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THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: SEPTEMBER 10, 1990

NAME OF CORRESPONDENT: MR. GEORGE W. BIEL

SUBJECT: OPPOSES THE CIVIL RIGHTS ACT OF 1990

COUNSEL'S OFFICE
RECEIVED
SEP 10 1990

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACT CODE	DATE YY/MM/DD	TYPE RESP	C D	COMPLETED YY/MM/DD
JOHN SUNUNU		ORG	90/09/10		C	90/09/10 TC
CU ofc Cgray	REFERRAL NOTE:	R	90/09/12	TC	C	90/09/18
Cuat10	REFERRAL NOTE:	A	90/09/12		C	90/09/18
S Green	REFERRAL NOTE:	A	90/09/25		C	90/10/10
CULUND CUAT10	REFERRAL NOTE: For SMG-159 Reply	R	90/10/10	NL	A	90/11/21 CS

COMMENTS: ~~Restaff to Shirley Green - 9/18/90 W. Lund~~
Return to Legal Counsel's Ofc - 10/10/90 CS

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

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THE WHITE HOUSE

WASHINGTON

November 21, 1990

Dear Mr. Biel:

Governor Sununu has asked me to respond to your September 6 letter about the Kennedy-Hawkins employment discrimination bill. I apologize for the long delay in replying.

As you know, the President disapproved this bill, and the Senate sustained his veto. The President was distressed that the supporters of Kennedy-Hawkins were unwilling to accept any of the reasonable compromises offered by the Administration. For essentially the same reasons set forth in your letter, however, the President believed that his commitment to equal opportunity required him to veto the bill. I am enclosing for your review copies of the President's veto message and an accompanying memorandum from the Attorney General.

Thank you for sharing your thoughts on this important issue.

Yours truly,

Nelson Lund
Associate Counsel to the President

Mr. George W. Biel
President & CEO
Houston's Restaurants, Inc.
Suite 720
8 Piedmont Center
Atlanta, GA 30305

Enclosures

R 10-11

(10)

THE WHITE HOUSE
WASHINGTON

October 10, 1990

MEMORANDUM

TO: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT
OEOB ROOM 106

FROM: MIKE ORTEGA MO
CHIEF OF STAFF'S CORRESPONDENCE
OEOB ROOM 54-A

RE: LETTER TO THE CHIEF OF STAFF
ON THE CIVIL RIGHTS ACT OF 1990

Governor Sununu's West Wing staff has instructed me to return the attached letter to you (Mr. George W. Biel, Houston's Restaurants, Inc., Houston, Texas).

This particular writer merits a more specific response on the civil rights issue than the standard form-letter reply that is used in Presidential correspondence.

Thank you.

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

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: <u>all</u> 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 <u>every</u> 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 <u>shall not</u> 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 <u>all</u> 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.

17312

HOUSTON'S RESTAURANTS, INC.

GEORGE W. BIEL
PRESIDENT

TEL (404) 231-0161

September 6, 1990

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

Dear Mr. Sununu,

I am writing to ask you to advise the President to veto the Civil Rights Act of 1990.

The bill would allow juries to award whatever monetary damages they think are deserved. I have a deep concern about the spiraling costs of our civil justice system. We need reform in the area of non-economic damages, not more legislation promoting it.

The bill would also make it difficult for us to defend ourselves in charges alleging that a particular job requirement or practice, even if inadvertent, has a discriminatory effect. For this reason we would be forced to consider adopting quotas in hiring and promotion. This is a result that Congress expressly rejected when originally drafting Title VII.

Houston's has nearly 2300 employees. Of these, 27% are minorities and 48% are women. We have always had a strong commitment to the protection of civil rights for our employees and job applicants. The restaurant industry is, in fact, the largest employer of minorities in the country. However, the Civil Rights bill is flawed and should be vetoed. Please convey these thoughts to the President.

