the job.

(2) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on such evidence as statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

Legislative History: "This langugage is meant to codify the meaning of business necessity as used in Griggs and other opinions of the Supreme Court."

Strike subsection 703(k)(1)(B) and insert at the end of (A) the following:

> provided, however, that if the elements of a decision-making process are not capable of separation for analysis, they may be analyzed as one employment practice, just as where the criteria are distinct and separate each must be identified with particularity.

Legislative History: Agreement that plaintiff can plead the elements of a decision-making process as one employment practice, and the determination of whether the elements in fact are not capable or separation for analysis shall be made after discovery.

{NOTE: This paragraph would be added at the end of the proposed legislative history with the last five words before the citation eliminated, as agreed, from the end of the last paragraph.}

No. 104—Part II

Congressional Record

United States of America

PROCEEDINGS AND DEBATES OF THE 101st CONGRESS, SECOND SESSION

Vol. 136 WASHINGTON, FRIDAY, AUGUST 3, 1990 No. 104

House of Representatives

CIVIL RIGHTS ACT OF 1990

Mr. HAWKINS. Mr. Speaker, pursuant to the provisions of House Resolution 449, I call up from the Speaker's table the Senate bill (S. 2104) to amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes, and ask for its immediate consideration.

The Clerk read the title of the Senate bill.

MOTION OFFERED BY MR. HAWKINS

Mr. HAWKINS. Mr. Speaker, I offer a motion.

The Clerk read as follows:

Mr. HAWKINS moves to strike all after the enacting clause and insert in lieu thereof the text of H.R. 4000, as passed by the House, as follows:

SECTION 1. SHORT TITLE.

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

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and

(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.

(b) PURPOSES.—The purposes of this Act are to—

(1) respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and

(2) strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

SEC. 3. DEFINITIONS.

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

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

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'group of employment practices' means a combination of employment practices that produces one or more decisions with respect to employment, employment referral, or admission to a labor organization, apprenticeship or other training or retraining program.

"(o)(1) The term 'required by business necessity' means—

"(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or

"(B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

"(2) In deciding whether the standards in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

"(3) This subsection is meant to codify the meaning of 'business necessity' as used in *Griggs v. Duke Power Co.* (401 U.S. 424 (1971)) and to overrule the treatment of business necessity as a defense in *Wards Cove Packing Co., Inc. v. Atonio* (109 S. Ct. 2115 (1989)).

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

SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.

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

NOTICE

An interim issue of the daily Congressional Record will be published during the August adjournment in order to permit Members to revise and extend their remarks.

All material for insertion must be signed by the Member and delivered to the respective offices of the Official Reporters of Debates (Room HT-60 or S-220 of the Capitol), Monday through Friday, between the hours of 10:00 a.m. and 3:00 p.m., through August 15. The interim issue will be dated August 15, 1990 and will be delivered on August 16.

None of the material printed in the interim issue of the Congressional Record may contain subject matter, or relate to any event, that occurred after the adjournment date.

Members of Congress desiring to purchase reprints of material submitted for inclusion in the Congressional Record during the adjournment may do so by contacting the Congressional Printing Management Division, at the Government Printing Office, on 275-2226, between the hours of 8:00 a.m. and 4:30 p.m. daily.

By order of the Joint Committee on Printing.

WENDELL H. FORD, *Chairman.*

CS

ID # 176806 CU

HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Clint Eulick

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

Subject: Copies of his book, Unfinished Business A Civil Rights Strategy for America's Third Century

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuello	ORIGINATOR	90/09/24	NAN	C	90/10/01 CS
Cuello	F	90/9/25		C	90/10/01 CS
		/ /			/ /
		/ /			/ /
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Referral Note:
Referral Note: See Comment
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: 10/1 book retained in counsel office CS

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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

LANDMARK
LEGAL FOUNDATION
CENTER FOR CIVIL RIGHTS

Jerald L. Hill
President
Landmark Legal Foundation

Clint Bolick
Director
Center for Civil Rights

9/19/90

Dear Mr. Gray,

Enclosed is a copy of my book presenting a civil rights vision based on individual liberty. Hope you enjoy it.

Please hang tough on the civil rights bill and keep up the great work. My best regards to Lee Liberman + Fred Nelson.

Sincerely,

Clint Bolick

Center for Civil Rights: 216 G Street, N.E. • Washington, D.C. 20002 • (202) 546-6045
Headquarters: 1006 Grand Avenue • 15th Floor • Kansas City, Missouri 64106 • (816) 474-6600

CS
INCOMING

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

ID# 176908

HU010

DATE RECEIVED: SEPTEMBER 24, 1990

NAME OF CORRESPONDENT: MR. MIKE KEYS

COUNSEL'S OFFICE
RECEIVED
SEP 25 1990

SUBJECT: URGES THE ADMINISTRATION TO AVOID FURTHER CONCESSIONS ON THE CIVIL RIGHTS ACT OF 1990

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
JOHN SUNUNU	ORG	90/09/24		C	90/09/24
REFERRAL NOTE: ~~EBGray~~ CMAC	R	90/09/25		C	90/11/19 CS
REFERRAL NOTE: CMAC 10	A	90/09/26		C	90/11/19 CS
REFERRAL NOTE:		__/__/__			__/__/__
REFERRAL NOTE:		__/__/__			__/__/__
REFERRAL NOTE:					

COMMENTS: No further action required. This tracking sheet may be closed out. Nelson Lund 11-19-90 CS

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

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

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

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

176908

MIKE KEYS, PRESIDENT<THE SAN FRA
510 7TH ST<
SAN FRANCISCO CA 94103 21AM

WESTERN UNION | MAILGRAM®

UNITED STATES POSTAL SERVICE

4-0170395264 09/21/90 ICS IPMRNCZ CSP WSHB
4158615060 MGMB TDRN SAN FRANCISCO CA 148 09-21 0114P EST

JOHN SUNUNU, CHEIF OF STAFF
WHITE HOUSE
WASHINGTON DC 20510

PLEASE DO NOT MAKE ANY FURTHER CONCESSIONS ON THE CIVIL RIGHTS ACT OF 1990. WE ARE CONCERNED THAT THE MOST RECENT ADMINISTRATION OFFER WILL NOT PRESENT RESORT TO QUOTAS. WE ARE ALSO DEEPLY TROUBLED THAT THE ADMINISTRATION PROPOSAL, AS WE UNDERSTAND IT, DOES NOT ADEQUATELY PROTECT THE RIGHTS OF NON-PARTIES TO CHALLENGE A CONSENT DECREE WHICH OPERATES TO HARM THEM. OUR MEMBERS, WHO ARE NOT PARTIES TO A CASE SHOULD HAVE THE RIGHT, REFLECTED IN MARTIN VS WILKS, TO CHALLENGE THE IMPLEMENTATION OF A CONSENT DECREE AFTER IT OPERATES TO HARM THEM. IT IS ONLY THEN THAT POLICE OFFICERS CAN DEMONSTRATE TO THE COURT HOW HE OR SHE HAS BEEN ACTUALLY HARMED, IN ADDITION TO MAKING LEGAL ARGUMENTS BASED ON THAT HARM.

MIKE KEYS, PRESIDENT
THE SAN FRANCISCO POLICE OFFICERS ASSN

510 7TH ST

SAN FRANCISCO CA 94103

13:16 EST

MGMCOMP

5241 (MM 10/89)

To reply by Mailgram Message, see reverse side for Western Union's toll-free numbers.

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12

ID # 176927 CU
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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: C. Boyden Gray

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

Subject: Civil Rights memo for Fred Sullivan

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuffe	ORIGINATOR	90,08,24		I	90,08,24
	Referral Note:				
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	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
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DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

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

Comments: _____

Keep this worksheet attached to the original incoming letter.
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5/81

THE WHITE HOUSE

WASHINGTON

August 24, 1990

MEMORANDUM FOR LOUIS SULLIVAN
SECRETARY
HEALTH AND HUMAN SERVICES

FROM: C. BOYDEN GRAY Original signed by CBG
COUNSEL TO THE PRESIDENT

SUBJECT: Civil Rights

Governor Sununu has suggested that I fax this draft op-ed piece to you to see whether you might like to sign it (with whatever changes you think appropriate) and submit it to the Post, as a way of advancing the discussions that will occur in September and as a gentle response to Art Fletcher.

THE WHITE HOUSE

WASHINGTON

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_____ Proposal not scanned.

_____ Statement not scanned.

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_____ Only table of contents scanned.

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_____ Bill not scanned.

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Comments:

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Congress has nearly completed a bill that would revolutionize the law of employment discrimination. But the legal obscurity of most provisions in the bill, along with the extreme speed of its passage through the legislative process, has prevented adequate public debate. This is unacceptable, for the legislation threatens to promote rather than prevent discrimination on the basis of race, religion, and sex.

So far, this has been a good year for civil rights. With President Bush's strong support, the Americans with Disabilities Act ("ADA") was enacted this summer. The most sweeping civil rights legislation in a generation, this law extends guarantees against discrimination to 43 million Americans with disabilities who never had these rights before.

Knowing the need for consensus, the ADA's sponsors spent several years working both with the Congress and with the business community that will have to comply with it. The legislation passed almost unanimously, and it has very broad support among all those who will be affected. The legislative process worked well -- so well that 17 countries are now following the U.S. lead in moving to adopt similar legislation. This unprecedented example of international civil rights leadership is a satisfying follow-up to the unique domestic leadership exercised by President Bush including his support for this legislation during the 1988 political campaign.

In sharp contrast, the bill titled "The Civil Rights Act of 1990" has been in the public arena for barely 7 months. It has provoked total opposition from those who must comply with it, it has destroyed the consensus on civil rights in Congress that has marked the modern era, and it shows few signs of support or even recognition outside the Beltway.

What's going on? This bill does not directly address the substantive rules of conduct that guide people in their lives. Instead, it rewrites the rules of legal warfare that apply in the specialized world inhabited by trial lawyers. Its ultimate effects on the lives of real people, however, will be enormous. Contrary to what its proponents claim, moreover, the bill does not merely "restore" the law that existed before a recent series of controversial Supreme Court decisions. Rather, it creates powerful new incentives for quota hiring, a practice that will foster destructive resentments in the workplace and beyond. Allocating jobs and promotions by race and sex is an insult to the civil rights of both the victim and the "beneficiary" of the quotas, since neither has the right to succeed on the basis of equal opportunity.

The quota problem is created mainly by the bill's treatment of the Supreme Court's Wards Cove decision and the "business necessity" rule. The issue arises in "disparate impact" cases when a plaintiff shows that a particular hiring or promotion practice has unintentionally caused a statistical imbalance in

the racial or sexual composition of an employer's work force. The employer can defend the practice by arguing that it is justified by legitimate business objectives.

The issue raised by Wards Cove is which party bears the ultimate burden of proof on that question. Wards Cove resolved an ambiguity in the prior law by placing the burden of proof on the plaintiff. That aspect of Wards Cove has been the focus of criticism of the decision by proponents of the Civil Rights Act of 1990, as well as by the Washington Post (editorial 8/6) and Arthur Fletcher (New York Times 8/19). But a statute shifting the burden to the employer has long been acceptable to the Administration and to a broad Congressional coalition led by Senator Nancy Kassebaum and (at least until "party discipline" intervened) by Democratic Congressman John LaFalce. Unfortunately, despite this and many other compromises offered during months of negotiations, proponents of the pending bill have unbendingly demanded a complete rewrite of disparate impact jurisprudence.

First, the bill permits plaintiffs to establish a legal violation on the basis of statistical disparities without any proof of what caused the disparities. But some disparities are not caused by the employer's practices. Even when none of an employer's practices caused a disparate impact on minorities or women, overall "bad" numbers will force the employer to prove that every

single practice either met the business necessity test or had no statistical effect. This is unprecedented and wrong.

Second, the bill creates a brand new "business necessity" test that would render countless sound and legitimate business practices legally indefensible. Employers would not be able to use criteria designed to select the best people for a job instead of just the minimally qualified. Nor could they reduce soaring health care costs by refusing to hire cigarette smokers or drug addicts currently on methadone maintenance. The latter example comes from a 1979 case that no one ever questioned until a few months ago. This and many other decisions would be overruled, all in the name of "restoring the law," and all without an opportunity for public debate or even knowledge.

Employers whose numbers are "off" will face the prospect of lengthy, expensive, and potentially polarizing lawsuits under rules that virtually guarantee they will lose in court. The use of quotas will insulate them from such litigation, and at far less expense and disruption to their businesses. The quotas will rarely be announced in public, but they will be met. "Business necessity" in the truest sense will see to that.

The Civil Rights Act of 1990 thus turns the landmark Civil Rights Act of 1964 on its head. For 26 years we have made tremendous progress toward equal opportunity under a statute that aimed directly at eliminating discrimination and expressly rejected the

concept of proportionate representation in the workplace. It should not now be replaced with a statute that coerces employers to adopt secret quotas to avoid lawsuits that are rigged against them.

Among other unacceptable provisions, the Civil Rights Act of 1990 also creates sweeping and unnecessary new tort-style remedies having nothing to do with any Supreme Court decision. These provisions will provide a great deal of new employment for lawyers, but not for anyone else. In fact, opportunities for employment will probably be lost since the costs of litigation cannot be exported, and our competitors abroad will gain an advantage in world markets.

When the House of Representatives took up this bill, one of the country's largest employers, two-thirds of whose employees are women and one-tenth black, encouraged its black and female managers to write their own Congressmen. This attempted exercise of freedom of speech prompted a leading civil rights group to threaten the company with a boycott unless these activities ceased. This raw blackmail, apart from its offensiveness, may help explain why so little is publicly known about the bill.

The Administration has offered to accommodate every reasonable concern articulated by proponents of the Civil Rights Act of 1990. Shifting the burden of proof, additional adjustments in the rules of disparate impact, and new remedies for workplace

harassment -- none of this has been enough. It's now time for proponents of the bill to explain precisely and publicly just what more they want and why.

"D# 177179

HU 010

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

COUNSEL'S OFFICE
RECEIVED
SEP 25 1990

DATE RECEIVED: SEPTEMBER 25, 1990

NAME OF CORRESPONDENT: MR. WAYNE C. CARTER

SUBJECT: URGES THE PRESIDENT NOT TO VETO THE CIVIL RIGHTS ACT OF 1990

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		ORG	90/09/25		C	90/11/19
REFERRAL NOTE: S. Green					F	90/11/19
					SG	A 90/11/26
REFERRAL NOTE: For SMG-159 sent					Reply	A 90/11/26
REFERRAL NOTE:						
REFERRAL NOTE:						
REFERRAL NOTE:						

DJ

COMMENTS: _____

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 4900 1161 ____

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

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

10

DELAWARE PARALYZED VETERANS ASSOCIATION, INC.
Suite 101 — Lafayette Building
25 South Old Baltimore Pike
Christiana, Delaware 19702
(302) 368-4898

177179

DELAWARE — THE FIRST STATE

September 21, 1990

The Honorable George Bush
The White House
Washington, DC 20500

Dear President Bush:

The membership of the Delaware Paralyzed Veterans Association, Inc. urges you to support the Civil Rights Act of 1990. Do not veto this bill.

Sincerely,

Wayne C. Carter
Executive Director, DPVA

WCC:pd

CS

ID # 177430CU
HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Jim Ciccone

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

Subject: forwards copy of letter from Secretary Sullivan to the President regarding Civil Rights

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Code	Completion Date YY/MM/DD
Cuoco	ORIGINATOR	90,09,24		C	90,09,27 CS
	Referral Note:				
Cuoco 10	A	90,09,25		C	90,09,27
	Referral Note:	ATTN: FYI			CS
Cuoco	I	90,09,25	J	C	90,09,25
	Referral Note:				
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	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES.
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
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FOR OUTGOING CORRESPONDENCE:
- Type of Response = Initials of Signer
- Code = "A"
- Completion Date = Date of Outgoing

Comments: The attached has been noted. This matter may be closed out.

Nelson Lund 9-27-90 CS

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Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
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5/81

THE WHITE HOUSE
WASHINGTON

Date: 09/22/90

TO: BOYDEN GRAY

FROM: **JAMES W. CICCONI**
Assistant to the President and
Deputy to the Chief of Staff

The attached has been forwarded
to the President.

SEP 24 1990

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C 20201

September 21, 1990

The Honorable George H. Bush
President
The White House
Washington, D.C. 20500

Dear Mr. President:

I am reluctant to distract you from the press of the many crucial issues before you. But, a successful outcome on the civil rights bill is a critically important matter of fundamental fairness , good government, and a well deserved legacy of your Administration. I, therefore, feel compelled to ask for your intervention at this time.

I believe the current talks on the civil rights bill are heading to impasse. While I am not expert on the technical issues, I am absolutely convinced such a disappointing outcome is avoidable and unnecessary. It is my understanding that the civil rights community and others interested in restoring the Griggs case, on their side, are eager to reach agreement on terms that are easily within your appropriate opposition to the establishment of quotas. Fundamentally, they seek a restoration of the situation to that which existed before the Supreme Court decision in Wards Cove.

For your part, I know your firm desire to sign a civil rights bill.

Despite apparent views to the contrary, I personally know that Bill Coleman and those representing the Administration are honestly and faithfully acting to mediate the very few remaining differences in language. Yet, there remains an impasse over words. Mr. President, the civil rights bill carries too much symbolic and substantive importance to the country and for your Administration to let failure occur, or undue political brinksmanship to be undertaken, over legal niceties and technical wordsmithing. Your personal preferences and beliefs on this matter are just too close to the desires of the civil rights leadership to allow failure to obstruct success.

Instruction from you to reach agreement can bring an immediate solution that will meet your requirements and the basic objectives of the civil rights leadership. I urge you to intervene at this time. A resolution of this matter before the House and Senate Conference will yield you immeasurable political benefit. It will also avoid unnecessary wrangling during the Conference that, I believe, will cause suspicion and mistrust in the Black community and among all those concerned about equality for some time to come, irrespective of any final settlement reached at the end of the Conference.

If I can be further helpful to you, I am at your disposal.

Sincerely,

Tom

ID # 177989 CU
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WHITE HOUSE
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Name of Correspondent: [illegible]

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Subject: H.R. 2015 [illegible] Act
Bill

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DISPOSITION CODES:
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AUTOCLAVE ENGINEERS, INC.

THOMAS C. GUELCHER
Vice President of Corporate Development & C.F O

August 29, 1990

The President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

SUBJECT: H.R. 4000/S. 2104, KENNEDY-HAWKINS BILL

As you well know, the subject legislation was passed without the modifications you had requested. In our opinion, this legislation, if enacted into law, would represent a substantive departure from previous law and call into question some of the fundamental principles of past civil rights legislation.