Sincerely,

George W. Biel

George W. Biel
President & CEO

CS

ID # 172800 CU
HU010

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Emerson Mallick

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

Subject: Civil Rights Act of 1990

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuccia	ORIGINATOR	D 90/09/06		O	90/09/12
Curtin	A	D 90/09/07		O	90/09/12
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ACTION

ACTION CODES.
A - Appropriate Action
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D - Draft Response
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R - Direct Reply w/Copy
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DISPOSITION

DISPOSITION CODES:
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Comments: Restaff to Shirley Green 9/12/90 N. Lund

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M & M DRYWALL, INC.

9340 Corporation Drive, Suite 1 • Indianapolis, Indiana 46256
(317) 842-1726 • FAX (317) 576-1159

September 4, 1990

President George Bush
White House
Washington, D.C. 20500

Dear Sir:

My concerns regarding the Civil Rights Act of 1990, following, are points that would drastically harm the business community. Therefore, I sincerely urge you to veto this legislation.

If this bill is passed and signed into law in its present form, businesses would be forced into quota hiring to protect themselves from extensive litigation and the possible extensive fines for compensatory and punitive damages.

Any alleged discrimination could cost so much, it could put businesses out of business. Therefore, I sincerely hope you veto this legislation.

Sincerely,

Emerson Mattick

Emerson Mattick
President

[redacted]

M & M DRYWALL, INC.

9340 Corporation Drive, Suite 1 • Indianapolis, Indiana 46256

White House Council
C. Boyden Gray
White House
Washington, D. C. 20500

[redacted]

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CS

ID # 173132 CU
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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Name of Correspondent: Nelson Mundel

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Subject: Letter to George W. Bush re Civil Rights

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
		ACTION	**DISPOSITION**		
Cuyo	ORIGINATOR	90/11/21	NL	A	90/11/21
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ACTION CODES:
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THE WHITE HOUSE

WASHINGTON

November 21, 1990

Dear Mr. Biel:

Governor Sununu has asked me to respond to your September 6 letter about the Kennedy-Hawkins employment discrimination bill. I apologize for the long delay in replying.

As you know, the President disapproved this bill, and the Senate sustained his veto. The President was distressed that the supporters of Kennedy-Hawkins were unwilling to accept any of the reasonable compromises offered by the Administration. For essentially the same reasons set forth in your letter, however, the President believed that his commitment to equal opportunity required him to veto the bill. I am enclosing for your review copies of the President's veto message and an accompanying memorandum from the Attorney General.

Thank you for sharing your thoughts on this important issue.

Yours truly,

Nelson Lund
Associate Counsel to the President

Mr. George W. Biel
President & CEO
Houston's Restaurants, Inc.
Suite 720
8 Piedmont Center
Atlanta, GA 30305

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

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: <u>all</u> 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 <u>every</u> 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 <u>shall not</u> 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 <u>all</u> 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.

R 10-11

(10)

THE WHITE HOUSE
WASHINGTON

October 10, 1990

MEMORANDUM

TO: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT
OEOB ROOM 106

FROM: MIKE ORTEGA MO
CHIEF OF STAFF'S CORRESPONDENCE
OEOB ROOM 54-A

RE: LETTER TO THE CHIEF OF STAFF
ON THE CIVIL RIGHTS ACT OF 1990

Governor Sununu's West Wing staff has instructed me to return the attached letter to you (Mr. George W. Biel, Houston's Restaurants, Inc., Houston, Texas).

This particular writer merits a more specific response on the civil rights issue than the standard form-letter reply that is used in Presidential correspondence.

Thank you.

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PHOTOCOPY
GB HANDWRITING

THE WHITE HOUSE
WASHINGTON

HU010

THE PRESIDENT HAS SEEN
90 SEP 10 P2:26

September 5, 1990

MEMORANDUM FOR THE PRESIDENT

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

8/24/90 Enquirer

A new civil-rights consensus

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 Coster

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

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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.

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 mis-conceptions 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.