The quota issue is a major concern. Although this legislation admittedly does not mandate quotas, it certainly provides a strong incentive to adopt them by both raising the costs of litigation and by imposing on employers a greater burden of proof in showing nondiscriminatory hiring practices. Remedies available to the plaintiff, if successful in proving discrimination, are another concern. This legislation discourages settlement by employers and encourages litigation by employees. This reverses the goal of current law, which is to encourage conciliation prior to suit.

In a world becoming ever more competitive on a global basis, the last thing U.S. industry needs is more costly regulation. This is especially true for small companies such as Autoclave, which continue to provide a major portion of new employment opportunities.

Continued .....

2901 WEST 22ND STREET ▲ ERIE, PENNSYLVANIA 16506
P O BOX 4007 ▲ ERIE, PENNSYLVANIA 16512 ▲ 814/838-5804 ▲ FAX 814/838-5820

For all the reasons cited above, we urge you to follow through on your threatened veto. You have our wholehearted support.

Sincerely,

AUTOCLAVE ENGINEERS, INC.

Thomas C. Guelcher

Thomas C. Guelcher, Vice President
of Corporate Development and C.F.O.

:mfk

cc: Mr. J. C. Levinson
President, Autoclave Engineers, Inc.

Governor John Sununu
White House Chief of Staff

Mr. C. Boyden Gray, Esq.
White House Counsel

Mr. Peter Lunnie
National Assoc. of Manufacturers

ID # 178040 CU
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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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THE WHITE HOUSE

WASHINGTON

September 5, 1990

MEMORANDUM FOR C. BOYDEN GRAY

FROM: LEE S. LIBERMAN
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Civil Rights Legislation: Ken Blackwell, etc.

Attached for your review and signature is a memorandum to the President summarizing and attaching clips from the Cincinnati papers on Ken Blackwell's opposition to the bill and the results of a focus group in Chicago.

CBG:LSL:km1 (file/chron/bk
CBGray
LSLiberman
Chron

THE WHITE HOUSE

WASHINGTON

September 5, 1990

MEMORANDUM FOR THE PRESIDENT Original signed by

FROM: C. BOYDEN GRAY
COUNSEL TO THE PRESIDENT

SUBJECT: Civil Rights Legislation

Attached please find (1) clips from the Cincinnati Enquirer and Post regarding Ken Blackwell, the black Republican candidate for Congress (who stands a very good chance of winning) and his opposition to the Civil Rights Act of 1990 on the ground that it is a quota bill (TAB A); and (2) the results of an August 10 focus group of blacks in Chicago (TAB B).

The noteworthy points about each: despite the NAACP's attack on Blackwell, far from rushing to endorse the legislation, Blackwell's Democratic opponent Luken indicated that, although he would probably vote for the bill if it came to that, he "agrees with the [P]resident that there is a better bill out there." The Post further notes that "The attack also has many political observers wondering why the NAACP would attack one of the few black congressional candidates in the country who appears to have a chance of winning--and becoming the first black Republican member of the U.S. House of Representatives in 30 years."

The report on the focus group concludes that "How the President chooses to handle the Civil Rights legislation is not likely to significantly [a]ffect group members' perceptions of him." It indicates general unawareness of and lack of interest in the status of the legislation. (Some apparently thought it had already been signed, confusing it with the ADA, but the report notes that you "won no praise for signing what the group saw as a civil rights bill, perhaps an indication of the small amount of latent goodwill available.") The problems that were of real concern to the group were apparently "drugs, poor education systems and lack of jobs and how blacks were so hurt or threatened by these problems as to make the rights and empowerment notions relatively unimportant."

As the focus group report notes, it is a great leap to generalize from a single focus group to the whole country. Nevertheless, I pass it along for what it is worth. At least it and the Blackwell race are further evidence that the politics on this are far from overwhelmingly one-sided.

cc: John Sununu

July 27, 1990

MEMORANDUM

TO: Mary, Norm

FROM: David Hansen,
R.N.C. Political Division Survey Research

RE: Chicago Black Focus Group

The Committee sponsored a focus group session of 20 blacks in downtown Chicago on July 26. Participants were all Chicago residents recruited by criteria of age and education to broadly represent the city's black population. Both Southside and Westside neighborhoods were represented. Reported participation in the last mayoral election was also a recruitment requirement.

While I would not normally recommend that the findings from a single focus group of twenty participants be generalized to the whole country, black opinion relevant to us and the President seems so widely and strongly held that the results from this one group should be seriously considered.

The analogy would be for the results from a single focus group conducted on taxes and welfare in an all white, strongly Republican suburb to be generalized for Republicans everywhere. Of course you'd hear the same litany of complaints on these topics regardless of the number or location of your focus groups. As taxes and welfare are to us, so are we to blacks.

Perceptions of Bush

George Bush was viewed unfavorably by the participants of this single group: there was no perception that Bush has any more concern or compassion for blacks than Republicans in general. In March of 1989, focus group participants held more neutral, "give him a chance" attitudes towards Bush than what was heard in this group. Bush does not benefit from specific comparisons to Reagan (who was brought up often). With repeated references such as "Reagan and Bush and the conservative judges they have been appointing...", he is apparently seen as an accessory or heir to Reagan and his policies.

The response to Bush seems strongly conditioned by blacks' general attitudes towards Republicans/whites/the rich, but a few specific complaints were brought up.

Participants reacted very personally to an important policy difference they have with the Administration over fighting drugs. This group's consensus view was that tough enforcement meant only more jail space to incarcerate more blacks, and Bush was closely tied to the drive for more of this sort of enforcement. Bush as chastised for "thinking the only thing blacks need were jails" by one woman. Group members brought up repeatedly the need for increased treatment opportunities as the specific solution most likely to help the drug problem, and they saw little interest in this tactic on Bush's part.

Bush's role as the head of the CIA was cited as a sort of proof of his complicity in the complaint that Republicans, as being one and the same as the white power structure which holds blacks down, allow the flow of drugs into black communities. Both of these points were made in last year's focus groups. Connecting the CIA and permitting drugs to come into the country is the perception, widely held by the group, that the Agency (and Bush) was in league with the drug cartels since it was in league with Noriega.

Neil Bush was said to have "stolen money," and while not accusing the President of any sort of criminal complicity or cover-up, the group seemed to strongly hold his son's actions against him.

Civil Rights and Affirmative Action

How the President chooses to handle the Civil Rights legislation is not likely to significantly effect group members' perceptions of him. Neither the legislation nor affirmative action in general were volunteered as things Bush could do to help blacks when this question was asked of the group.

Many had heard radio or morning show announcements about the disabilities 'civil rights' bill scheduled to be signed that same day and confused this with the bill still awaiting the President's signature. When asked about "the civil rights bill passed by the Senate and waiting for the President to sign," the group concluded that the legislation had already been signed. Bush won no praise for signing what the group saw as a civil rights bill, perhaps an indication of the small amount of latent goodwill available to him if he were to sign the real legislation.

Blacks' sense of distrust and alienation from Republicans and the white power structure which Bush epitomized to these participants leads to an image which may not be hurt further by a veto of one piece of legislation. Even if black and Democratic elites were to work extensively at characterizing a veto as hurting blacks, groups members hold few positive evaluations of Bush which could be at stake.

'Affirmative Action,' 'Civil Rights,' and 'Economic Empowerment' were recognized by participants as being important for blacks generally, but none of the three concepts seemed to hold a very strong personal meaning to individuals in the group. This would also tend to limit the damage to Bush's image with blacks in the event of veto.

Affirmative action was viewed more favorably by Chicago participants than in last year's focus groups in Cleveland and Jackson, Mississippi. It was termed to be needed and helpful for "the quiet ones," which I think meant people unarticulate enough or forceful enough to fight against perceived wrongs. There were no negatives attached to affirmative action such as quotas working as a ceiling for black hiring, as were heard last year.

Most in the group seemed to think that civil rights is no longer as important an issue for blacks as it once was: drugs and basic economic survival have displaced it, but it was also said that "we **have** civil rights, its more human rights that's the issue, [including concerns about discrimination against older people, single mother with children, etc.]" and "we have civil rights, but we're not **using** them."

These attitudes were not unanimously held, as civil rights elicited stronger support from a couple of the younger, more politically aware participants, in the sense that they thought more needed to done with about it.

The group refused to answer a question of which was more important, civil rights or economic empowerment. Participants instead started to cite drugs, poor education systems and lack of jobs and how blacks were so hurt or threatened by these problems as to make the rights and empowerment notions relatively unimportant.

Personal Progress Under Bush

Participants for the most part have noticed no difference in their own lives, either for the better or the worse, in the time Bush has been president. Many claimed that they knew of others who have had it worse. This could reflect how black American lives are more economically vulnerable than whites even in calm general economic conditions. It may also show blacks picking up on the line of increasing dissatisfaction or anxiety with direction of the country which increasingly seems to be the storyline of the day with the white national media, despite individuals' relatively high satisfaction with their own condition.

What Can Bush Do to Help Blacks?

In direct response to this question, participants named education and jobs: they wanted direct education aid and low interest loans from the federal government, and more spending on jobs and policies which keep jobs in their communities. These same two issues were identified as the prime concerns of blacks in March of 1989.

Reagan and Bush were criticized for cutting education spending, and as was found last year, jobs programs and centers were criticized for failing to provide training the jobs which command respect in today's economy and pay decent wages. Computer skills was given as an example of the centers could be teaching, but are not.

In addition, two other issues came up often enough in the discussion to consider adding to the list of at least the Chicago black voter agenda: health care and housing. Participants wanted health care costs contained and availability guaranteed. In this sense the concerns were quite similar to ones heard recently with white focus group participants. Black voters had no trouble calling for a national health system. One termed the country to be in the "dark ages" with its health delivery system when compared to national systems elsewhere.

Although federal money and policy is involved, the housing problems sounded to be unique to Chicago and its public and private housing stock.

The Parties

The Democratic party was criticized with complaints which seemed to be based in the cynicism blacks have for white society's institutions, and it would be wrong to say that the group was deeply dissatisfied with the party. It did received special criticism for its disunity, and lack of follow through on behalf of, and loyalty to, its supporters. The Republican party was at an other point in the discussion credited with each of these qualities the Democrats were scored on.

While no personality-like comparisons were asked, another point of contrast was the perception of Democratic incompetence *versus* Republican competence. Republicans were not exactly praised for this trait as the benefactors of our competence were seen to be anyone but blacks: "The Republicans are all about the rich getting richer and the poor getting poorer."

In three job handling comparisons, participants gave the most credit to best being able to handle them to the Democratic party. For the most part, it was not through positive perceptions of what the Democrats stood for or had proven they could accomplish which led the group to these conclusions as much as it was consistent rejection of Republican aims and motives. The sole opportunity for the Republican party may be in the area of education, as there was no awareness of what we stood for, and no suspicions or misconceptions to overcome.

Participants rejected the argument that the Republican party could do a better job with solving the threat of drugs, for the reasons mentioned above. In the area of jobs, participants either scored Republicans for allowing the loss of industrial employment to overseas competition, or else ruefully allowed that the Party could do a better job at creating jobs, but only for the benefit of ourselves.

For the Republican party to prove that it respects blacks and should deserve their vote, it was clear that this group was looking for an enduring day-in, day-out sort of commitment. Again, creating jobs and improving educational opportunity were mentioned as areas where the Party could prove itself. One member called for the Party to nominate a black as vice-president as a way to prove its commitment, an assertion which went unchallenged.

GOP Surrogates

Participants were surprisingly unaware of Jack Kemp. Even his football fame was recalled only after some delay. Eventually the group arrived at a negative impression of him.

Luis Sullivan was recognized as the Secretary of Health, even when his first name was mistakenly read as "Leon". Reactions were positive, though there was no specific mention to his attacks on tobacco marketing to blacks, for example. "He's a brother, he's doing alright" was one comment. Considering the contempt participants had for the Republican party, a reaction of "He's sold out" or more derogatory than that could have been expected.

William Bennett was easily recognized to be the "Drug Czar." Reactions were quite negative, based on, again, the suspicion participants had about Republican motives for the drug war.

Black Third Party

There was not much support initially for a third party in Chicago. The reasoning seemed to go that for it to exist, it would have to succeed, and for it to succeed it would need someone like Harold Washington to lead it, and participants saw no potential leaders with that sort of stature.

Eventually, a consensus was formed that each in the group could support a third party candidate, but this seemed to be a forced decision, and not strong enough to base a strategy of promoting a third party candidate.

Hartigan

The group was aware of Hartigan, but had no firm opinions about him. Their expectations were not particularly high for him and were formed on basis of his race and not his party.

Edgar

Participants were more aware of Edgar than Hartigan. There was no strong rejection out of hand of him, and some media based around an event in the black community, perhaps a uniform or team warm-ups donation to a youth organization, was recalled and positively evaluated by many in the group.

THE WHITE HOUSE

WASHINGTON

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A new civil-rights consensus

8/24/90 Enquirer

BY KEN BLACKWELL
Guest Columnist

America needs to find and build a new civil-rights consensus. If this is to be done, I believe it will happen through defining and promoting policies that empower individuals to achieve their own potential through their own efforts in a society which permits rewards for their work and their accomplishments.

The Civil Rights Act of 1990 is mislabeled. It is a flagrant violation of truth in packaging. The original idea of civil rights was to remove irrelevant racial, religious and sexist barriers to individual accomplishment and fulfillment. This bill, like an old general, is still fighting the last war, and it is doing it so ineptly that it threatens the gains of the past.

The moral agreement which has opened greater opportunity for so many over the past three decades was based on judging people on their individual character, not on some group identification. The 1990 act, far from being race- or sex-neutral, defines people by race and sex, and insists that this be the primary factor in hiring decisions. Individuals would not be judged as individuals, but rather as parts of distinct groups which must be employed at levels "equal" to their proportion in the population.

An old principle assaulted

The bill reverses an indispensable principle of American justice, innocent until proven guilty. Discrimination would no longer mean wrongful intent to treat people differently because of race or sex. Instead, statistical disparities between a group's representation in a given work force vs. the local population would by themselves establish a presumption of discriminatory guilt. The burden of proof would be on employers to prove their innocence.

This bill does not empower people. It empowers lawyers. It allows such unprecedented opportunity for large contingency fees that it might better be called Aid to Dependent Lawyers. The courts will be opened to countless suits based on statistics alone, with no need to show actual discrimination, a litigation bonanza. Lawyers will be given incentive to file as

Ken Blackwell
. . . opposing fraudulent legislation

many cases as possible in the hope that a few will pay off with substantial windfalls.

Facing the prospect of statistically based suits and punitive damages, employers will have little choice but to adopt race- and sex-conscious quotas, and the cost of legal fees will force employers to settle before trial whether or not a suit has merit.

Congress has recognized the absurdity of this proposition by exempting itself from its provisions. This arrogant and hypocritical practice must stop. If laws make so little sense that the Congress cannot comply, neither should anyone else be subjected to them.

The act's promotion of hiring quotas and free-wheeling litigation is a serious defect, but even worse is that it distracts attention from congressional inaction on ideas which promise an actual beneficial effect on people's lives, ideas which will, if they work, increase economic opportunity for individuals.

This view is not new with me. Five years ago in testimony before the Republican Study Committee of the U.S. House of Representatives, I noted the need to address the intertwined problems of employment and education and housing: "You can't land a decent job because you don't have an education, and you can't get a decent education because of where you live, and you can't move to a decent neighborhood because you don't have a job."

I noted then and I still believe that we cannot in our society compel employers to give jobs to people who do not qualify to hold them. We cannot instill training by legislative decree. And we cannot meet mortgage payments with good wishes. The employment/education/housing problems are economic in nature, and we need economic solutions to whip them.

We do not know for sure what will work, but we need to start trying some ideas which may. Enterprise zones may well generate jobs in areas with concentrations of underemployed and unemployed people. Educational vouchers may well contribute to better education for inner-city children. Permitting tenants to buy public housing may well provide better homes for low-income people.

What we can be sure will *not* work is the fraudulent Civil Rights Act of 1990. I have urged President Bush to veto this piece of legislative legerdemain, and to ask Congress to get moving on a Reward for Individual Achievement Act of 1991.

An equal chance for all

Americans believe in fairness. Americans believe in giving everyone an equal chance to succeed or fail on individual merit. And a majority of Americans will support initiatives which give their economically disadvantaged fellow citizens a chance to improve their lives through education and work.

This is the path that can build an American consensus begin economic civil rights in a society where the character and effort of individual citizens, not the legislated group they were born into, make the difference in the quality of their lives.

Ken Blackwell, a former mayor and city councilman, is the Republican nominee for Congress from the First District.

TO: Andy Guyton

Blackwell takes snub in stride

NAACP attacks stand on civil rights legislation

By Sharon Moloney
Post staff reporter

J. Kenneth Blackwell views Tuesday's denunciation by the Cincinnati NAACP as just another of the disagreements he has had with various groups of voters throughout his career.

"As I've said on any number of occasions, I have a 14-year record of public service and it has been controversial," Blackwell said. "I'm sure that at some point or another there isn't a voter in Cincinnati who hasn't disagreed with me."

But the NAACP's blistering attack, aimed at Blackwell's opposition to the pending federal 1990 Civil Rights bill, has a new twist: In previous skirmishes on civil rights, Blackwell, a black Republican candidate for the 1st District U.S. House seat, has drawn heat from conservatives.

The attack also has many political observers wondering why the NAACP would attack one of the few black congressional candidates in the country who appears to have a chance of winning — and becoming the first black Republican member of the U.S. House of Representatives in 30 years.

Blackwell's record has been one of support for civil rights issues, although he hasn't always taken the generally accepted viewpoint.

As a Cincinnati City Council member in 1988, Blackwell spearheaded the drive to pass the city's banking ordinance that opened local bank records on commercial loans to minorities and low-income neighborhoods.

Blackwell's opponent in the 1st District race, Cincinnati Mayor Charles Luken, also voted for the banking ordinance. But some Cincinnati bankers and business leaders were reportedly so incensed at Blackwell's leadership on it that their financial support for his congressional campaign was said to be suffering.

Please see BLACKWELL, 12A

Blackwell

From Page 1A

Blackwell disputed such reports by pointing to the solid participation of many business leaders in his campaign, led by Clement Buenger, chairman and CEO of Fifth Third Bank, a one-time bitter opponent of the banking bill.

J. Kenneth Blackwell

Also in 1988, Blackwell urged a return to proportional representation as a method for electing City Council members. He also pushed an ordinance opening the city's private clubs to minorities and women.