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Subject: The Enforcement Provisions of Title VII

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CU/C	Referral Note:				CS
CU/C	A	90,09,07		C	90,09,07
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CU/C	I	9010907		C	9009107
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5/81

THE WHITE HOUSE

WASHINGTON

September 7, 1990

MEMORANDUM FOR C. BOYDEN GRAY

FROM: NELSON LUND

SUBJECT: ACLU Report on the Effects of Wards Cove

The ACLU Report submitted by Mr. Coleman contains no evidence to support his claim that the Wards Cove rulings on particularity or the definition of business necessity have led to significant changes in the outcome of cases in litigation.

Let's look first at the numbers. The Report discusses only 5 cases, which is a far cry from the 150 that Mr. Coleman claimed in his meeting with you. And the report ignores the 11 cases identified by the Justice Department in which plaintiffs have prevailed after Wards Cove.

Next, consider the outcomes in the five cases:

- In one case (Bernard), the district court had ruled in favor of the defendants on all issues before Wards Cove, and the circuit court simply affirmed.

- In three cases (Joint Apprenticeship Committee, Evans, and Allen), the district courts had ruled in favor of the plaintiffs, and the circuit courts merely remanded for reconsideration in light of Wards Cove. The plaintiffs have not "lost" these cases.

- The fifth case is an unpublished district court decision which is not available on LEXIS.

What's more, the ACLU Report does not itself make the claim that is being made by Mr. Coleman. It characterizes 4 of the cases as turning on the burden of proof issue, which is irrelevant since the Administration is not insisting on preserving this aspect of Wards Cove. The fifth case (Joint Apprenticeship Committee) is characterized by the Report as a "particularity" case, but the Report claims that it appears to have been wrongly decided even under Wards Cove.

Finally, a careful examination of the four reported decisions cited in the ACLU Report shows that none of them supports Mr. Coleman's claim:

Allen v. Seidman, 881 F.2d 375 (CA7 1989) (Posner, J.). This case contains some Posnerian musings to the effect that the Supreme Court has changed the definition of business necessity. Besides the fact this is sheer dicta, Posner seems to indicate that the Seventh Circuit had beaten the High Court to the punch by making the same changes way back in 1985.

In any event, the case holds only that the district court (which had ruled in favor of the plaintiff) had imposed the wrong burden of proof:

> "[The judge below], however, said that 'it has not been shown that the Program Evaluation was a reliable selection device.' This is the language of burden of persuasion not production, and the burden of persuasion was placed on the wrong party, the employer. We therefore remand the case for reconsideration under the correct legal standard." 881 F.2d, at 381.

Evans v. City of Evanston, 881 F.2d 382 (CA7 1989) (Posner, J.). In a case decided the same day as Allen, Posner came close to affirming the district court's decision in favor of the plaintiff even though it was issued before Wards Cove. Posner ultimately decided to remand the case since "the judge (quite understandably considering the state of the law when he decided the case) placed the burden on the wrong party." 881 F.2d, at 385. This already makes the case irrelevant for present purposes, but even so Posner's opinion clearly invites a reinstatement of the decision for the plaintiffs. Id.

Bernard v. Gulf Oil Corp., 890 F.2d 735 (CA5 1989) (Higginbotham, J.). This is a complex case, but the most important points are as follows. First, unlike Posner, Judge Higginbotham does not ridicule the Supreme Court's claim that it was merely clarifying the law rather than changing it. Thus, while there is some discussion of Wards Cove in Higginbotham's opinion, there is not one word to suggest that the case would or should have been decided differently before Wards Cove. Indeed, Higginbotham goes out of his way to use the Albemarle test for job-relatedness at crucial points in the analysis! And finally, this is a case in which the district court had ruled against the plaintiffs on all issues prior to Wards Cove -- the affirmance by the Fifth Circuit is hardly evidence of any change in the law.

EEOC v. Joint Apprenticeship Committee, 895 F.2d 86 (CA2 1990) (Kearse, J.). In this case, the district court ruled in favor of the EEOC. Judge Kearse found that the court had apparently applied a legal standard on the particularity issue that may have been inconsistent with Wards Cove because it relieved the plaintiff of any obligation to prove causation. If she misinterpreted Wards Cove, as the ACLU Report claims, then her decision is obviously irrelevant because the Supreme Court can correct her without the aid of new legislation. In any event, Kearse found only that the court below had applied the wrong

legal framework, and there is no reason to assume or expect that the EEOC will lose this case:

> "[W]e express no view as to the sufficiency of EEOC's statistics to establish the requisite disparities, or as to whether summary judgment [for the plaintiff] is appropriate with respect to causation." 895 F.2d, at 91.