As deputy undersecretary of the U.S. Department of Housing and Urban Development, Blackwell proposed a plan for the federal government to sell 50,000 single-family homes seized for mortgage default at low rates to low-income buyers.

None of this was mentioned by NAACP officials Tuesday when they denounced Blackwell for opposing the proposed federal Civil Rights Bill of 1990.

Frank Allison, Cincinnati chapter president, charged that Blackwell had "sold his soul for a mess of votes" in the 1st District. Allison said Blackwell had forgotten "from whence he came" and how civil rights laws of the past had helped him achieve his position as a prominent black politician. One of the NAACP's major concerns is the civil rights bill.

Blackwell countered that his opposition to the bill stems not from what civil rights legislation can achieve, but how the goal is achieved. He says the bill adopts a quota system and is intrinsically unfair.

About the bill

Republican J. Kenneth Blackwell contends that minority hiring provisions in the 1990 Civil Rights Act would unfairly lead to quotas. Blackwell's Democratic opponent, Charles Luken, largely shares Blackwell's view. The bill's provisions include:

- Bans on racial harassment in the work place.
- Barriers against reopening court-approved fair-hiring agreements.
- Changes making it easier to use statistics to win discrimination suits against employers and for punitive damages for women and other discrimination victims.
- A $150,000 cap on the amount of punitive damages for intentional discrimination that courts could award to women, religious minorities and the disabled. The bill would allow the cap to be exceeded by the amount of compensatory damages, if higher.

"I have a legitimate disagreement with Frank Allison, a difference in principal which I have been delineating very thoughtfully," Blackwell says. "We share the same goals. But it is not always necessary to arrive at those goals in the same way or by marching to the same drummer."

Luken largely shares Blackwell's view of the proposed Civil Rights Bill of 1990. He says he "agrees with the president that there is a better bill out there." He said he would probably vote for the bill if it comes to that, but he doubts it would ever come to a vote without significant amendments.

Much of the controversy over Blackwell in the minority community has its roots in his defection from the Charter Party in 1980 to join the GOP.

The Charter Party has a strong minority contingent, with strong ties to the National Association for the Advancement of Colored People. Its members include such politically and otherwise influential blacks as former Mayor Theodore Berry and former Council Member and NAACP president Marian Spencer. Some Charterites considered Blackwell's defection a betrayal of the party that first offered blacks a serious chance at elected office. Indeed, Berry once described Blackwell's defection publicly as "base ingratitude."

Blackwell further incurred their ire when he led the opposition to Charter-supported income tax increases and a Metro bus tax increase in the early 1980s.

Another sore point is Blackwell's stand on apartheid in South Africa.

While he vehemently opposes apartheid and has spoken out against it at the United Nations, he has long been criticized for opposing sanctions against businesses in South Africa. Blackwell contends that sanctions hurt black workers more than anyone else.

Whether the NAACP's charges Tuesday will hurt Blackwell's congressional campaign remains to be seen. The NAACP stopped short of saying it will campaign against Blackwell.

In their last race for City Council, Blackwell and Luken split about evenly votes in the minority sections of the city.

THE CINCINNATI ENQUIRER WEDNESDAY, AUGUST 29, 1990 SECTION D

NAACP leader blasts Blackwell civil rights view

BY KELLY LEWIS
The Cincinnati Enquirer

Angered by J. Kenneth Blackwell's opposition to a key piece of civil rights legislation, local NAACP President Frank Allison Tuesday said the First District congressional candidate had "stomped on the graves" of slain civil rights leaders.

At issue: the Civil Rights Act of 1990. Two versions of the bill have passed the House and Senate and are being reviewed in a conference committee.

Proponents say the measure will reverse Supreme Court decisions that have made it difficult for women and minority job-seekers to win discrimination lawsuits. Opponents say it amounts to establishing hiring quotas. President Bush has vowed to veto it.

Allison leveled his criticism in response to Blackwell's guest column in *The Enquirer* on Aug. 24. Blackwell, a Republican, called the legislation "fraudulent" and urged a veto.

Allison, who supports the bill, said he believed Blackwell's position is an attempt to attract voters from Cincinnati's western suburbs in the congressional race.

"Because he believes the only way to ensure his election is to appeal to the darkest side and deepest fears of voters, Mr. Blackwell has signed his name to an editorial which is devoid of both reason and factual support," Allison said.

"The saddest observation of all is that Mr. Blackwell, by his attack, has stomped on the graves of Medgar Evers, Martin Luther King Jr., and the other martyrs who have paid the supreme sacrifice for the Blackwells of this world to reap the benefits of a free society. Shame on you, Mr. Blackwell, for selling your soul for a mess of votes."

(Please see BLACKWELL, Page D-2)

Civil rights bill remains bogged in debate

Congress to work with two versions

BY KEITH WHITE
Gannett News Service

WASHINGTON — To its supporters, the proposed Civil Rights Act of 1990 puts teeth — pulled by the Supreme Court in recent decisions — back in anti-discrimination laws covering employment.

To its opponents, the bill threatens businesses with such severe penalties they will be forced to adopt quotas in hiring and promotion.

Similar versions of the bill have passed the House and Senate and now wait reconciliation when Congress returns next month.

President Bush opposed both bills and threatens to veto the final product, arguing it will result in the use of quotas — even though both versions specifically reject that.

"It will also foster divisiveness and litigation rather than conciliation and do more to promote legal fees than civil rights," wrote Bush in a letter to House Minority leader Bob Michel, R-Ill., earlier this month.

Although House members amended their bill to restrict the punitive damages that could be awarded in employment discrimination cases and to reject quotas, Bush said those changes do not cure the bill's defects.

The goal of this bill is to overturn five recent Supreme Court decisions that "have hamstrung the vigorous enforcement of this nation's civil rights employment laws," said Rep. Jack Brooks, D-Texas, during House debate.

Those decisions reversed previous law by putting the burden on employees to prove that suspicious hiring practices are due to discrimination rather than business necessities, limiting the opportunity for aggrieved persons to sue and permitting greater challenge of agreements to improve hiring and promotion of minorities.

Republicans say the bill would tilt things too far against the employer and make him or her vulnerable to lawsuits which would result in damages so great it could drive them out of business.

Blackwell

CONTINUED FROM PAGE D-1

The First District includes most of Cincinnati and suburban Hamilton County west of Mill Creek. Fourteen percent of the voting-age population is black, according to *The Almanac of American Politics 1990.*

Blackwell, responding to what he termed "very hard" allegations, said he has been a fighter for equal opportunity and equal access.

"I'm nobody's puppet. I'm man enough to take the heat for my opinions," he said.

Blackwell said that, in its present form, the civil rights bill is quota legislation.

"It stands to erode a basic element of the business process," Blackwell said. "Business owners must have the opportunity to choose the best person to get the job done without worrying about fitting a quota."

Blackwell pointed to his record against discrimination in home-mortgage lending by Cincinnati banks when he was a city councilman. While on council he sponsored an ordinance to force local banks to reveal the numbers of mortgage loans they made in predominantly black neighborhoods if they wanted to do business with the city.

Blackwell

Allison

Cincinnati Mayor Charles Luken, who is running against Blackwell in the congressional race, said the bill is not perfect but he would support it.

In the recent House vote, U.S. Rep. Willis D. Gradison Jr. R-Cincinnati, voted against the legislation. Charles Luken's father, U.S. Rep. Thomas A. Luken, Democrat-Cincinnati, voted for it.

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ASSOCIATED BUILDERS AND CONTRACTORS, INC.

October 19, 1990

The Honorable George H.W. Bush
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Bush:

Associated Builders and Contractors (ABC) urges you to veto the Civil Rights Act of 1990. As an association of 18,000 contractors, ABC is concerned that the punitive and compensatory provisions of S.2104 will benefit no one but lawyers.

Quotas, driven by statistical percentages and punitive and compensatory damages requirements in the bill, are not justified by the claim that Title VII remedies are inadequate. As the Washington Post has said, "Title VII's remedial structure certainly is not unique. Congress repeatedly has concluded that employment principally is an economic relationship and that employment injuries do not require tort remedies." The language of this bill simply creates new chaos to replace order and understanding.

The Kennedy/Hawkins solution to accusations of discrimination will require a company to identify each and every one of its practices that are involved in hiring, promotion, and its day-today business operations--no matter how trifling or hard to define--and then prove that none has an impact that is discriminatory: turning the time-honored concept of innocent until proven guilty on its head.

Again, ABC urges you to veto S2104.

Sincerely,

Charles E. Hawkins, III, CAE
Vice President, Government Affairs

729 15th Street, NW • Washington, DC 20005 • (202) 637-8800

CB

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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Name of Correspondent: Jack Curtin

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Subject: Civil Rights Act

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 CB	90/10/29		C	90/10/29 CB
	Referral Note:	cont. cones.			
Cuguay	A CB	90/10/29	BG	A	90/10/29 CB
	Referral Note:	Letter to Mr. Curtin			
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A - Appropriate Action
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I - Info Copy Only/No Action Necessary
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S - For Signature
X - Interim Reply

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THE WHITE HOUSE

WASHINGTON

October 29, 1990

Dear Mr. Curtin:

Your letter to the President of September 28 has been referred to me for reply.

We appreciate your taking the trouble to offer advice about achieving a successful compromise with the proponents of the Kennedy-Hawkins bill. Unfortunately, with regard to the negotiations that were in progress at the time of your letter, the sources you consulted do not seem to have provided you with a complete and accurate account of the relevant facts. Nor, I must say, is the legal analysis suggested in your letter consistent with my considered views or those of the Attorney General.

As you know, the President withheld his approval from the Kennedy-Hawkins bill. In your letter of September 28 you stated: "We ought not jeopardize the trust of deeply aggrieved persons that they will be able to obtain justice if they submit their disputes to the courts. The rule of law and the functioning of our society depend on the effectiveness with which our legal system continues to earn that trust." The President and the Administration agree completely with these statements. The President's veto message and the accompanying memorandum of the Attorney General, copies of which are enclosed, explain in detail the proper application of these principles to the Kennedy-Hawkins bill. I hope that your review of these documents will persuade you to lend your support to the President's decision and to the Administration's continuing effort to strengthen our Nation's employment discrimination laws.

Thank you again for writing.

Yours truly,
Original signed by CBG

C. Boyden Gray
Counsel to the President

Mr. John J. Curtin, Jr.
President
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Enclosures

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release October 22, 1990

TO THE SENATE OF THE UNITED STATES:

I am today returning without my approval S. 2104, the "Civil Rights Act of 1990." I deeply regret having to take this action with respect to a bill bearing such a title, especially since it contains certain provisions that I strongly endorse.

Discrimination, whether on the basis of race, national origin, sex, religion, or disability, is worse than wrong. It is a fundamental evil that tears at the fabric of our society, and one that all Americans should and must oppose. That requires rigorous enforcement of existing antidiscrimination laws. It also requires vigorously promoting new measures such as this year's Americans with Disabilities Act, which for the first time adequately protects persons with disabilities against invidious discrimination.

One step that the Congress can take to fight discrimination right now is to act promptly on the civil rights bill that I transmitted on October 20, 1990. This accomplishes the stated purpose of S. 2104 in strengthening our Nation's laws against employment discrimination. Indeed, this bill contains several important provisions that are similar to provisions in S. 2104:

- Both shift the burden of proof to the employer on the issue of "business necessity" in disparate impact cases.
- Both create expanded protections against on-the-job racial discrimination by extending 42 U.S.C. 1981 to the performance as well as the making of contracts.
- Both expand the right to challenge discriminatory seniority systems by providing that suit may be brought when they cause harm to plaintiffs.
- Both have provisions creating new monetary remedies for the victims of practices such as sexual harassment. (The Administration bill allows equitable awards up to $150,000.00 under this new monetary provision, in addition to existing remedies under Title VII.)
- Both have provisions ensuring that employers can be held liable if invidious discrimination was a motivating factor in an employment decision.
- Both provide for plaintiffs in civil rights cases to receive expert witness fees under the same standards that apply to attorneys fees.
- Both provide that the Federal Government, when it is a defendant under Title VII, will have the same obligation to pay interest to compensate for delay in payment as a nonpublic party. The filing period in such actions is also lengthened.
- Both contain a provision encouraging the use of alternative dispute resolution mechanisms.

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The congressional majority and I are on common ground regarding these important provisions. Disputes about other, controversial provisions in S. 2104 should not be allowed to impede the enactment of these proposals.

Along with the significant similarities between my Administration's bill and S. 2104, however, there are crucial differences. Despite the use of the term "civil rights" in the title of S. 2104, the bill actually employs a maze of highly legalistic language to introduce the destructive force of quotas into our Nation's employment system. Primarily through provisions governing cases in which employment practices are alleged to have unintentionally caused the disproportionate exclusion of members of certain groups, S. 2104 creates powerful incentives for employers to adopt hiring and promotion quotas. These incentives are created by the bill's new and very technical rules of litigation, which will make it difficult for employers to defend legitimate employment practices. In many cases, a defense against unfounded allegations will be impossible. Among other problems, the plaintiff often need not even show that any of the employer's practices caused a significant statistical disparity. In other cases, the employer's defense is confined to an unduly narrow definition of "business necessity" that is significantly more restrictive than that established by the Supreme Court in Griggs and in two decades of subsequent decisions. Thus, unable to defend legitimate practices in court, employers will be driven to adopt quotas in order to avoid liability.

Proponents of S. 2104 assert that it is needed to overturn the Supreme Court's Wards Cove decision and restore the law that had existed since the Griggs case in 1971. S. 2104, however, does not in fact codify Griggs or the Court's subsequent decisions prior to Wards Cove. Instead, S. 2104 engages in a sweeping rewrite of two decades of Supreme Court jurisprudence, using language that appears in no decision of the Court and that is contrary to principles acknowledged even by Justice Stevens' dissent in Wards Cove: "The opinion in Griggs made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose."

I am aware of the dispute among lawyers about the proper interpretation of certain critical language used in this portion of S. 2104. The very fact of this dispute suggests that the bill is not codifying the law developed by the Supreme Court in Griggs and subsequent cases. This debate, moreover, is a sure sign that S. 2104 will lead to years -- perhaps decades -- of uncertainty and expensive litigation. It is neither fair nor sensible to give the employers of our country a difficult choice between using quotas and seeking a clarification of the law through costly and very risky litigation.

S. 2104 contains several other unacceptable provisions as well. One section unfairly closes the courts, in many instances, to individuals victimized by agreements, to which they were not a party, involving the use of quotas. Another section radically alters the remedial provisions in Title VII of the Civil Rights Act of 1964, replacing measures designed to foster conciliation and settlement with a new scheme modeled on a tort system widely acknowledged to be in a state of crisis. The bill also contains a number of provisions that will create unnecessary and inappropriate incentives for litigation. These include unfair retroactivity rules; attorneys fee provisions that will discourage settlements; unreasonable new statutes of limitation; and a "rule of construction" that will make it extremely difficult to know how courts can be expected to apply the law. In order to assist the Congress regarding legislation in this area, I enclose herewith a memorandum from the Attorney General explaining in detail the defects that make S. 2104 unacceptable.

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Our goal and our promise has been equal opportunity and equal protection under the law. That is a bedrock principle from which we cannot retreat. The temptation to support a bill -- any bill -- simply because its title includes the words "civil rights" is very strong. This impulse is not entirely bad. Presumptions have too often run the other way, and our Nation's history on racial questions cautions against complacency. But when our efforts, however well intentioned, result in quotas, equal opportunity is not advanced but thwarted. The very commitment to justice and equality that is offered as the reason why this bill should be signed requires me to veto it.

Again, I urge the Congress to act on my legislation before adjournment. In order truly to enhance equal opportunity, however, the Congress must also take action in several related areas. The elimination of employment discrimination is a vital element in achieving the American dream, but it is not enough. The absence of discrimination will have little concrete meaning unless jobs are available and the members of all groups have the skills and education needed to qualify for those jobs. Nor can we expect that our young people will work hard to prepare for the future if they grow up in a climate of violence, drugs, and hopelessness.

In order to address these problems, attention must be given to measures that promote accountability and parental choice in the schools; that strengthen the fight against violent criminals and drug dealers in our inner cities; and that help to combat poverty and inadequate housing. We need initiatives that will empower individual Americans and enable them to reclaim control of their lives, thus helping to make our country's promise of opportunity a reality for all. Enactment of such initiatives, along with my Administration's civil rights bill, will achieve real advances for the cause of equal opportunity.

GEORGE BUSH

THE WHITE HOUSE,
October 22, 1990.

# # #

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

October 22, 1990

MEMORANDUM FOR THE PRESIDENT

FROM: DICK THORNBURGH
ATTORNEY GENERAL

SUBJECT: S. 2104, the "Civil Rights Act of 1990"

This memorandum sets forth my views, and those of the Department of Justice, on S. 2104, the "Civil Rights Act of 1990." Although the bill contains some provisions that we both would like to see become law, S. 2104 is fatally flawed.

On May 17, 1990, in a Rose Garden speech marking the reauthorization of the Civil Rights Commission, you outlined the principles that would guide the approach of your Administration to civil rights legislation. You stated that: (1) civil rights legislation must operate to obliterate consideration of factors such as race and sex from employment decisions; (2) it must reflect fundamental principles of fairness that apply throughout our legal system; and (3) it should strengthen deterrents against harassment in the workplace based on race, sex, religion, or disability, but should not produce a new and unjustified lawyers' bonanza.

S. 2104 is not consistent with these principles. It creates powerful incentives for employers to adopt quotas in order to avoid litigation. It shields discriminatory consent decrees from legal challenge under many circumstances. And it contains several provisions that will serve primarily to foster litigation rather than conciliation and mediation.

I. INCENTIVES FOR EMPLOYERS TO ADOPT QUOTAS

Sections 3 and 4 of S. 2104 create strong incentives for employers to adopt quotas. Although putatively needed to "restore" the law that existed before the Supreme Court's opinion in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), these sections actually engage in a sweeping rewrite of the law of employment discrimination.

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

THE WHITE HOUSE

WASHINGTON

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unintentionally but disproportionately exclude persons of a particular race, sex, ethnicity, or religion 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 like 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, 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. Supporters of S. 2104 argue that this rule imposes an unreasonable burden on employees, and have claimed that legislation is needed to redress this imbalance. As you know, your Administration is prepared to accept the shifting of that burden to the defendant.

Sections 3 and 4 of S. 2104, however, go far beyond this shift in the burden of proof. First, the bill effectively creates a new presumption of discrimination whenever a plaintiff shows a sufficient statistical disparity in the racial, sexual, ethnic, or religious makeup of an employer's workforce, even if the plaintiff fails to identify any employment practice that has caused the disparity. Second, it defines "business necessity" in

an unduly restrictive way. Finally, it imposes unreasonable restrictions on the type of evidence an employer may use in proving business necessity. In combination, these provisions will force employers to choose between (1) lengthy litigation, under rules rigged heavily against them, or (2) adopting policies that ensure that their numbers come out "right." Put another way, the bill exerts strong pressure on employers to adopt surreptitious quotas.

A. THE PRESUMPTION OF DISCRIMINATION ARISING FROM STATISTICAL DISPARITIES

Under Section 4, a plaintiff may bring a disparate impact case by alleging that a "group of employment practices results in" significant statistical disparity. "Group of employment practices" is very broadly defined in Section 3 to include any "combination of employment practices that produces one or more decisions with respect to employment . . ."

That definition provides no limitation whatsoever: all practices that combine to produce, say, hiring decisions -- for example, use of a high school graduation requirement, plus an interview, plus job references, plus a requirement of a clean criminal record -- all could be lumped together as a single "group." Thus, if an employer's bottom line numbers are "wrong," the employer can be forced to prove that every practice is required by "business necessity."

Section 4 includes language emphasizing this point. Subsection (k)(1)(B)(i) states that "except as provided in clause (iii), 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" (emphasis added). The exception in clause (iii) seems at first to state the opposite, but actually takes away what it seems to give. Specificity is not required where the defendant has "failed to keep such records" as are "necessary to make [the] showing" of specifically which "practice or practices are responsible for the disparate impact."

Thus, the bill requires any employer whose workforce has the "wrong" bottom line numbers to point to records showing that one of its practices could have been challenged as "responsible for" the disparate impact. This is not a mere recordkeeping requirement: it is essentially a transfer from the plaintiff to the defendant of the obligation to make out the bulk of the plaintiff's prima facie case. The transfer of obligations is merely disguised as a recordkeeping requirement. An employer who cannot meet the burden created by this rule faces the prospect of defending all of its employment practices under the business necessity test.

This concealed obligation does not merely create all the record-keeping burdens one would imagine, but also a classic Catch-22: if an imbalance in the employer's workforce is caused by something other than the employer's practices (by housing patterns, for example), so that the employer could not possibly have kept records showing which of its practices was responsible for the imbalance (because none was), a prima facie case will nevertheless be deemed to have been established because the group of practices "results in" a disparate impact and the employer cannot possibly explain it from his own records.

The notion of allowing plaintiffs to attack a "group of practices" without showing that each member of the group has caused a disparate impact has absolutely no basis in Supreme Court precedent. All Supreme Court cases prior to Wards Cove focused on the impact of particular hiring practices, and plaintiffs have always targeted those specific practices. See Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Dothard v. Rawlinson, 433 U.S. 321 (1977); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); Connecticut v. Teal, 457 U.S. 440 (1982); Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777 (1988). The new rule created in S. 2104 is inconsistent with a fundamental principle of civil litigation: that the plaintiff is obliged to identify what act of the defendant is responsible for the plaintiff's injury. Even apart from other defects in Sections 3 and 4 of this bill, the treatment of "groups of practices" creates extremely powerful incentives for employers to adopt quotas rather than go through the litigation necessary to establish the "business necessity" of every one of their employment practices.

B. THE BUSINESS NECESSITY DEFINITION AND THE EVIDENTIARY RESTRICTIONS

The risk of surreptitious quotas created by the bill's provisions on "groups of practices" is compounded by S. 2104's unreasonably restrictive definition of "business necessity" and by evidentiary restrictions imposed on employers trying to meet the "business necessity" test. I will discuss each in turn.

1. The Business Necessity Definition

S. 2104 forces employers to defend any employment practice "involving selection" by showing a "significant relationship to successful performance of the job." This standard is new; it is found nowhere in any holding of the Supreme Court. On its face, it is defective because a narrow requirement of this type denies that there can be legitimate and desirable selection or promotion practices aimed at objectives other than successful job performance. Moreover, its very novelty guarantees that it will

generate litigation for employers seeking to defend themselves. Finally, the bill's peculiar treatment of prior cases is likely to suggest to courts that ambiguities should be resolved against employers. In combination, these defects again make it likely that employers will adopt quotas rather than risk expensive litigation whose outcome will be highly uncertain.

First, simply taking the definition literally, S. 2104 would preclude employers from using hiring or promotion practices serving many legitimate business objectives. Consider, for example, an employer with a policy under which promotions are given only to employees who receive "outstanding" ratings in their current jobs. The justification for such a policy might be that it provides an incentive for all employees to perform in an outstanding manner, thereby promoting overall efficiency within the firm. Under S. 2104, however, the employer could not rely on that justification. Rather, he or she would have to attempt to prove that outstanding performance in an employee's current job was "significant[ly] relat[ed] to successful performance" of the next job. In many cases, this might be impossible.

There is no sound policy reason for confining in this way the justifications an employer may offer for its selection practices. Nor were such restrictions required by Supreme Court decisions prior to Wards Cove. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); New York City Transit Authority v. Beazer, 440 U.S. 568, 587 n.31 (1979); Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2790 (1988) (plurality opinion). Indeed, the Wards Cove dissent itself made clear that under Griggs any "valid business purpose" would suffice. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2129 (1989) (Stevens, J., dissenting).

The statement in S. 2104 that the definition of business necessity is intended to codify Griggs cannot alter the inconsistency between the bill's text and the language of Griggs, or the inconsistency between the bill's text and almost two decades of Supreme Court precedent interpreting Griggs. Instead, it merely guarantees confusion as courts attempt to sort out precisely what Congress had in mind. This confusion will be time-consuming and very expensive. And it will bring no benefit to the victims of discrimination.

Finally, in attempting to interpret the confusing definition of "business necessity," some courts would likely come to the conclusion that Congress intended to bring about certain highly undesirable results. First, the bill states that it is designed to overrule Wards Cove's "treatment of business necessity as a defense." Part of that treatment of business necessity, though, was the Court's rejection of the view that an employer is required to show that the "challenged practice [is] 'essential' or 'indispensable' to the employer's business." Wards Cove

Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989). As the Supreme Court noted, "this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils," including quotas. Id. Rather, the Court quite reasonably found that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." Id. at 2125-2126 (citing Watson and Beazer as well as Griggs). On this issue, as pointed out above, the dissent in Wards Cove is in agreement.

In light of these statements, a statutory provision overruling "the treatment of business necessity" in Wards Cove could reasonably be interpreted by many courts as returning the bill's definition of business necessity to the widely criticized standard included in the original incarnation of S. 2104 ("essential to effective job performance"). This inference would be strengthened by two other provisions of the bill: Section 2 ("Findings and Purposes") and Section 11 ("Construction"). Working in tandem, Sections 2 and 11 would likely lead some courts to resolve ambiguities in the bill against prior decisions by the Supreme Court and against defendants.

2. Evidentiary Restrictions

Finally, employers who must attempt to meet the business necessity test must do so by means of "demonstrable evidence." This is a new term invented by the bill, and no definition is provided. The bill contains a long list of types of evidence that courts may "receive," but the bill does not say that any of these necessarily constitutes "demonstrable evidence." Courts will likely understand the use of this new term (particularly in light of Sections 2 and 11 of the bill) to mean that Congress is referring to some category of evidence that is narrower than the category of evidence on which courts would otherwise rely. The effect of this provision, then, will apparently be to indirectly raise the burden of proof on the defendant beyond what it would otherwise be.

I am not aware that any justification has been offered for restricting the kind of evidence on which courts may rely in this context. Nor do I believe that it is advisable to force the courts to engage in guessing games about the meaning of a novel term like "demonstrable evidence." As with several other aspects of Sections 3 and 4 of S. 2104, this provision will cause uncertainty among attorneys who must advise employers about the meaning of the law, and it will cause confusion in the courts. No good purpose will be served, and a great deal of pointless expense will be imposed on those who must live under this new legislation.

C. CONCLUSION

So far as I am aware, there is no reported judicial decision indicating any need for a legislative modification of the manner in which the courts handle "group[s] of employment practices" under disparate impact theory. The rule created in S. 2104, moreover, is contrary to fundamental principles of civil litigation, and it is likely to lead in practice to unjust results.

There is no sound policy reason for the imposition of artificial restrictions of the kind created by S. 2104 on the justifications that employers may offer for legitimate employment practices. Similarly, there is no sound policy reason for imposing on defendants evidentiary restrictions that exist nowhere else in the law and that are not even clearly spelled out in the proposed statute.

The effect of these proposed changes in the law is clear: these provisions, if they are enacted, would exert strong pressure on employers to avoid having to defend their employment practices; the only practicable way for employers to do this would be to avoid the statistical disparities that would require them to mount such a defense. In short, many employers will see no real alternative to adopting quotas.

II. FUNDAMENTAL FAIRNESS AND THE INSULATION OF QUOTAS FROM LEGAL CHALLENGE

The bill in its current form also promotes quotas through its treatment of discriminatory consent decrees. It does this by totally denying certain individuals access to the courts to challenge illegal agreements -- in which these individuals had no part -- prescribing quotas that exclude them from employment opportunities.

Section 6 of S. 2104 would overrule the Supreme Court's decision in Martin v. Wilks, 109 S. Ct. 2180 (1989). That case arose in the context of a civil rights action, but it turned on principles of fairness and access to court that apply in every situation. The Court held that white firefighters who had not been parties to a consent decree that mandated racial preferences could have their day in court to contend that the decree violated their civil rights.

Section 6 would in many circumstances cut off this right and deny some persons, who were never notified of these decrees and had no chance to challenge them, their right to sue. For example, a plaintiff denied a promotion as a result of a discriminatory consent decree in place ten years before the

plaintiff was hired would in some circumstances be precluded by Section 6 from challenging the decree.

At the outset, it must be stressed that only certain settlements or consent decrees can be successfully challenged after Martin v. Wilks: those containing provisions that violate an innocent third party's rights under Title VII or the Fourteenth Amendment. The only justification offered for this provision is the systemic interest in the finality of judicial resolution of disputes. But while that interest is important, it should not be pursued at the cost of the requirement of fundamental fairness that underlies our judicial system, in which individuals are traditionally guaranteed a meaningful opportunity to assert their interests in court before they are bound by judicial action.

Moreover, the concern at which Section 6 is assertedly directed, viz. the fear of repeated challenges to the same decree, is largely chimerical. Existing legal doctrines are already adequate to head off nonmeritorious challenges to decrees. The doctrines of law of the case, res judicata, and stare decisis will allow courts to deal with them summarily at little expense in time or money to the parties. In addition, the rules of joinder make it relatively easy for parties to ensure that affected people have their day in court in the original action. The threat of an award of attorney fees against the losing party who brings a frivolous suit is a further deterrent to such challenges.

The bill's treatment of discriminatory seniority systems is in stark contrast with its treatment of discriminatory consent decrees. In dealing with seniority systems, Section 7(b) of the bill appropriately corrects a defect in current law by allowing a plaintiff to challenge a discriminatory seniority system or practice at the time it is applied to the plaintiff. Current law requires the challenge to be made at the time of the adoption of the seniority system. Consistent with the view taken by your Administration, proponents of S. 2104 have rightly argued that this is unreasonable and should be corrected by legislation.

So far as I am aware, S. 2104's sponsors have given no explanation for this inconsistency between Sections 6 and 7(b) of their bill. The effect of it, however, is quite clear: unlike seniority systems, consent decrees have frequently contained provisions establishing hiring and promotion quotas or racial preferences. Section 6 prevents legal challenges to such provisions. Thus, far from enhancing civil rights, Section 6 severely abridges them.

Section 9 contains a provision complementing the provisions in Section 6. For the first time, Title VII would say that certain civil rights plaintiffs -- those challenging the legality

of quotas adopted under a consent decree -- could be required to pay attorneys fees where their lawsuit was neither frivolous nor otherwise unreasonable. The clear effect would be to discourage many challenges to illegal discrimination. The creation of fundamentally unfair obstacles to the vindication of our citizens' civil rights has no place in a civil rights bill.

Proponents of S. 2104 argue that Section 13 of the bill, which states that nothing in the bill "shall be construed to require or encourage an employer to adopt hiring or promotion quotas," is a sufficient answer to the concerns raised here and in Part I of this memorandum. In fact, however, Section 13 is entirely unresponsive to them. The problem with Sections 3 and 4 is not that they directly require or encourage quotas, but rather that employers will in fact choose to adopt quotas in order to avoid having to defend their hiring practices under the unreasonable litigation rules established by the bill. And the problem with Section 6 is not that it requires quotas, but that it insulates them from challenge. In fact, in its present form, Section 13 has an exception from the anti-quota language (and from all other provisions in the bill) for quotas that might be contained in some court-ordered remedies, affirmative action plans, or conciliation agreements.

III. EXPANSION OF REMEDIES UNDER TITLE VII AND PROVISIONS AFFECTING THE INCENTIVES FOR LITIGATION

Section 8 of S. 2104 radically alters the Civil Rights Act of 1964 by making available unlimited compensatory damages, as well as punitive damages and jury trials, in most cases under Title VII.

As you noted in your May 17 speech, federal law should provide an adequate deterrent against harassment in the workplace, and additional remedies are needed to accomplish this goal. Although S. 2104 imposes a partial cap on punitive damages, thereby setting an important precedent in the area of federal tort remedies, the expansion of remedies contained in Section 8 is excessive. Section 8 is not confined to filling the gap where existing remedies are inadequate, such as in many cases of sexual harassment. Rather, it imports into our employment discrimination laws the entire panoply of tort remedies, punitive damages, and jury trials, which runs counter to the concepts of mediation and conciliation upon which Title VII is based. This will create unnecessary and counterproductive litigation, serving the interests of lawyers far more than the interests of aggrieved employees.

Other provisions in S. 2104 will also contribute unnecessarily to fostering litigation instead of conciliation. An amendment to 42 U.S.C. 2000e-5(k), for example, permits plaintiffs to recover attorneys fees for continuing to litigate

even if the judgment they ultimately obtain is less favorable than a settlement offer they rejected. Similarly, a new paragraph (2) in 42 U.S.C. 2000e-5k creates special rules impeding waiver of attorney's fees as part of settlement, which will inevitably discourage settlements because defendants will not be able to estimate accurately the total cost of the settlement to which they are being asked to agree.

Several other provisions of this bill have little to do with promoting civil rights. Rather, they seem principally designed to give plaintiffs special and unwarranted litigation advantages. Section 7(a) gives plaintiffs 2 years, rather than 180 days (or, in certain cases, 300 days), to file discrimination claims. Section 11 creates a special legislative rule of construction for civil rights cases that seems intended to encourage courts to resolve cases in favor of plaintiffs whenever possible. And Section 15 unfairly applies the changes in the law made by S. 2104 to cases already decided.

IV. CONCLUSION

S. 2104, in the form in which it has been presented to you, is seriously flawed. While it contains certain desirable provisions, these sections are greatly outweighed by the portions of the bill that are objectionable in the particulars specified above. Taken as a whole, S. 2104 would do far more to disrupt our legal system and to disappoint the legitimate expectations of our citizens for equal opportunity than it would to advance the goal, to which you and I are both committed, of strengthening the laws against employment discrimination.

ID # 179318 CU
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CUGRAY	Referral Note: I	90/10/02		C	90/10/02 PS
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THE WHITE HOUSE

WASHINGTON

October 29, 1990

Dear Mr. Curtin:

Your letter to the President of September 28 has been referred to me for reply.

We appreciate your taking the trouble to offer advice about achieving a successful compromise with the proponents of the Kennedy-Hawkins bill. Unfortunately, with regard to the negotiations that were in progress at the time of your letter, the sources you consulted do not seem to have provided you with a complete and accurate account of the relevant facts. Nor, I must say, is the legal analysis suggested in your letter consistent with my considered views or those of the Attorney General.

As you know, the President withheld his approval from the Kennedy-Hawkins bill. In your letter of September 28 you stated: "We ought not jeopardize the trust of deeply aggrieved persons that they will be able to obtain justice if they submit their disputes to the courts. The rule of law and the functioning of our society depend on the effectiveness with which our legal system continues to earn that trust." The President and the Administration agree completely with these statements. The President's veto message and the accompanying memorandum of the Attorney General, copies of which are enclosed, explain in detail the proper application of these principles to the Kennedy-Hawkins bill. I hope that your review of these documents will persuade you to lend your support to the President's decision and to the Administration's continuing effort to strengthen our Nation's employment discrimination laws.

Thank you again for writing.

Yours truly,

Original signed by CBG

C. Boyden Gray
Counsel to the President

Mr. John J. Curtin, Jr.
President
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Enclosures

2. tracking
sheets
attached
for close
out

179318CU

AMERICAN BAR ASSOCIATION

OFFICE OF THE PRESIDENT
JOHN J. CURTIN, JR.
AMERICAN BAR CENTER
750 N LAKE SHORE DRIVE
CHICAGO, ILLINOIS 60611
TELEPHONE 312/988-5109
ABA/NET ABA2876

September 28, 1990

President George Bush
The White House
Washington, D.C.

Dear Mr. President:

Four months ago, you announced in the Rose Garden your desire to sign a civil rights bill which addressed issues raised by several recent Supreme Court rulings involving employment discrimination. We share the view that you expressed that such legislation is vitally needed. We urge you to press for prompt resolution of the few remaining unresolved issues so that victims of discrimination in the workplace can vindicate their rights through the judicial process. This issue is not and must not be a partisan issue. Neither the Nation nor your Administration would be well served by a veto of this bill.

The single most important area of disagreement involves the Wards Cove provision of the bill, the section which has prompted your concern about quotas. The remaining differences, however, seem sufficiently narrow as to be capable of resolution. I understand that both sides have offered language intended to achieve compromise. In mid-July, Governor Sununu made a proposal that he said would put to rest any lingering apprehensions about quotas. Last week, on September 20, 1990, Senator Kennedy indicated a willingness to accept the framework of that proposal subject to what appear to be relatively minor changes. Both proposals use identically phrased definitions of business necessity. The major significant difference is that the Kennedy language includes specific examples to which those definitions would apply. If the Kennedy compromise is not acceptable exactly as written, the differences between these two proposals appear so minimal as to be readily resolvable. I am enclosing copies of both proposals.

Despite the minor differences between these proposals, no further progress has been made toward a final agreement. In fact, my understanding is that the day after Senator Kennedy offered his compromise, a very different proposal was suggested. That latest proposal contains a definition of business necessity that had already been rejected by both the Senate and the House. Instead of finalizing agreement, this most recent position has taken the negotiation process backwards. The negotiations need to be put back on track quickly if you are to achieve the successful compromise which you have indicated you want.