(In passing, I note that the ACLU Report's vitriolic attack on the motivations of a black woman appointed by President Carter is one of the many weird features of the Report.)

I have attached copies of the 4 published opinions in question; the DOJ summary of post-Wards Cove cases; and the ACLU Report.

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September
7th
1 9 9 0

OUR FILE NUMBER

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

THE WHITE HOUSE

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

TESTIMONY TESTIMONY

September 5, 1990

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer:

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3 Testimonies

SUBJECT: Resolution Trust Corporation Oversight Board, Interior and Council of Environmental Quality, draft testimony on disposition of RTC assets and coordination of RTC with Dept. of the Interior and CEQ.

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

Please provide us with your views no later than

1:00 p.m. THURSDAY, SEPT. 6, 1990.

Direct your questions to Anna Fotias (395-3454), the legislative analyst in this office.

James J. Jukes for
Assistant Director for
Legislative Reference

Enclosures

cc: Ron Cogswell
Bob Fairweather
Paula VanHaggen
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Oversight Board Resolution Trust Corporation	Carol Hartwell	786-9718

DRAFT

9/5/90

TESTIMONY OF PETER M. MONROE

PRESIDENT

OVERSIGHT BOARD

OF THE

RESOLUTION TRUST CORPORATION

BEFORE THE

RESOLUTION TRUST CORPORATION TASK FORCE

COMMITTEE ON BANKING, FINANCE, AND URBAN AFFAIRS

U.S. HOUSE OF REPRESENTATIVES

September 7, 1990

Mr. Chairman and members of the Task Force, thank you for the opportunity to testify this morning. As requested, I appear before you to discuss, from the vantage point of the Oversight Board, natural and cultural resource policy as it relates to the disposition of assets by the Resolution Trust Corporation (RTC).

The Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) requires the RTC to publish and update semiannually an inventory of all the real estate assets subject to its jurisdiction. As part of the requirement to publish an inventory, the RTC must identify assets which have natural, cultural, recreational or scientific values. This is the only duty imposed on the RTC by FIRREA in the area of environmental concern.

The RTC made available to the public on January 1, 1990 its first inventory of real estate properties, which included a designation of properties with special significance in the four areas specified in the law. The identification was made primarily by field staff who, as we understand it, tended toward flagging a property when there was doubt about its potential significance.

Since that first inventory, the RTC has developed more elaborate procedures, such as standard instructions to appraisers to note features of such significance in their appraisal reports. Appraisers have been informed that a property may have:

- recreational significance if it is within or adjacent to existing public recreation areas or adjacent to rivers, lake shores or oceans;

- scientific significance if it has scientific uses or archaeological importance;
- historic value if it meets criteria for the National Register of Historic Places, such as an association with historical events or figures;
- and natural value if it is within or adjacent to national landmarks, national wilderness areas, national or state parks, national or state wildlife refuges, or areas identified by the Fish and Wildlife Service as critical habitats for endangered species, or other natural features that include wetlands, ocean and lake shores, caves, dunes, coastal barrier islands and estuaries.

Memorandum of Understanding

As you know, the RTC has been working closely with the Fish and Wildlife Service (the "Service") in drafting a Memorandum of Understanding ("MOU") which would establish procedures for identifying significant properties. The work has been completed and the MOU is undergoing review at the Department of the Interior. Because this agreement is seen principally as a matter of defining operating procedures, the Oversight Board has taken no action on it. However, we have monitored its progress and will evaluate its effect on both the asset identification and disposition efforts of the RTC.

The basic terms of the MOU provide for the Service to

identify features of natural or cultural significance on the RTC's real estate assets. If these are found, the Service will recommend actions to be taken by the RTC to preserve those features. Such recommendations may include sale to conservation groups or to State or Federal agencies, including the Service. The Service might also recommend the imposition of conservation easements on certain property.