We ought not jeopardize the trust of deeply aggrieved persons that they will be able to obtain justice if they submit their disputes to the courts. The rule of law and the functioning of our society depend on the effectiveness with which our legal system continues to earn that trust. The 1990 Civil Rights Act is needed to ensure and assure that in our nation employment decisions involving basic civil rights will be made on the basis of fundamental fairness and equality, not on the basis of prejudice.

We at the ABA stand ready to offer whatever assistance you believe will advance the negotiations.

Sincerely yours,

John J. Curtin, Jr.

Enclosures

cc: Honorable John H. Sununu
Honorable C. Boyden Gray
Honorable Edward M. Kennedy
Honorable Augustus F. Hawkins

A. July 12, 1990
Sununu White House Draft

The term required by business necessity means:

(1) in the case of employment practices primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to successful performance of the job.

(2) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on as such evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

LEGISLATIVE HISTORY

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in Griggs and other opinions of the Supreme Court.

such as tests, recruitment, evaluations, or requirements of education, experience, knowledge, skill, ability or physical characteristics, or practices

The term required by business necessity means:

of

a

(1) in the case of employment practices primarily [redacted] related to measure job performance, the practice or group of practices must bear a significant relationship to successful performance of the job.

not covered by (1)

(2) in the case of [redacted] employment practices [redacted], the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

(such as a plant closing or bankruptcy), or that involve rules relating to drug, methadone, alchohol or tcbacco use,

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may [redacted] such evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as [redacted] is appropriate.

receive

.LEGISLATIVE HISTORY

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in Griggs and [redacted].

to overrule the treatment of business necessity as a defense in Wards Cove.

September 20, 1990

DEFINITION OF BUSINESS NECESSITY

"(o)(1) The term 'required by business necessity' means --

"(A) in the case of employment practices such as tests, recruitment, evaluations, or requirements of education, experience, knowledge, skill, ability or physical characteristics, or practices primarily related to a measure of job performance, the practice or group of practices must bear a significant relationship to successful performance of the job; or

"(B) in the case of employment practices not covered by (A) (such as a plant closing or bankruptcy), or that involve rules relating to drug, methadone, alcohol or tobacco use, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

"(2) In deciding whether the standards described in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may receive such evidence as statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

"(3) This subsection is meant to codify the meaning of 'business necessity' as used in Griggs v. Duke Power Co. (401 U.S. 424 (1971)) and to overrule the treatment of business necessity as a defense in Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989)."

. . .

September 20, 1990

GROUP OF EMPLOYMENT PRACTICES

Strike subsection 703(k)(1)(B) (with the exception of the except clause that follows 703(k)(1)(B)(i)(II)) and insert at the end of (A) the following:

> provided, however, that where a group of employment practices result in disparate impact, and either the impact of the elements within the group of employment practices is not reasonably capable of separation for analysis, or a complaining party demonstrates how separate elements within the group of employment practices contribute to the disparate impact, the group of employment practices may be analyzed as one employment practice, just as where the elements are distinct and separate, each must be identified with particularity.
>
> [(2) and (3) remain unchanged.]

[Legislative history: Agreement that plaintiff can plead a group of employment practices, and the determination of whether a group of employment practices in fact is not reasonably capable of separation for analysis shall be made after discovery.]

C. September 21, 1990 - White House Draft

Delete subsection 701(n) and reletter. Delete subsection (o) and insert in lieu thereof the following:

"(n)(1) The term 'required by business necessity' means--

"(A) in the case of employment practices primarily intended by the respondent to measure job performance by tests, evaluations, requirements of education, experience, knowledge, skill, ability or physical characteristics, the practice has a manifest relationship to the employment in question; or

"(B) in the case of employment practices that are not primarily intended by the respondent to measure job performance, such as, but not limited to, legitimate community or customer relationship efforts, veracity requirements, job safety or efficiency, rules relating to drug, methadone, alcohol or tobacco use, rules relating to compliance with local, State or Federal laws, rules relating to a prior criminal record, and selection criteria designed to screen applicants for the potential for future promotions, the respondent's legitimate employment goals are significantly served by -- even if they do not require -- the challenged employment practice.

"(2) In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on as such evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate."

Exclusive Legislative History for Sections 3 & 4: "This language is meant to codify the meaning of business necessity as used in Griggs and other opinions of the Supreme Court."

In subsection 703(k)(1), strike "under this section" and insert in lieu thereof "only". Strike subsection 703(k)(2) and renumber. Strike subsection 703(k)(1)(B) and insert at the end of (A) the following:

> "provided, however, that if the elements of a decision-making process are not capable of separation for analysis, they may be analyzed as one employment practice, just as where the criteria are distinct and separate each must be identified with particularity."

Legislative History: Agreement that plaintiff can plead the elements of a decision-making process as one employment practice, and the determination of whether the elements in fact are not capable of separation for analysis shall be made after discovery.

> {NOTE: Such a paragraph would be added at the end of the legislative history attached to Gov. Sununu's July 10 letter to Sen. Kennedy, with the last five words before the citation eliminated, as agreed, from the end of the last paragraph.}

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To JOHN SUNUNU	From A. F. JACOBSON
Co. WHITE HOUSE	Co. 3M
Dept.	Phone # 612/733-1091
Fax # 202/456-2397	Fax # 612/737-3110

Allen F. Jacobson
Chairman of the Board and
Chief Executive Officer

September 28, 1990

3M 1793600

CBGray

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

Dear Governor Sununu:

You may remember meeting a group of CEO's and myself early this summer when we expressed our concern about the Kennedy-Hawkins Civil Rights Act of 1990.

I understand that The White House has developed a draft alternative. If it would be of help, I should be only too pleased to have my people look at it, so they could provide any comments which might be helpful.

Sincerely,

Allen Jacobson

General Offices/3M
Building 220-14W, 3M Center
St. Paul, Minnesota 55144-1000
612/733 1091

TJ

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HU010

BILL TEXT Report for S.2104
As passed by the Senate (Engrossed)

101st CONGRESS
2d Session

S. 2104

AN ACT

To amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes.

II

101st CONGRESS
2d Session

S. 2104

AN ACT

To amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes.

==========

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

SECTION 1. SHORT TITLE.
This Act may be cited as the "Civil Rights Act of 1990".

SEC. 2. FINDINGS AND PURPOSES.
(a) Findings.--Congress finds that--
(1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and
(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.
(b) Purposes.--It is the purpose of this Act to--
(1) respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and

(2) strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

SEC. 3. DEFINITIONS.

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

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

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'group of employment practices' means a combination of employment practices that produces one or more decisions with respect to employment, employment referral, or admission to a labor organization, apprenticeship or other training or retraining program.

"(o)(1) The term 'required by business necessity' means--

"(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or

"(B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

"(2) In deciding whether the standards in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

"(3) This subsection is meant to codify the meaning of 'business necessity' as used in Griggs v. Duke Power Co. (401 U.S. 424 (1971)) and to overrule Ward's Cove Packing Co., Inc. v. Atonio (109 S. Ct. 2115 (1989)).

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

SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.

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

"(k) Proof of Unlawful Employment Practices in Disparate Impact Cases.--

"(1) An unlawful employment practice based on disparate impact is established under this section when--

"(A) a complaining party demonstrates that an employment practice 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; or

"(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of employment practices are required by business necessity, except that--

"(i) except as provided in clause (iii), 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;

"(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity; and

"(iii) if the court finds 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--

"(I) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact; and

"(II) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact.

"(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.

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

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

(a) In General.--Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 4) is further amended by adding at the end thereof the following new subsection:

"(l) Discriminatory Practice Need Not Be Sole Contributing Factor.--Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a contributing factor for any employment practice, even though other factors also contributed to such practice.".

(b) Enforcement Provisions.--Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended by inserting before the period in the last sentence the following: "or, in a case where a violation is established under section 703(l), if the respondent establishes that it would have taken the same action in the absence of any discrimination. In any case in which a violation is established under section 703(l), damages may be awarded only for injury that is attributable to the unlawful employment practice".

SEC. 6. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

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

"(m) Finality of Litigated or Consent Judgments or Orders.--

"(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws may not be challenged in a claim under the United States Constitution or Federal civil rights laws--

"(A) by a person who, prior to the entry of such judgment or order, had--

"(i) actual notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person and that an opportunity was available to present objections to such judgment or order; and

"(ii) a reasonable opportunity to present objections to such judgment or order;

"(B) by a person with respect to whom the requirements of subparagraph (A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order; or

"(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons.

A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.

"(2) Nothing in this subsection shall be construed to--

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which they intervened;

"(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal government;

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

"(D) authorize or permit the denial to any person of the due process of law required by the United States Constitution.

"(3) Any action, not precluded under this subsection, that challenges an employment practice that implements and is within the scope of a litigated or consent judgment or order of the type referred to in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.".

SEC. 7. STATUTE OF LIMITATIONS; APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.

(a) Statute of Limitations.--Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended--

(1) by striking out "one hundred and eighty days" and inserting in lieu thereof "2 years";

(2) by inserting after "occurred" the first time it appears "or has been applied to affect adversely the person aggrieved, whichever is

later,";

(3) by striking out ", except that in" and inserting in lieu thereof ". In"; and

(4) by striking out "such charge shall be filed" and all that follows through "whichever is earlier, and".

(b) Application to Challenges to Seniority Systems.--Section 703(h) of such Act (42 U.S.C. 2000e-2) is amended by inserting after the first sentence the following new sentence: "Where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agreement with the intent to discriminate on the basis of race, color, religion, sex, or national origin, the application of such system or practice during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice.".

SEC. 8. PROVIDING FOR DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) is amended by inserting before the last sentence the following new sentences: "With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k), or in the case of an unlawful employment practice under the Americans with Disabilities Act of 1990, other than an unlawful employment practice established in accordance with paragraph (3)(A) or paragraph (6) of section 102 of that Act, as it related to standards and criteria that tend to screen out individuals with disabilities)--

"(A) compensatory damages may be awarded; and

"(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded against such respondent;

in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon. Compensatory and punitive damages and jury trials shall be available only for claims of intentional discrimination. If compensatory or punitive damages are sought with respect to a claim of intentional discrimination arising under this title, any party may demand a trial by jury.".

SEC. 9. CLARIFYING ATTORNEY'S FEES PROVISION.

Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended--

(1) by inserting "(1)" after "(k)";

(2) by inserting "(including expert fees and other litigation expenses) and" after "attorney's fee,";

(3) by striking out "as part of the"; and

(4) by adding at the end thereof the following new paragraphs:

"(2) No consent order or judgment settling a claim under this title shall be entered, and no stipulation of dismissal of a claim under this title shall be effective, unless the parties or their counsel attest to the court that a waiver of all or substantially all attorney's fees was not compelled as a condition of the settlement.

"(3) In any action or proceeding in which any judgment or order granting relief under this title is challenged, the court, in its discretion, may allow the prevailing party in the original action (other than the Commission or the United States) to recover from the party against whom relief was granted in the original action a reasonable attorney's fee (including expert fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor or otherwise) such judgment or order.".

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

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended--

(1) in subsection (c), by striking out "thirty days" and inserting in lieu thereof "ninety days"; and

(2) in subsection (d), by inserting before the period ", and the same interest to compensate for delay in payment shall be available as in cases involving non-public parties, except that prejudgment interest may not be awarded on compensatory damages.".

SEC. 11. CONSTRUCTION.

Title XI of the Civil Rights Act of 1964 (42 U.S.C. 2000h et seq.) is amended by adding at the end thereof the following new section:

"SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS.

"(a) Effectuation of Purpose.--All Federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies.

"(b) Nonlimitation.--Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to repeal or amend by implication any other Federal law protecting such civil rights.

"(c) Interpretation.--In interpreting Federal civil rights laws, including laws protecting against discrimination on the basis of race, color, national origin, sex, religion, age, and disability, courts and administrative agencies shall not rely on the amendments made by the Civil Rights Act of 1990 as a basis for limiting the theories of liability, rights, and remedies available under civil rights laws not expressly amended by such Act.".

SEC. 12. RESTORING PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

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

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

(2) by adding at the end thereof the following new subsections:

"(b) For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

"(c) The rights protected by this section are protected against impairment by nongovernmental discrimination as well as against impairment under color of State law.".

SEC. 13. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this Act shall be construed to require an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex or national origin: Provided, however, That nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law.

SEC. 14. SEVERABILITY.

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

SEC. 15. APPLICATION OF AMENDMENTS AND TRANSITION RULES.

(a) Application of Amendments.--The amendments made by--

(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989;

(2) section 5 shall apply to all proceedings pending on or commenced after May 1, 1989;

(3) section 6 shall apply to all proceedings pending on or commenced after June 12, 1989;

(4) sections 7(a)(1), 7(a)(3) and 7(a)(4), 7(b), 8, 9, 10, and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) section 7(a)(2) shall apply to all proceedings pending on or commenced after June 12, 1989; and

(6) section 12 shall apply to all proceedings pending on or commenced after June 15, 1989.

(b) Transition Rules.--

(1) In general.--Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 4, 5, 7(a)(2), or 12, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

(2) Section 6.--Any orders entered between June 12, 1989 and the date of enactment of this Act, that permit a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by section 6, shall be vacated if, not later than 6 months after the date of enactment of this Act, a request for such relief is made. For the 1-year period beginning on the date of enactment of this Act, an individual whose challenge to an employment practice that implements a litigated or consent judgment or order is denied under the amendment made by section 6, or whose order or relief obtained under such challenge is vacated under such section, shall have the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered as that individual had on June 12, 1989.

(c) Period of Limitations.--The period of limitations for the filing of a claim or charge shall be tolled from the applicable effective date described in subsection (a) until the date of enactment of this Act, on a showing that the claim or charge was not filed because of a rule or decision altered by the amendments made by sections 4, 5, 7(a)(2), or 12.

SEC. 16. CONGRESSIONAL COVERAGE.

Title VII of the Civil Rights Act of 1964 (42 U.S.C. 200e et seq.) is amended by adding at the end thereof the following new section:

"SEC. 719. CONGRESSIONAL COVERAGE.

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

Passed the Senate July 18 (legislative day, July 10), 1990.

Attest:

Secretary.

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SPECIAL INSTRUCTIONS/REMARKS:

Legislative Affairs brought the House and Senate version of Civil Rights Act to the office saying that you had requested them.

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LEGI-SLATE Report for the 101st Congress Wed, August 15, 1990 3:52pm (EDT)

BILL TEXT Report for S.2104
As passed by the House (Engrossed Amendments), August 3, 1990.

KEY: << ... >> indicates struck-through text in printed version
{{ ... }} indicates bold parenthesis (usually numbered Senate amendments)
[[...]] indicates bold brackets in printed version

101st CONGRESS
2d Session

S. 2104

AMENDMENT

In the House of Representatives, U. S.,
August 3, 1990.
Resolved,
That the bill from the Senate (S. 2104) entitled "An Act to amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes", do pass with the following
AMENDMENT:
Strike out all after the enacting clause and insert:

==========

SECTION 1. SHORT TITLE.
This Act may be cited as the "Civil Rights Act of 1990".

SEC. 2. FINDINGS AND PURPOSES.
(a) Findings.--Congress finds that--
(1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and
(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.
(b) Purposes.--The purposes of this Act are to--
(1) respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and
(2) strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

SEC. 3. DEFINITIONS.

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

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

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'group of employment practices' means a combination of employment practices that produces one or more decisions with respect to employment, employment referral, or admission to a labor organization, apprenticeship or other training or retraining program.

"(o)(1) The term 'required by business necessity' means--

"(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or

"(B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

"(2) In deciding whether the standards in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

"(3) This subsection is meant to codify the meaning of 'business necessity' as used in Griggs v. Duke Power Co. (401 U.S. 424 (1971)) and to overrule the treatment of business necessity as a defense in Wards Cove Packing Co., Inc. v. Atonio (109 S. Ct. 2115 (1989)).

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

SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.

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

"(k) Proof of Unlawful Employment Practices in Disparate Impact Cases.--(1) An unlawful employment practice based on disparate impact is established under this section when--

"(A) a complaining party demonstrates that an employment practice 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; or

"(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of employment practices is required by business necessity, except that--

"(i) except as provided in clause (iii), 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;

"(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be

required to demonstrate that such practice is required by business necessity; and

"(iii) if the court finds 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--

"(I) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact; and

"(II) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact;

except that an employment practice or group of employment practices demonstrated to be required by business necessity shall be unlawful where a complaining party demonstrates that a different employment practice or group of employment practices with less disparate impact would serve the respondent as well.

"(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.

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

"(4) The mere existence of a statistical imbalance in an employer's workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation.".

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

(a) In General.--Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 4) is further amended by adding at the end thereof the following new subsection:

"(l) Discriminatory Practice Need Not Be Sole Contributing Factor.--Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a contributing factor for any employment practice, even though other factors also contributed to such practice.".

(b) Enforcement Provisions.--Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended by inserting before the period in the last sentence the following: "or, in a case where a violation is established under section 703(l), if the respondent establishes that it would have taken the same action in the absence of any discrimination. In any case in which a violation is established under section 703(l), damages may be awarded only for injury that is attributable to the unlawful employment practice".

SEC. 6. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

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

the following new subsection:

"(m) Finality of Litigated or Consent Judgments or Orders.--(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws may not be challenged in a claim under the United States Constitution or Federal civil rights laws--

"(A) by a person who, prior to the entry of such judgment or order, had--

"(i) actual notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person and that an opportunity was available to present objections to such judgment or order; and

"(ii) a reasonable opportunity to present objections to such judgment or order;

"(B) by a person with respect to whom the requirements of subparagraph (A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order; or

"(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons.

A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.

"(2) Nothing in this subsection shall be construed to--

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which they intervened;

"(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal government;

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

"(D) authorize or permit the denial to any person of the due process of law required by the United States Constitution.

"(3) Any action, not precluded under this subsection, that challenges an employment practice that implements and is within the scope of a litigated or consent judgment or order of the type referred to in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.".

SEC. 7. STATUTE OF LIMITATIONS; APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.

(a) Statute of Limitations.--Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended--

(1) by striking out "one hundred and eighty days" and inserting in lieu thereof "2 years";

(2) by inserting after "occurred" the first time it appears "or has been applied to affect adversely the person aggrieved, whichever is later,";

(3) by striking out ", except that in" and inserting in lieu thereof

". In"; and

(4) by striking out "such charge shall be filed" and all that follows through "whichever is earlier, and".

(b) Application to Challenges to Seniority Systems.--Section 703(h) of such Act (42 U.S.C. 2000e-2) is amended by inserting after the first sentence the following new sentence: "Where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agreement with the intent to discriminate on the basis of race, color, religion, sex, or national origin, the application of such system or practice during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice.".

SEC. 8. PROVIDING FOR DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

(a) Damages.--Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) is amended by inserting before the last sentence the following new sentences: "With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k)) or in the case of an unlawful employment practice under the Americans with Disabilities Act of 1990 (other than an unlawful employment practice established in accordance with paragraph (3)(A) or paragraph (6) of section 102 of that Act) as it relates to standards and criteria that tend to screen out individuals with disabilities)--

"(A) compensatory damages may be awarded; and

"(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded against such respondent;

in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon. Compensatory and punitive damages and jury trials shall be available only for claims of intentional discrimination. If compensatory or punitive damages are sought with respect to a claim of intentional discrimination arising under this title, any party may demand a trial by jury.".

(b) Limitation on Punitive Damages.--Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) is amended--

(1) by inserting "(1)" after "(g)"; and

(2) by adding at the end the following:

"(2) If the respondent has fewer than 100 employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, then the amount of punitive damages that may be awarded under paragraph (1)(B) to an individual against the respondent shall not exceed--

"(A) $150,000; or

"(B) an amount equal to the sum of compensatory damages awarded under paragraph (1)(A) and equitable monetary relief awarded under paragraph (1);

whichever is greater.".

SEC. 9. CLARIFYING ATTORNEY'S FEES PROVISION.

Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended--

(1) by inserting "(1)" after "(k)";

(2) by inserting "(including expert fees and other litigation expenses) and" after "attorney's fee,";

(3) by striking out "as part of the"; and

(4) by adding at the end thereof the following new paragraphs:

"(2) No consent order or judgment settling a claim under this title shall be entered, and no stipulation of dismissal of a claim under this title shall be effective, unless the parties or their counsel attest to

the court that a waiver of all or substantially all attorney's fees was not compelled as a condition of the settlement.

"(3) In any action or proceeding in which any judgment or order granting relief under this title is challenged, the court, in its discretion, may allow the prevailing party in the original action (other than the Commission or the United States) to recover from the party against whom relief was granted in the original action a reasonable attorney's fee (including expert fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor or otherwise) such judgment or order.".

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

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended--

(1) in subsection (c), by striking out "thirty days" and inserting in lieu thereof "ninety days"; and

(2) in subsection (d), by inserting before the period ", and the same interest to compensate for delay in payment shall be available as in cases involving non-public parties, except that prejudgment interest may not be awarded on compensatory damages".

SEC. 11. CONSTRUCTION.

Title XI of the Civil Rights Act of 1964 (42 U.S.C. 2000h et seq.) is amended by adding at the end thereof the following new section:

"SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS.

"(a) Effectuation of Purpose.--All Federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies.

"(b) Nonlimitation.--Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to repeal or amend by implication any other Federal law protecting such civil rights.

"(c) Interpretation.--In interpreting Federal civil rights laws, including laws protecting against discrimination on the basis of race, color, national origin, sex, religion, age, and disability, courts and administrative agencies shall not rely on the amendments made by the Civil Rights Act of 1990 as a basis for limiting the theories of liability, rights, and remedies available under civil rights laws not expressly amended by such Act.".

SEC. 12. RESTORING PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

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

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

(2) by adding at the end thereof the following new subsections:

"(b) For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

"(c) The rights protected by this section are protected against impairment by nongovernmental discrimination as well as against impairment under color of State law.".

SEC. 13. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that

are otherwise in accordance with the law.

SEC. 14. SEVERABILITY.

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

SEC. 15. APPLICATION OF AMENDMENTS AND TRANSITION RULES.

(a) Application of Amendments.--The amendments made by--

(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989;

(2) section 5 shall apply to all proceedings pending on or commenced after May 1, 1989;

(3) section 6 shall apply to all proceedings pending on or commenced after June 12, 1989;

(4) sections 7(a)(1), 7(a)(3) and 7(a)(4), 7(b), 8, 9, 10, and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) section 7(a)(2) shall apply to all proceedings pending on or commenced after June 12, 1989; and

(6) section 12 shall apply to all proceedings pending on or commenced after June 15, 1989.

(b) Transition Rules.--

(1) In general.--Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 4, 5, 7(a)(2), or 12, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

(2) Section 6.--Any orders entered between June 12, 1989 and the date of enactment of this Act, that permit a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by section 6, shall be vacated if, not later than 6 months after the date of enactment of this Act, a request for such relief is made. For the 1-year period beginning on the date of enactment of this Act, an individual whose challenge to an employment practice that implements a litigated or consent judgment or order is denied under the amendment made by section 6, or whose order or relief obtained under such challenge is vacated under such section, shall have the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered as that individual had on June 12, 1989.

(3) Final judgments.--Pursuant to paragraphs (1) and (2), any final judgment entered prior to the date of the enactment of this Act as to which the rights of any of the parties thereto have become fixed and vested, where the time for seeking further judicial review of such judgment has otherwise expired pursuant to title 28 of the United States Code, the Federal Rules of Civil Procedure, and the Federal Rules of Appellate Procedure, shall be vacated in whole or in part if justice requires pursuant to rule 60(b)(6) of the Federal Rules of Civil Procedure or other appropriate authority, and consistent with the constitutional requirements of due process of law.

(c) Period of Limitations.--The period of limitations for the filing of a claim or charge shall be tolled from the applicable effective date described in subsection (a) until the date of enactment of this Act, on a showing that the claim or charge was not filed because of a rule or decision altered by the amendments made by sections 4, 5, 7(a)(2), or 12.

SEC. 16. COVERAGE OF THE HOUSE OF REPRESENTATIVES.

(a) In General.--Notwithstanding any provision of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or of other law, the purposes of such title shall, subject to subsections (b) and (c), apply in their entirety to the House of Representatives.

(b) Employment in the House.--

(1) Application.--The rights and protections under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to paragraph (2), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(2) Administration.--

(A) In general.--In the administration of this subsection, the remedies and procedures made applicable pursuant to the resolution described in subparagraph (B) shall apply exclusively.

(B) Resolution.--The resolution referred to in subparagraph (A) is House Resolution 15 of the One Hundred First Congress, as agreed to January 3, 1989, or any other provision that continues in effect the provisions of, or is a successor to, the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988).

(3) Exercise of rulemaking power.--The provisions of paragraph (2) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

SEC. 17. OTHER STATUTE OF LIMITATIONS; NOTICE OF RIGHT TO SUE.

(a) Statute of Limitations.--Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended--

(1) in paragraph (1)--

(A) by striking out "180 days" and inserting in lieu thereof "2 years"; and

(B) by inserting "or has been applied to affect adversely the person aggrieved, whichever is later" after "occurred"; and

(2) in paragraph (2), by striking out "within 300 days" and all that follows through "whichever is earlier" and inserting in lieu thereof "a copy of such charge shall be filed by the Commission with the State agency".

(b) Notice of Right to Sue.--Section 7(e) of such Act (29 U.S.C. 626(e)) is amended--

(1) by striking out paragraph (2);

(2) by striking out the paragraph designation in paragraph (1);

(3) by striking out "Sections 6 and" and inserting "Section"; and

(4) by adding at the end thereof the following: "If a charge filed with the Commission is dismissed by the Commission, the Commission shall so notify the person aggrieved and within 90 days after the giving of such notice a civil action may be brought against the respondent named in the charge by a person defined in section 11 (29 U.S.C 630).".

SEC. 18. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts amended by this Act.

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Clerk.

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Name of Correspondent: Nelson-Hurd

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

Subject: Op-Ed on Civil Rights Law

ROUTE TO:

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

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
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FOR OUTGOING CORRESPONDENCE.
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

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5/81

THE WHITE HOUSE

WASHINGTON

September 14, 1990

MEMORANDUM FOR C. BOYDEN GRAY

FROM: NELSON LUND

SUBJECT: Op-Ed on Civil Rights

Attached are two versions of the op-ed. Draft 1 is the original from August 16; Draft 2 includes references to today's NYT editorial, some new examples of the business necessity problem from your September 12 memo to Governor Sununu, and a few other minor changes.

Attachment

cc: Lee Liberman
Fred Nelson

DRAFT 1

Congress has nearly completed a bill that would revolutionize the law of employment discrimination. But the legal obscurity of most provisions in the bill, along with the extreme speed of its passage through the legislative process, has prevented adequate public debate. This is unacceptable, for the legislation threatens to promote rather than prevent discrimination on the basis of race, religion, and sex.

So far, this has been a good year for civil rights. With President Bush's strong support, the Americans with Disabilities Act ("ADA") was enacted this summer. The most sweeping civil rights legislation in a generation, this law extends guarantees against discrimination to 43 million Americans with disabilities who never had these rights before.

Knowing the need for consensus, the ADA's sponsors spent several years working both with the Congress and with the business community that will have to comply with it. The legislation passed almost unanimously, and it has very broad support among all those who will be affected. The legislative process worked well -- so well that 17 countries are now following the U.S. lead in moving to adopt similar legislation. This unprecedented example of international civil rights leadership is a satisfying follow-up to the unique domestic leadership exercised by

President Bush including his support for this legislation during the 1988 political campaign.

In sharp contrast, the bill titled "The Civil Rights Act of 1990" has been in the public arena for barely 7 months. It has provoked total opposition from those who must comply with it, it has destroyed the consensus on civil rights in Congress that has marked the modern era, and it shows few signs of support or even recognition outside the Beltway.

What's going on? This bill does not directly address the substantive rules of conduct that guide people in their lives. Instead, it rewrites the rules of legal warfare that apply in the specialized world inhabited by trial lawyers. Its ultimate effects on the lives of real people, however, will be enormous. Contrary to what its proponents claim, moreover, the bill does not merely "restore" the law that existed before a recent series of controversial Supreme Court decisions. Rather, it creates powerful new incentives for quota hiring, a practice that will foster destructive resentments in the workplace and beyond. Allocating jobs and promotions by race and sex is an insult to the civil rights of both the victim and the "beneficiary" of the quotas, since neither has the right to succeed on the basis of equal opportunity.

The quota problem is created mainly by the bill's treatment of the Supreme Court's Wards Cove decision and the "business necessity" rule. The issue arises in "disparate impact" cases when a plaintiff shows that a particular hiring or promotion practice has unintentionally caused a statistical imbalance in the racial or sexual composition of an employer's work force. The employer can defend the practice by arguing that it is justified by legitimate business objectives, and the issue raised by Wards Cove is which party bears the ultimate burden of proof on that question.

Wards Cove resolved an ambiguity in the prior law by placing the burden of proof on the plaintiff. A statute shifting the burden to the employer has long been acceptable to the Administration and to a broad Congressional coalition led by Senator Nancy Kassebaum and (at least until "party discipline" intervened) by Democratic Cong. John LaFalce. Unfortunately, despite this and many other compromises offered during months of negotiations, proponents of the pending bill have unbendingly demanded a complete rewrite of disparate impact jurisprudence.

First, the bill permits plaintiffs to establish a legal violation on the basis of statistical disparities without any proof of what caused the disparities. But some disparities are not caused by the employer's practices. Even when none of an employer's

practices caused a disparate impact on minorities or women, overall "bad" numbers will force the employer to prove that every single practice either met the business necessity test or had no statistical effect. This is unprecedented and wrong.

Second, the bill creates a brand new "business necessity" test that would render countless sound and legitimate business practices legally indefensible. Employers would not be able to use criteria designed to select the best people for a job instead of just the minimally qualified. Nor could they reduce soaring health care costs by refusing to hire cigarette smokers or drug addicts currently on methadone maintenance. The latter example comes from a 1979 case that no one ever questioned until a few months ago. This and many other decisions would be overruled, all in the name of "restoring the law," and all without an opportunity for public debate or even knowledge.

Employers whose numbers are "off" will face the prospect of lengthy, expensive, and potentially polarizing lawsuits under rules that virtually guarantee they will lose in court. The use of quotas will insulate them from such litigation, and at far less expense and disruption to their businesses. The quotas will rarely be announced in public, but they will be met. "Business necessity" in the truest sense will see to that.

The Civil Rights Act of 1990 thus turns the landmark Civil Rights Act of 1964 on its head. For 26 years we have made tremendous progress toward equal opportunity under a statute that aimed directly at eliminating discrimination and expressly rejected the concept of proportionate representation in the workplace. It should not now be replaced with a statute that coerces employers to adopt secret quotas to avoid lawsuits that are rigged against them.

Among other unacceptable provisions, the Civil Rights Act of 1990 also creates sweeping and unnecessary new tort-style remedies having nothing to do with any Supreme Court decision. These provisions will provide a great deal of new employment for lawyers, but not for anyone else. In fact, opportunities for employment will probably be lost since the costs of litigation cannot be exported, and our competitors abroad will gain an advantage in world markets.

When the House of Representatives took up this bill, one of the country's largest employers, two-thirds of whose employees are women and one-tenth black, encouraged its black and female managers to write their own Congressmen. This attempted exercise of freedom of speech prompted a leading civil rights group to threaten the company with a boycott unless these activities

ceased. This raw blackmail, apart from its offensiveness, may help explain why so little is publicly known about the bill.

The Administration has offered to accommodate every reasonable concern articulated by proponents of the Civil Rights Act of 1990. Shifting the burden of proof, additional adjustments in the rules of disparate impact, and new remedies for workplace harassment -- none of this has been enough. It's now time for proponents of the bill to explain precisely and publicly just what more they want and why.

DRAFT 2

Congress is apparently on the verge of presenting the President with a bill that would revolutionize the law of employment discrimination. But the legal obscurity of most provisions in the bill, along with the extreme speed of its passage through the legislative process, has prevented adequate public debate. A recent New York Times editorial, for example, incorrectly asserts that the bill would restore a 1971 Supreme Court decision that was "overruled" last year. The absence of informed public discussion is unacceptable, for the legislation threatens to promote rather than prevent discrimination on the basis of race, religion, and sex.

So far, this has been a good year for civil rights. With President Bush's strong support, the Americans with Disabilities Act ("ADA") was enacted this summer. The most sweeping civil rights legislation in a generation, this law extends guarantees against discrimination to 43 million Americans with disabilities who never had these rights before.

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in moving to adopt similar legislation. This unprecedented example of international civil rights leadership is a satisfying follow-up to the unique domestic leadership exercised by President Bush, including his support for this legislation during the 1988 political campaign.

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What's going on? This bill does not directly address the substantive rules of conduct that guide people in their lives. Instead, it rewrites the rules of legal warfare that apply in the specialized world inhabited by trial lawyers. Its ultimate effects on the lives of real people, however, will be enormous. Contrary to what its proponents claim, moreover, the bill does not merely "restore" the law that existed before a recent series of controversial Supreme Court decisions. Rather, it creates powerful new incentives for quota hiring, a practice that will foster destructive resentments in the workplace and beyond. Allocating jobs and promotions by race and sex is an insult to the civil rights of both the victim and the "beneficiary" of the

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Second, the bill creates a brand new "business necessity" test that would render countless sound and legitimate business practices legally indefensible. Employers would not be able to use criteria designed to select the best people for a job. Nor could they reject applicants with felony convictions for theft or drug-dealing. Nor could they refuse to hire members of the Ku Klux Klan. Nor could they reduce soaring health care costs by refusing to hire cigarette smokers or drug addicts currently on methadone maintenance. The last example comes from a 1979 case that no one ever questioned until a few months ago. This and many other decisions would be overruled, all in the name of "restoring the law," and all without an opportunity for public debate or even knowledge.

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DRAFT 2

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The Administration has offered to accommodate every reasonable concern articulated by proponents of the Civil Rights Act of 1990. Shifting the burden of proof, additional adjustments in the rules of disparate impact, and new remedies for workplace harassment -- none of this has been enough. It's now time for proponents of the bill, including the editorial board of the New York Times to explain precisely and publicly just what more they want and why.

CB

ID # 180124 CU

HU 010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Mark Siler

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

Subject: Letter to Nancy Kassebaum from Senator Orrin G. Hatch re: the Clinical Laboratories Act of 1990

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	90/10/03	TC	C	90/10/25 CB
CUMT 10	I	90/10/04	TC	C	90/10/24 CB
Cuglby	I	90/10/04		C	90/10/24 DC
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Referral Note: _____

ACTION CODES.
A - Appropriate Action
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FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: 10-24-90 No FURTHER ACTION REQUIRED PER NELSON LUND 10-24-90 [signature]

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5/81

Office of Legislative Affairs

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

FACSIMILE TRANSMISSION COVER PAGE

TO: Boyden Gray — FAX No. 456-6279

Phone No. _____

FROM: Nick Wise — Phone No. 514-3951

DATE: 10/3/90 ~~, 1989~~

NUMBER OF PAGES: _____ (excluding transmittal page)

CONTENTS: Watch "Dear Colleague" letter (CRTS)

NFAR

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

10/03/90 15:07 DOJ:OLA 001

United States Senate
COMMITTEE ON LABOR AND HUMAN RESOURCES
WASHINGTON, DC 20510-6300

September 26, 1990

The Honorable Nancy Kassebaum
302 Russell Senate Office Building
Washington, D.C. 20510

Dear Nancy:

The Conference Report on the so-called Civil Rights Act of 1990 will soon be on the Floor. I urge you to vote against the Conference Report. Nothing in it cures the severe problems contained in the bill when you voted against it on July 18. It is still a quota bill.

A couple of provisions in the bill are being ballyhooed as "curing" the quota problem. As I will discuss briefly, they do not. This bill remains a powerful engine of reverse discrimination for the reasons I have described in previous correspondence and on the Floor. Let me respond to the so-called cures:

1. Added to Section 13: "Nothing in the amendments made by this Act shall be construed to require an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex, or national origin ...."

We have never argued that the bill "requires" anyone to adopt a quota. We have argued that by the rewriting of the rules of bringing disparate impact cases, employers will quietly resort to quotas in order to avoid costly lawsuits they have virtually no chance to win.

This language does not even address that problem, let alone solve it. In order to avoid quotas in this bill, several serious flaws must be addressed in Sections 3 and 4 of the bill:

First, a plaintiff must be required to identify the specific employer practices contributing to the disparate impact. Every Supreme Court disparate impact case has focused on particular hiring practices. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971) (high school diploma; general intelligence tests); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (written tests); Washington v. Davis, 426 U.S. 229 (1976) (written test); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height/weight requirements); Nashville Gas Co. v.

Satty, 434 U.S. 136 (1977) (pregnancy policies); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) (no-narcotics use); Connecticut v. Teal, 457 U.S. 440 (1982) (written test); Watson v. Ft. Worth Bank & Trust, 108 S.Ct. 2777 (1988) (supervisor's subjective judgment).