As part of an attachment to the MOU, the Service has suggested language that could be included in the deed, or other instrument of conveyance, reserving to the United States a perpetual conservation easement. This would give the government the right:

- to control the vegetation, topography and hydrology of the property by the use of appropriate measures such as planting, excavation and the building of dikes;
- where appropriate, to conduct predator management activities, to construct fences and exclude the public or the property owner, or to prohibit fishing and hunting;
- to have a right of ingress and egress across the property to the easement area, including the right to build construction buildings and roads sufficiently wide to accommodate access by vehicles and equipment deemed necessary for easement management.

Where such easements exist, the property owner would be prohibited from building any structures in the easement area. He

or she would not be permitted to alter the vegetation or hydrology of the area, such as by mowing, cultivation, draining, channeling, or diverting the natural flow of surface or underground waters into, within, or out of the easement area.

We recognize that such provisions may seem prohibitively restrictive to potential buyers and could therefore impede sale of the asset or cause erosion of the property's value. By its terms, however, the MOU reserves to the RTC the sole discretion whether or not to implement the Service's recommendations. This discretion is crucial because FIRREA does not give the RTC the authority to expend funds or to forego maximum recovery on assets with natural, cultural, natural or historic significance. As the Task Force indicated in its questions to the witnesses, "[t]he RTC would make the decision about accepting or rejecting conservation easements and would accept them only if they do not significantly reduce the sale value of the property."

FIRREA does not require that the RTC enter into an agreement with the Service, or follow any particular prescribed procedure, but it will help to have the skills and resources of the Service in meeting FIRREA's identification requirement. It will be useful to the RTC to know what can best be done, from a conservation viewpoint, with each of these properties. To the extent recommendations can be implemented without conflicting with the RTC's statutory mission to maximize recovery and minimize loss on its assets, it might be appropriate for the RTC to do so. However, to the extent that implementation of such

recommendations would adversely impact the recovery from a property, the RTC may have to decline such implementation.

The Oversight Board will continue to monitor the RTC's work in this area to ensure that its implementation of the MOU does not detract from its achievement of its overriding objective -- resolution of the thrift crisis at least cost.

Other conservation efforts

Some have questioned whether it makes sense for the RTC simply to identify properties and stop short of taking any affirmative steps to implement conservation efforts for them. However, the Conference Report on FIRREA states that "[t]he creation of this inventory does not impose any duty on the RTC with respect to such properties or create any liabilities for the RTC in connection with such properties." FIRREA does not mandate — or even authorize — the RTC to make any special disposition of properties with natural, cultural, recreational or scientific significance.

While the RTC should certainly do all it can to further sound environmental policies, it is important to remember that there are limits on its authority. It was not specifically authorized to dispose of these properties at below market value, or subject to a right of first refusal by certain categories of buyers, as was the case with properties for affordable housing.

FIRREA created the RTC to resolve troubled thrift institutions. We need no reminders that the resolution process costs the taxpayers more than we all wish it did. FIRREA's

bottom line mandate to the RTC is to minimise those costs. In resolving thrifts, the RTC has a duty to maximize the recovery from the liquidation of assets so as to mitigate the losses that ultimately are borne by the taxpayers. Furthermore, as receiver for a closed thrift, the RTC has a fiduciary duty to the creditors of that thrift to maximize the liquidation proceeds. Reduced losses at these receiverships results in reduced costs to the taxpayers.

The RTC's mandate to minimize losses is buttressed by numerous provisions for specific procedures to achieve that result. FIRREA imposes limitations on the RTC's authority to sell assets at below market value. It requires the creation of reliable appraisal standards to ascertain values. It directs the RTC to market its assets as widely as possible so as to generate the best bids possible. These provisions are all intended to ensure that the RTC not sell assets at less than fair market value and that the taxpayers get the greatest possible return from these assets.