The Conference Report, however, is unchanged from the Senate version and mandates no such particularity requirement. The bill does retain the Senate's language that if a court finds, after discovery, that the plaintiff can identify specific practices contributing to the disparity, the plaintiff must so identify those practices. This language is meaningless because the plaintiff never has to allege that any specific practice or practices contribute to this disparity--the plaintiff can always allege some or all of the employer's practices result in a disparity. Only if the employer proves that any of his employment practices did not contribute to the disparity is the employer freed from defending those particular practices. Under this bill, the plaintiff can still have the trier of fact hear the case--and prevail--without ever identifying a specific practice causing the disparity. There is simply no case where a plaintiff shows an overall statistical disparity in a job and the employer does not have to satisfy its burden under the bill. A mere allegation that all of the employer's practices contribute to a disparity is still sufficient to force an employer to defend itself, including all of its practices.

I might add, this bill will resurrect the previously discredited "comparable worth" theory of pay discrimination under Title VII. Under this theory, pay discrimination exists if persons in a predominantly female or minority job are paid less than persons in a different job which is predominantly male or nonminority, and some subjective job evaluation study rates the two jobs as "comparable" in worth. The comparable worth theory rests on the assertion that an employer's whole set of compensation practices, including reliance on market place factors, causes a disparate impact on the compensation of women and minorities. This theory has been rejected by virtually every court which has considered it under Title VII. E.g., AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985).

Under this bill, however, the comparable worth theory will be a winner. Once a plaintiff alleges that all of an employer's pay-setting practices cause a disparity in pay between, say, a predominantly female and a predominantly male job, no employer relying on the marketplace can win that lawsuit. As Justice Kennedy said while a Judge on the Court of Appeals for the Ninth Circuit:

"Disparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process .... The instant case does not involve an employment practice that yields to disparate impact analysis. As we noted in an earlier case, the decision to base compensation on the competitive market, rather than on a theory of comparable worth, involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis. Spaulding, 740 F.2d at 708. In the case before us, the compensation system in question resulted from surveys, agency hearings, administrative recommendations, budget proposals, executive actions, and legislative enactments. A compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated by Dothard and Griggs; such a compensation system, the result of a complex of market forces, does not constitute a single practice that suffices to support a claim under disparate impact theory." AFSCME v. State of Washington, 770 F.2d at 1405-06.

This bill reverses this ruling and opens the door to previously unsuccessful claims which will play havoc with our economy.

Second, it is a fundamental principle of American jurisprudence that plaintiffs bear the burden of persuasion to demonstrate that the wrongdoing they allege actually occurred. Thus, for example, an employee or applicant must prove that the employer actually discriminated against him. E.g., New York City Transit Authority v. Beazer, 440 U.S. at 587 n.31 (1979). This bill reverses that traditional American legal principle by requiring an employer to prove its innocence, and to do so under a brand new, and more stringent, definition of "business necessity."

Third, the Griggs definition of business necessity, that a challenged practice has "a manifest relationship to the employment in question," must be utilized. Griggs v. Duke Power, 401 U.S. at 432 (1971). The Court consistently followed this standard after Griggs and before Wards Cove. E.g., Watson v. Ft. Worth Bank & Trust, 108 S.Ct. at 2790 (1988) (plurality opinion); Connecticut v. Teal, 457 U.S. at 446 (1982); New York City Transit Authority v. Beazer, 440 U.S. at 587 (1979); Dothard v. Rawlinson, 433 U.S. at 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. at 425 (1975). Instead, this bill retains the language of the Senate bill, that employment practices "must bear a significant relationship to successful performance of the job" or "to a significant business objective of the employer," a much more stringent standard.

Fourth, especially in employment cases, all Americans must be assured the right to challenge a consent decree or litigated judgment, entered in a case to which they were not parties, at the time the consent decree or judgment operates to deny them equal protection of the law or their federal statutory civil rights. Otherwise, reverse discrimination embodied in consent decrees will be insulated from challenge. This Conference Report retains the Senate's language which extinguishes the right to access to court to challenge racially preferential consent decrees.

The language added to Section 13 mentioned earlier does not even address any of these points. It won't work. Hortatory statements won't stop employers from using quotas under the pressure of this bill in order to avoid certain lawsuits they cannot win. Only changes to the operative provisions of the bill, as I have just described, will make it so.

2. "The mere existence of a statistical imbalance in an employer's workforce on account of race, sex, religion, or national origin, is not alone sufficient to establish a disparate impact violation." Added to Section 4 by the Senate-House conference.

As explained by its supporters, this amendment merely requires statistical comparisons between the racial composition of the jobs at issue and the racial composition of the qualified population in the relevant labor market. But, as I have argued for months, this does not solve the quota problem. Let's use plumbers as one example in the Senate Committee Report's Minority Views. Suppose a person from a specific group is rejected for a job at a plumbing company. Twenty percent of the plumbers in the relevant geographical labor market are from the group; but only 10 percent of the company's plumbers are from that group. The rejected applicant sues, alleging illegal disparate impact under this bill. All the plaintiff would have to do is show that in the relevant labor market 20 percent of the plumbers are from the group, that the employer has filled its plumber jobs at only half of that percentage, and allege that a group--or all--of the company's hiring practices cause the imbalance. At this point, the plaintiff wins--unless, in a reversal of traditional American jurisprudence, the employer can prove its innocence, which can only be done under a much stricter standard than the Supreme Court set forth in Griggs v. Duke Power.

In short, a mere imbalance in a job--regardless of the overall workforce's numbers--is still the basis of a claim under this bill. Moreover, a plaintiff never alleges a mere statistical imbalance anyway; he or she always alleges that

employer practices, together with the statistical imbalance, are illegal. This language does not solve the problem.

As President Bush wrote to Congressman John J. LaFalce on August 2, 1990: The changes in the bill made by House amendments, "in fact, do nothing to cure the bill's defects.... I want to make it clear that the adoption of these ... amendments would not result in a bill I can sign."

I also want to reiterate briefly that Section 6 of the bill continues to strip Americans of an equal right to a day in court. You were among the 40 senators who voted against Senator Kennedy's second degree "killer" amendment to my amendment which would have restored that right. The Conference Report denies Americans the access they now have to go into court and challenge a consent decree or litigated judgment entered in a case to which they were not even a party, on the ground that the operation of the judgment denies him or her the equal protection of the laws. This is terribly unfair.

I urge you to vote against the Conference Report on the Civil Rights Act of 1990.

Sincerely,

Orrin G. Hatch
United States Senator

OGH:mdt

CS

ID # 180339 CU
HU 010
R: 10/4
4:50 P

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: The President

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

Subject: Copy of note from POTUS to Gov. Sununu handed to him by Hon Fish re: Civil Rights

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Code	Completion Date YY/MM/DD
Cmoje.	ORIGINATOR	90/10/04		C	90/11/19 CS
CMAT :10	A	90/10/04		C	90/11/19 CS
Cmgray	I	90/10/04		C	90/10/04 CS
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Referral Note: _____

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

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

Comments: The captioned was overtaken by events. Nelson Lund 11-19-90 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

[redacted]

THE WHITE HOUSE
WASHINGTON

OCT 4 1990

DATE: October 4, 1990

FROM THE PRESIDENT

TO: Governor Sununu

[redacted]

This note was handed to me at this morning's meeting by Ham Fish.

[redacted]

cc: Boyden Gray

[redacted]

Oct 4, 90

Mr. President,

After months of negotiations on the Civil Rights Act involving key White House officials, I have become involved much as I did at this time last year in the Fair Housing legislation. The effort is to reach me to hear your concerns & heard your [redacted] in the ceremony introducing your Civil Rights Commission.

[redacted]

(over)

[redacted]

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC

10-4-90
Handed to me
W.H. 9 AM
by Ham
Fish

-2-

I am convinced all involved want a law as you do - and not just an issue. Why otherwise would the vote on the Conference Report be put off day after day to allow me time to negotiate?

[redacted]

I hope we will finish today and ask that you be receptive to our work product.

Livingston
Regula

Ham Fish

ID# 180398 R:10-15

HU010

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: OCTOBER 05, 1990

NAME OF CORRESPONDENT: THE HONORABLE VICKI MILES - LAGRANGE

SUBJECT: URGES THE PRESIDENT TO SIGN THE CIVIL RIGHTS ACT OF 1990

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	90/10/05		C	90/10/05
CUOFC CV C.Gray	REFERRAL NOTE:					
	REFERRAL NOTE: C/	R	90/10/10		C	90/10/30 TC
CUAT10		C	90/10/11		C	90/10/30 TC
S. Green	REFERRAL NOTE:	A	90/10/31	SG	A	90/11/02 TC
	REFERRAL NOTE: FOR SMG 159			Sent		
	REFERRAL NOTE:		/ /			/ /

COMMENTS: _____

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

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*ACTION CODES:	*DISPOSITION	*OUTGOING CORRESPONDENCE:
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS OF SIGNER
*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	* CODE = A
*D-DRAFT RESPONSE	*C-COMPLETED	*COMPLETED = ~~DATE~~ OF OUTGOING
*F-FURNISH FACT SHEET	*S-SUSPENDED	
*I-INFO COPY/NO ACT NEC		
*R-DIRECT REPLY W/COPY		
*S-FOR-SIGNATURE		
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REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE (ROOM 75,OEOB) EXT-2590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

18 c 398

Oklahoma State Senate

VICKI MILES-LaGRANGE
DISTRICT 48
STATE CAPITOL, ROOM 417-A
(405) 524-0126

LAW OFFICE
525 CENTRAL PARK DRIVE
SUITE 202A
P.O. BOX 18207
OKLAHOMA CITY, OKLAHOMA 73154
(405) 524-1800

STATE CAPITOL
OKLAHOMA CITY, OKLAHOMA
73105

CHAIRMAN
JUDICIARY

COMMITTEES:
APPROPRIATIONS
EDUCATION
HUMAN RESOURCES
STANDARDS AND ETHICS
TOURISM

October 1, 1990

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

Dear Mr. Sununu:

I am writing to ask you to urge the President to sign the Civil Rights Act of 1990. I believe that this is the most important piece of civil rights legislation since the Civil Rights Act of 1964.

I hope that you believe as I do that the civil rights gains made by our nation during the last several decades should not be eroded at any cost.

Thank you for your consideration.

Sincerely,

Vicki Miles-LaGrange

Vicki Miles-LaGrange
State Senator
District 48

18433

SEARCH - QUERY
00001 180433

180433 DOCUMENT= 1 OF 1

OPID JV
DOCDATE 901004
RECTYP IBA
MEDIA L
STAFF PRESIDENT BUSH
PRBUSH
NAME MR. JOHN E. JACOB
TITLE PRESIDENT AND CHIEF EXECUTIVE
OFFICER
ORG NATIONAL URBAN LEAGUE, INC.
STREET 500 EAST 62ND STREET
ADDR NEW YORK NY 10021
SUBJECT URGES THE PRESIDENT TO SIGN THE CIVIL RIGHTS
ACT OF 1990
SUBCODE HU010
LE
INDCODE 4900 4400
RPTCODE MI
ACTION CUGRAY ORG 901005 C 901113
CUAT10 RSA 901009 RESTAFFED TO FRED NELSON C 901113
CUAT21 RSA 901127 NOV 13 90 NL MEMO TO JAMES CICCONI C 901113
RM DSP 901116 CP2 A 901116

I0601 * END OF DOCUMENTS IN LIST. PRESS ENTER OR ENTER ANOTHER COMMAND.

11-16-90
per JE
" response to "
to P

JANUARY 24, 1991
Republican National Committee Winter
Meeting

file - Political Affairs
Mandatis for file
Coffee and 1-25-91 A.M.

Republican
National
Committee

Lee Atwater
Chairman

March 14, 1990

MEMORANDUM FOR JOE HAGIN
ED ROGERS
JIM WRAY

FROM: LEE ATWATER

SUBJECT: REQUEST FOR WHITE HOUSE RECEPTION FOR JANUARY 1991

The Republican National Committee will be holding its Winter Meeting in Washington D.C. on January 24-26, 1991. We would like to request a White House reception with the President and Mrs. Bush for RNC members and spouses on Thursday, January 24, 1991. Approximately 350 people would be in attendance.

The reception in June 1989 was a tremendous success, and I know that a return visit to the White House, following what promises to be an exciting and hard-fought campaign year, would be a memorable experience for all concerned.

Your assistance on this request is greatly appreciated. Please contact Pat Giardina in the Convention and Meetings Office at 863-8630 to work out the details.

Thanks again for all your help.

LA: gsp

Dwight D. Eisenhower Republican Center • 310 First Street Southeast • Washington, D.C. 20003 • (202) 863-8700
Telex: 701144 • FAX: 863-8820

NATIONAL URBAN LEAGUE
80 ANNIVERSARY
1910-1990

THE PRESIDENT

Jim C
Did this get
a reply

1111 14th St, NW
20005

October 4, 1990

Dear Mr. President:

The organizations comprising the Black Leadership Forum (BLF) strongly urge you to sign The Civil Rights Act of 1990.

Collectively, we believe that the legislation has legitimately reformed the Supreme Court decisions that have left a devastating impact on the employment rights of African Americans. We firmly believe that, with some 20 substantive changes that were made in the legislation to accommodate your concerns, The Civil Rights Act of 1990 is ready for your signature.

The changes in the legislation were made through "good faith" efforts during the entire negotiating period between congressional sponsors, the civil rights community experts and your staff, and the modifications in the legislation were in response to your suggestions. Given this, the legislation you will have before you not only reflects your interest but results in a well reasoned and most effective response to the Supreme Court's misinterpretation of critical employment discrimination law.

Mr. President, based on the aforementioned reasons we believe you will do what is right and sign "The Civil Rights Act of 1990" into law. We believe you will do this, Mr. President, because you have stated that you are not and would never be an anti-civil rights President and because we believe that you do not want racial discrimination and bigotry to prevail in this nation. Lastly, Mr. President we strongly believe that you will sign "The Civil Rights Act of 1990" because you firmly believe in what's right for America.

Mr. President, we remain committed to working with you on the most critical issue in the Black civil rights community. Therefore, we wish to meet with you to reaffirm our strong commitment to the legislation and to have the opportunities to clarify any misgivings about this legislation that you might have.

Sincerely,

/ceh

John E. Jacob
Chairman
Black Leadership Forum

Mr. George Bush
President of the
United States of America
The White House
1600 Pennsylvania Avenue
Washington, DC 20005

bcc: ✓ Patty Presack

10-C

C.B. 2476

18493

NATIONAL URBAN LEAGUE
80 ANNIVERSARY
1910-1990

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/ceh

John E. Jacob
Chairman
Black Leadership Forum

Mr. George Bush
President of the
United States of America
The White House
1600 Pennsylvania Avenue
Washington, DC 20005

BLACK LEADERSHIP FORUM MEMBERSHIP

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President and CEO
National Urban League, Inc.
500 East 62nd Street
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FAX: (212) 755-2140

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President and CEO
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FAX: (215) 951-2227

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President
SCLC
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Atlanta, GA 30312
(404) 522-1420
FAX: (404) 659-7390

William Lucy
President
Coalition of Black Trade Unionists
c/o 1625 L Street, NW
(202) 429-1200
FAX: (202) 223-6103

Thomas H. Watkins
President
National Newspaper Publishers
Association
N.Y. Daily Challenge
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Brooklyn, NY 11216
(718) 636-9500
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1301 Pennsylvania Avenue, NW - Suite 400
Washington, DC 20004
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FAX: (202) 626-8774

Dr. Rillastine Wilkins
President
National Black Caucus of Local
Elected Officials
2305 5th Street
Muskegon Heights, MI 49444

Daisy M. Wood
President
National Pan-Hellenic Council
7904 Montero Drive
Prospect, KY 40059
(502) 228-4441 (r)
(502) 452-7532 (b)
FAX: (502) 452-5075

Honorable Unita Blackwell
Mayor of Mayersville
President
National Conference of
Black Mayors
Mayersville, MI

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

ID# 180433

H4010 R 10-11

INCOMING

DATE RECEIVED: OCTOBER 05, 1990

NAME OF CORRESPONDENT: MR. JOHN E. JACOB

SUBJECT: URGES THE PRESIDENT TO SIGN THE CIVIL RIGHTS ACT OF 1990

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		ORG	90/10/05	CS		C 90/11/13
CLAT 10	REFERRAL NOTE:	A	90/10/09	CS		C 90/11/13
RESTAFF CLAT 21	REFERRAL NOTE:	A	90/10/09	CS		C 90/11/13
RM	REFERRAL NOTE:	BSP	90/11/16	CP2		A 90/11/16
	REFERRAL NOTE:		/ /			/ /
	REFERRAL NOTE:		/ /			/ /

COMMENTS: _____

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 4900 4400 ____

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

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

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

THE WHITE HOUSE

WASHINGTON

November 16, 1990

Dear John:

Thank you for your letter concerning the Kennedy-Hawkins legislation. As you know, I value your views and those of the Black Leadership Forum very highly and am always glad to have your thoughts.

You are absolutely right that all parties devoted vast amounts of time and energy to good faith negotiations over this bill. For my part, I consistently expressed my hope that I would receive a civil rights bill I could sign this year. To that end, I met on a number of occasions with congressional proponents of the Kennedy-Hawkins bill as well as with civil rights leaders and other concerned citizens, and I spelled out in private and in public remarks the principles that I believe must underlie such a bill.

First and foremost, as I have said, civil rights legislation must work to obliterate consideration of factors such as race, color, religion, sex, and national origin from employment decisions. Second, new legislation must reflect fundamental principles of fairness that apply throughout our legal system. Third, I believe that we can strengthen the deterrents our law provides against on-the-job harassment without replicating problems that mark our general system of tort law.

As you know, one of our primary concerns with the Kennedy-Hawkins bill was the extent to which it would have resulted in the adoption of quotas in the workplace. While I recognize that this is a point on which we disagree, I feel the concerns about quotas expressed by the Justice Department and other legal analysts were soundly, and honestly, based. Further, I am convinced that this overriding concern of our Administration could have been addressed in the bill while still retaining

its stated purpose. Indeed, this was in fact done in the legislation I forwarded to Congress. Under Kennedy-Hawkins, in many cases, an employer could find it impossible to defend legitimate business practices or counter unfounded allegations. In other cases, an employer's defense would be confined to an unduly narrow definition of "business necessity," one significantly more restrictive than the Supreme Court established in Griggs. Unable to defend legitimate practices in court, employers would be driven to adopt quotas in order to avoid liability or lengthy and costly litigation.

There are many points of agreement between Kennedy-Hawkins and the bill that I sent to Congress, and I want to build on these and fix the problems that remain, to produce a bill that I can sign.

You know of my long-standing personal commitment to the cause of equal rights. I want to assure you, John, that regardless of our differences on this bill -- differences I am convinced can still be bridged -- I will continue to enforce with vigor the sound body of anti-discrimination laws that now exists, and we will continue to fight against bigotry and prejudice in all their various forms.

Thank you again for writing, and best wishes.

Sincerely,

Mr. John E. Jacob
Chairman
Black Leadership Forum
National Urban League
500 East 62nd Street
New York, New York 10021

bcc: Ciccoli
Gray
Democrat

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Chairman
Black Leadership Forum
National Urban League
500 East 62nd Street
New York, New York 10021

GB/JWC/ckb-pt (11PRES)

CLEAR THRU JIM CICCONI

PRESIDENT TO SIGN

Dear John:

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First and foremost, ~~as I have said~~, civil rights legislation must work to obliterate consideration of factors such as race, color, religion, sex, and national origin from employment decisions. Second, new legislation must reflect fundamental principles of fairness that apply throughout our legal system. Third, I believe that we can strengthen the deterrents that our law provides against on-the-job harassment without replicating problems that mark our general system of tort law. (already?)

~~As you know,~~ One important problem with the Kennedy-Hawkins bill was the extent to which it would have introduced quotas. Primarily through provisions in which employment practices may unintentionally cause the disproportionate exclusion of members of certain groups, the bill would have given powerful incentives for employers to adopt hiring and promotion quotas. New and very technical rules of litigation in the bill would have made it difficult for employers to defend

legitimate business practices. In many cases, a defense against unfounded allegations would be impossible. In others, an employer's defense would be confined to an unduly narrow definition of "business necessity," one significantly more restrictive than the Supreme Court established in Griggs. Unable to defend legitimate practices in court, employers would be driven to adopt quotas in order to avoid liability.

America's promise must remain equal opportunity and equal protection under the law. There are many points of agreement between Kennedy-Hawkins and the bill that I sent to Congress, and I want to build on these and fix the problems that remain, in order to produce a bill that I can sign. In any event, my Administration ~~and I~~ will continue vigorously to enforce ~~with vigor the sound body of~~ anti-discrimination laws that now exists, and we will continue to fight against bigotry and prejudice in all their various forms. I ~~know~~ feel that we ~~will~~ shall continue to work together in that cause and in the efforts to expand equal opportunity for all Americans.

Thank you again for writing, and best wishes.

Sincerely,

Mr. John E. Jacob
Chairman
Black Leadership Forum
National Urban League
500 East 62nd Street
New York, New York 10021

GB/JWC/ckb (10PRESG)

PRESIDENT TO SIGN

THE WHITE HOUSE

WASHINGTON

90 NOV 13 PM 6:15

November 13, 1990

MEMORANDUM FOR JAMES W. CICCONI
ASSISTANT TO THE PRESIDENT AND
DEPUTY TO THE CHIEF OF STAFF

FROM: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Draft Letter to Mr. John E. Jacob Re: Kennedy-Hawkins Legislation

At your request, Counsel's office has reviewed the captioned draft letter. We have no legal objections.

We appreciate having had the opportunity to review this matter.

Kennedy
Hawkins

~~JC~~
JC

OK JC

Bayden

Maureen —
as predicted, one more round.
Probably another one after that too - if you
want to just set this up + give me printout
(as agree), that's fine.

Thanks, JG.

John —
paragraph 2, line 2 —
Should "good faith"
be hyphenated?

Maureen

Jim —
Please review + edit. If you have
no edits, I'll attach incoming.

JG —
Redo; then send to Once Boyden's
counsel for OK. Once
changes are included, I'll JG. 11/7
show to JHS. JG

THE WHITE HOUSE

WASHINGTON

Dear John:

Thank you for your letter concerning the Kennedy-Hawkins legislation. As you know, I value your views and those of the Black Leadership Forum very highly and am always glad to have your thoughts.

You are absolutely right that all parties devoted vast amounts of time and energy to good faith negotiations over this bill. For my part, I consistently expressed my hope that I ~~could sign~~ would receive a ~~second~~ civil rights bill I could sign this year. To that end, I met on a number of occasions with congressional proponents of the Kennedy-Hawkins bill as well as with civil rights leaders and other concerned citizens, and I spelled out in private and in public remarks the principles that I believe must underlie such a bill.

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As you know, one ~~important problem~~ our primary concerns with the Kennedy-Hawkins bill was the extent to which it would have ~~introduced~~ resulted in the adoption of quotas. ~~Primarily through provisions in which employment practices may unintentionally cause the disproportionate exclusion of members of certain groups, the bill would have given powerful incentives for employers to adopt hiring and promotion quotas. New and very technical rules of litigation in the bill would have made it difficult for employers to defend~~ addressed in the bill while still retaining its stated purpose. Indeed, this was in fact done in the legislation I forwarded to Congress. in the workplace.

While I recognize that this is a point on which we disagree, I feel the concerns about quotas expressed by the Justice Dept and other legal analysts were sound, and honestly based. Further, I am convinced that this overriding concern of our administration could have been

legitimate business practices. In many cases, defense against unfounded allegations would be impossible. In others, an employer's defense would be confined to an unduly narrow definition of "business necessity," one significantly more restrictive than the Supreme Court established in Griggs. Unable to defend legitimate practices in court, employers would be driven to adopt quotas in order to avoid liability.

America's promise must remain equal opportunity and equal protection under the law. There are many points of agreement between Kennedy-Hawkins and the bill that I sent to Congress, and I want to build on these and fix the problems that remain, to produce a bill that I can sign. In any event, my Administration and I will continue to enforce with vigor the sound body of anti-discrimination laws that now exists, and we will continue to fight against bigotry and prejudice in all their various forms. I know that we will continue to work together in that cause and in the efforts to expand equal opportunity for all Americans.

Thank you again for writing, and best wishes.

Sincerely,

PP

Mr. John E. Jacob
Chairman
Black Leadership Forum
National Urban League
500 East 62nd Street
New York, New York 10021

FROM
THE WHITE HOUSE
WASHINGTON, D C.

Mr. John E. Jacob
Chairman
Black Leadership Forum
National Urban League
500 East 62nd Street
New York, New York 10021

FROM
THE WHITE HOUSE
WASHINGTON, D.C.

Mr. John E. Jacob
Chairman
Black Leadership Forum
National Urban League
500 East 62nd Street
New York, New York 10021

Maureen —
OK for agree to
John Jacob.
Thanks,
JG
10/26

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* want

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Mr. John E. Jacob
Chairman
Black Leadership Forum
National Urban League
500 East 62nd Street
New York, New York 10021

GB/JWC/ckb (10PRESG)

FOR THE PRESIDENT TO SIGN

Insert

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(To marked material on next page.)

"business necessity" that is significantly more restrictive than that established by the Supreme Court in Griggs and in two decades of subsequent decisions. Thus, unable to defend legitimate practices in court, employers will be driven to adopt quotas in order to avoid liability.

Proponents of ~~S. 2104~~ assert that ~~it is~~ needed to overturn the Supreme Court's Wards Cove decision and restore the law that had existed since ~~the~~ Griggs, ~~case in 1971~~. ~~S. 2104,~~ however, ~~does~~ not ~~in fact~~ codify Griggs or the Court's subsequent decisions prior to Wards Cove. Instead, ~~S. 2104~~ engages in a sweeping rewrite of two decades of Supreme Court jurisprudence, using language that appears in no decision of the Court and that is contrary to principles acknowledged even by Justice Stevens' dissent in Wards Cove: "The opinion in Griggs made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose."

I am aware of the dispute among lawyers about the proper interpretation of certain critical language used in this portion of S. 2104. The very fact of this dispute suggests that the bill is not codifying the law developed by the Supreme Court in Griggs and subsequent cases. This debate, moreover, is a sure sign that S. 2104 will lead to years -- perhaps decades -- of uncertainty and expensive litigation. It is neither fair nor sensible to give the employers of our country a difficult choice between using quotas and seeking a clarification of the law through costly and very risky litigation.

S. 2104 contains several other unacceptable provisions as well. One section unfairly closes the courts, in many instances, to individuals victimized by agreements, to which they were not a party, involving the use of quotas. Another section radically alters the remedial provisions in Title VII of the Civil Rights Act of 1964, replacing measures designed to foster conciliation and settlement with a new scheme modeled on a tort system widely acknowledged to be in a state of crisis.

Maureen -

OK for azure. We may need another round of Jim's edits after this - sorry.

Thanks,

JB. 11/7

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Thank you again for writing, and best wishes.

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500 East 62nd Street
New York, New York 10021

GB/JWC/ckb (10PRESG)

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Dear John:

Thank you for your letter concerning the Kennedy-Hawkins legislation. As you know, I value your views and those of the Black Leadership Forum very highly and am always glad to have your thoughts.

You are absolutely right that all parties have devoted vast amounts of time and energy to good faith negotiations over this bill. For my part, I have consistently expressed my hope that I could sign a second civil rights bill this year. To that end, I have met on a number of occasions with Congressional proponents of the Kennedy-Hawkins bill as well as with civil rights leaders and other concerned citizens, and I have spelled out in private and in public remarks the principles that I believe must underlie such a bill.

First and foremost, as I have said, civil rights legislation must work to obliterate consideration of factors such as race, color, religion, sex, and national origin from employment decisions. Second, new legislation must reflect fundamental principles of fairness that apply throughout our legal system. Third, I believe that we can strengthen the deterrents our law provides against on-the-job harassment without replicating problems that mark our general system of tort law.

America's promise must remain equal opportunity and equal protection under the law, ~~and in its current form~~ There are many points of →

agreement between Kennedy-Hawkins and the bill that I have sent to Congress, and I want to build on these and fix the problems that remain, to produce a bill that I can sign. In any event, my Administration and I will continue to enforce with vigor the sound body of anti-discrimination laws that now exists, and we will continue to fight against bigotry and prejudice in all their various forms. I know that we will continue to work together in that cause and in the efforts to expand equal opportunity for all Americans.

Thank you again for writing, and best wishes.

Sincerely,

Dear John:

Thank you for your letter concerning the Kennedy-Hawkins legislation. As you know, I value your views and those of the Black Leadership Forum very highly and am always glad to have your thoughts.

You are absolutely right that all parties have devoted vast amounts of time and energy to good faith negotiations over this bill. For my part, I have consistently expressed my hope that I could sign another civil rights bill this year. To that end, I have met on numerous occasions with congressional proponents of the Kennedy-Hawkins bill as well as with civil rights leaders and other concerned citizens, and I have spelled out in private and in public remarks the principles that I believe must underlie any legislation on this topic.

First and foremost, as I have said, civil rights legislation must operate to obliterate consideration of factors such as race, color, religion, sex, and national origin from employment decisions. Second, new legislation must reflect fundamental principles of fairness that apply throughout our legal system. Third, I believe that we can strengthen the deterrents our law provides against on-the-job-harassment without replicating problems that mark our general tort law system.

~~I am quite disappointed that the legislation as it currently stands does not meet these principles~~ While there are many points of agreement between us on the bill, I cannot sign Kennedy-Hawkins in its current form, ~~but~~ I persist in believing that we can arrive at a good bill. I therefore intend to send Congress language that I can sign and that should be acceptable to all.

Throughout this process, I have agreed that people should not be barred from challenging discriminatory seniority systems and that the remedies for discrimination could be improved. My Administration also agrees that the burden of proof on the "business necessity" issue in disparate impact cases could be shifted to the defendants. Many other points of agreement exist as well, and should not be lost.

America's promise, however, must remain equal opportunity and equal protection under the law, and in its current form Kennedy-Hawkins ~~continues to depart too far from our civil rights traditions. It~~ places employers in the untenable position of having to defend costly lawsuits with the rules rigged against them unless they see to it that their workforces are balanced. My concern is that That will result in quotas. Closing the courthouse door to victims of quota schemes is also fundamentally unfair, and creating another "lawyer's bonanza" is simply unwise.

These problems can be fixed. The language that I will send to the Hill can resolve the difficulties and I hope will give rise to a bill that all can support. In any event, my Administration

will continue to enforce with vigor the very sound body of anti-discrimination laws that now exists, and we will continue to fight against bigotry and prejudice in all their various forms. I know that we will working together in that cause and in the efforts to expand opportunity for all Americans.

Thank you again for writing.

THE WHITE HOUSE
WASHINGTON

JOE:

Per our conversation, please prepare a response for the President's signature that is a little less argumentative and not as long.

Thank you.

Dianne Butterfield
x2702

Sent to Joe
Watkins 10/23/90
for response

Jim

from Fred
Nelson/
Counsel

90 OCT 19 PM 4:25

Joe Watkins
OTBC arguments
ltr to John Jacobs/ URBAN
League

Dear John:

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America's promise, however, must remain equal opportunity and equal protection under the law, and in its current form Kennedy-Hawkins continues to depart too far from our civil rights traditions. It places employers in the untenable position of having to defend costly lawsuits with the rules rigged against them unless they see to it that their workforces are balanced. That will result in quotas. Closing the courthouse door to victims of quota schemes is also fundamentally unfair, and creating another "lawyer's bonanza" is simply unwise.

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Thank you again for writing.

NATIONAL URBAN LEAGUE
80 ANNIVERSARY
1910-1990

Jim C
Did this get
a reply

October 4, 1990

Dear Mr. President:

The organizations comprising the Black Leadership Forum (BLF) strongly urge you to sign The Civil Rights Act of 1990.

Collectively, we believe that the legislation has legitimately reformed the Supreme Court decisions that have left a devastating impact on the employment rights of African Americans. We firmly believe that, with some 20 substantive changes that were made in the legislation to accommodate your concerns, The Civil Rights Act of 1990 is ready for your signature.

The changes in the legislation were made through "good faith" efforts during the entire negotiating period between congressional sponsors, the civil rights community experts and your staff, and the modifications in the legislation were in response to your suggestions. Given this, the legislation you will have before you not only reflects your interest but results in a well reasoned and most effective response to the Supreme Court's misinterpretation of critical employment discrimination law.

JC
(Snyder
has signed)
Jim

Mr. President, based on the aforementioned reasons we believe you will do what is right and sign "The Civil Rights Act of 1990" into law. We believe you will do this, Mr. President, because you have stated that you are not and would never be an anti-civil rights President and because we believe that you do not want racial discrimination and bigotry to prevail in this nation. Lastly, Mr. President we strongly believe that you will sign "The Civil Rights Act of 1990" because you firmly believe in what's right for America.

Mr. President, we remain committed to working with you on the most critical issue in the Black civil rights community. Therefore, we wish to meet with you to reaffirm our strong commitment to the legislation and to have the opportunities to clarify any misgivings about this legislation that you might have.

Sincerely,

/ceh

John E. Jacob
Chairman
Black Leadership Forum

Mr. George Bush
President of the
United States of America
The White House
1600 Pennsylvania Avenue
Washington, DC 20005

bcc: ✓ Patty Presack

ID # 180433 CU

HU010 R: 11-9 2:15

PS

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: [redacted]

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

Subject: draft letter to Sen. John & David re: Kennedy-Hawkins legislation; civil rights

ROUTE TO: Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
		ACTION	DISPOSITION		
WHITE HOUSE	ORIGINATOR	90/11/09		C	90/11/13
	Referral Note:				
EXEC SEC	K	90/11/09	NLO	C	90/11/13 PS
	Referral Note:	MEMO FOR CICCONI			PS
	_	/ /		_	/ /
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				
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	Referral Note:				

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

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

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

Comments: _____

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

5/81

THE WHITE HOUSE

WASHINGTON

November 13, 1990

MEMORANDUM FOR JAMES W. CICCONI
ASSISTANT TO THE PRESIDENT AND
DEPUTY TO THE CHIEF OF STAFF

FROM: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Draft Letter to Mr. John E. Jacob Re: Kennedy-Hawkins Legislation

At your request, Counsel's office has reviewed the captioned draft letter. We have no legal objections.

We appreciate having had the opportunity to review this matter.

THE WHITE HOUSE
WASHINGTON

11/8

TO: C. BOYDEN GRAY

FROM: **JAMES W. CICCONI**
Assistant to the President and
Deputy to the Chief of Staff

Please clear the attached.

Thanks.

Dear John:

Thank you for your letter concerning the Kennedy-Hawkins legislation. As you know, I value your views and those of the Black Leadership Forum very highly and am always glad to have your thoughts.

You are absolutely right that all parties devoted vast amounts of time and energy to good faith negotiations over this bill. For my part, I consistently expressed my hope that I would receive a civil rights bill I could sign this year. To that end, I met on a number of occasions with congressional proponents of the Kennedy-Hawkins bill as well as with civil rights leaders and other concerned citizens, and I spelled out in private and in public remarks the principles that I believe must underlie such a bill.

First and foremost, as I have said, civil rights legislation must work to obliterate consideration of factors such as race, color, religion, sex, and national origin from employment decisions. Second, new legislation must reflect fundamental principles of fairness that apply throughout our legal system. Third, I believe that we can strengthen the deterrents our law provides against on-the-job harassment without replicating problems that mark our general system of tort law.

As you know, one of our primary concerns with the Kennedy-Hawkins bill was the extent to which it would have resulted in the adoption of quotas in the workplace. While I recognize that this is a point on which we disagree, I feel the concerns about quotas expressed by the Justice Department and other legal analysts were soundly, and honestly, based. Further, I am convinced that this overriding concern of our Administration could have been addressed in the bill while still retaining

its stated purpose. Indeed, this was in fact done in the legislation I forwarded to Congress. Under Kennedy-Hawkins, in many cases, an employer could find it impossible to defend legitimate business practices or counter unfounded allegations. In other cases, an employer's defense would be confined to an unduly narrow definition of "business necessity," one significantly more restrictive than the Supreme Court established in Griggs. Unable to defend legitimate practices in court, employers would be driven to adopt quotas in order to avoid liability or lengthy and costly litigation.

There are many points of agreement between Kennedy-Hawkins and the bill that I sent to Congress, and I want to build on these and fix the problems that remain, to produce a bill that I can sign.

You know of my long-standing personal commitment to the cause of equal rights. I want to assure you, John, that regardless of our differences on this bill -- differences I am convinced can still be bridged -- I will continue to enforce with vigor the sound body of anti-discrimination laws that now exists, and we will continue to fight against bigotry and prejudice in all their various forms.

Thank you again for writing, and best wishes.

Sincerely,

Mr. John E. Jacob
Chairman
Black Leadership Forum
National Urban League
500 East 62nd Street
New York, New York 10021

GB/JWC/ckb-pt (11PRES)

CLEAR THRU JIM CICCONI

PRESIDENT TO SIGN