Clearly there may be other statutes which affect the RTC in its handling and disposition of assets, including environmental laws. The RTC is in the process of examining the applicability of these statutes to in its various capacities. Whatever the outcome of that legal determination, we expect to work with the RTC in fashioning responsible and intelligent policies for handling environmental concerns in its asset disposition efforts.

We do not believe the RTC's interests in asset disposition

are adversarial to those of conservation groups. Within the constraints of its funding and authority, the RTC is facilitating the availability of opportunities for promotion of environmental interests. The identification of properties appropriate for such efforts is a very important first step. Followed by dissemination of this information to the general public, it allows entities with conservation objectives to act by acquiring such properties and applying their expertise and resources to them.

As in so many areas, the RTC must engage in a balancing act between environmental concerns and the obligation to resolve the savings and loan crisis at the least cost to the taxpayer. To the greatest extent possible, the RTC should attempt to accomodate the concerns of natural and cultural resource policy to the greatest extent possible, within the constraints imposed upon it by FIRREA. Unless and until the Congress decides otherwise, however, that RTC has no authority to spend taxpayer funds on the promotion of environmental interests.

Mr. Chairman, this concludes my formal statement. I would be happy to take any questions you may have.

DRAFT

TESTIMONY OF DINAH BEAR
GENERAL COUNSEL
COUNCIL ON ENVIRONMENTAL QUALITY

September 7, 1990

BEFORE THE RESOLUTION TRUST CORPORATION TASK FORCE

Good morning. Thank you for the invitation to appear before the Resolution Trust Corporation Task Force. I will discuss the Council on Environmental Quality's involvement with the Resolution Trust Corporation, and the relationship between the Resolution Trust Corporation (RTC) and the requirements of the National Environmental Policy Act.

The Council first became aware of the Resolution Trust Corporation and the responsibilities delegated to it under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) in August of 1989, as a result of discussions with representatives of the Texas Center for Policy Studies. A CEQ representative attended the first interagency meeting to discuss the RTC's efforts to inventory and dispose of "properties with natural, cultural, recreational, or scientific values of special significance", as required by FIRREA, in October, 1989. Other agencies represented at that meeting included the Department of the Interior, the National Park Service, the U.S. Fish and Wildlife Service, the Bureau of Land Management, the Oversight Board, and the U.S. Forest Service. Discussion at that meeting focused primarily on RTC's proposed data elements for identifying properties possessing "values of special significance". Resource

agency representatives sought to gain a better understanding of RTC's operations, including the number and type of properties that it expected to take over, how the inventory would be conducted, and how "values of special significance" would be considered in the disposition process. At this meeting, Oversight Board representatives indicated that the question of the applicability of the National Environmental Policy Act and other environmental review laws to the actions of RTC was under active consideration and that an opinion on that matter would be published in a matter of weeks.

A second interagency meeting was convened by CEQ in March of this year, attended by most of the agencies which were represented at the first meeting, along with representatives of the Environmental Protection Agency. Shortly afterwards, the CEQ representative circulated a memorandum to attendees at that meeting which suggested using the government clearinghouse to make sure that all potentially interested state, regional and local agencies would be aware of the properties on the inventory with "special significance", as well as using other existing information systems, such as those developed under the historic preservation laws, to assist in the identification of properties with special significance. The memorandum pointed out that FIRREA specifically authorized the RTC to use clearinghouses to collect and disseminate pertinent information. However, soon thereafter, RTC staff indicated to the CEQ representative that the RTC was no longer interested in participating in these

discussions. We have had no further communication with RTC staff until preparations for this hearing.

You have asked whether the RTC is a government agency subject to the requirements of federal environmental statutes, including the National Environmental Policy Act (NEPA). CEQ has, oversight responsibility for the implementation of NEPA by federal agencies. In that regard, CEQ issued regulations in 1978 which implement the procedural provisions of NEPA.

From time to time, CEQ has faced the question of whether a particular governmental entity was a "federal agency" for the purposes of NEPA. CEQ has determined several entities not to be "federal agencies". These entities includes the Smithsonian Institution, the American Red Cross, the United States Holocaust Memorial Council, and, most recently, the North American Wetlands Conservation Council. In making such determinations, CEQ has historically consulted with the entity's legal office to determine their characterization of the institution, as well as independently examining such characteristics as the entity's appointing powers, compliance with other federal procedural statutes such as the Freedom of Information Act and the Administrative Procedures Act, and pertinent legislative history.

Our attempt to answer the question of whether the RTC is an agency for purposes of NEPA has been, in all candor, a difficult one. Attempts at discussing this issue with the RTC's legal office have not been fruitful. The underlying statute - FIRREA - and the accompanying committee report provide no direct guidance on the point. Indeed, the committee report's discussion of

Section 21(F), the provision which directs the RTC's Real Estate Asset Division to publish an inventory of real property assets identifying properties with natural, cultural, recreational, or scientific values of special significance, states that, "The creation of this inventory does not impose any duty on the RTC with respect to such properties or create any liabilities for the RTC in connection with such properties."[1] While the committee report is not legally conclusive, that language does suggest that the authors of the report did not intend for the inventory requirement to imply the existence of further responsibilities.

Throughout the lengthy provisions of FIRREA, there are numerous instances in which the RTC is designated as an "agency" for certain purposes and not for others. For example, the RTC, in its role as a corporation, is designated as an agency for purposes of administrative procedures and judicial review provisions of the Administrative Procedures Act[2]. For purposes of audits, accounts, and obligations[3], the RTC is defined as a "mixed-ownership" corporation[4]. The RTC is an "agency" for

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1. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Conference Report to Accompany H.R. 1278, 101-222, August 4, 1989, p 413.

2. 12 USC §1441a(b)(1)(B).

3. 12 USC §1441a(b)(2).

4. "Mixed-ownership Government corporations" and "wholly owned Government corporations" are designated in the U.S. Code at Title 31, Section 9101. Besides the RTC, other "mixed ownership government corporations" are Amtrak; the Central Bank for Cooperatives, the Federal Deposit Insurance Corporation; the Federal Home Loan Banks; the Federal Intermediate Credit Banks; the Federal Land Banks; the National Credit Union Administration Central Liquidity Facility; the Regional Banks for Cooperations; the Rural Telephone Bank in certain circumstances; the U.S.

purposes of the conflict of interest provisions,[5] but is not an agency for purposes of the senior executive service provisions of the Civil Service Reform Act of 1978.[6] The RTC is declared to be an agency to the same extent as the Federal Deposit Insurance Corporation[7] when acting in its fiduciary capacity as conservator or receiver. In fulfilling their responsibilities under FIRREA, the RTC and the FDIC are both directed to utilize the services of private parties such as property managers, auction marketers and brokerage services, if deemed practicable and efficient.[8] The RTC is not permitted to have employees unless the Oversight Board

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Railway Association; the Financing Corporation; the Resolution Funding Corporation. None of the entities has ever demonstrated compliance with NEPA, and there are no judicial decisions holding any of these entities as a federal agency for purposes of NEPA. In perhaps the closest case on point, Edwards v. First Bank of Dundee, plaintiffs sought to prevent the demolition of a bank building under the provisions of NEPA and the National Historic Preservation Act (NHPA), until the Federal Deposit Insurance Corporation authorized a change of location of banking facilities or complied with NEPA or and NHPA. The Court found the "basic flaw" in the case to the "total absence of any federal involvement - there was no perceived federal funding or other major federal action involved, and no federal officer had been named as a party defendant. In the only other case we have found dealing with NEPA and a "mixed owned government corporation", the Fourth Circuit Court of Appeals found NEPA and NHPA claims to be inapplicable to Amtrak activities. Amtrak's authorizing statute specifically declares that the corporation is not "an agency or establishment of the United States Government." 45 USC §541. Miltenberger v. Chesapeake & Ohio Railway Co., 450 F.2d 971 (1971).

5. 12 USC §1441a(p)(1)(A).

6. 5 USC §3132(a)(1)(D).

7. 12 USC §1441a(b)(1)(B).

8. 12 USC §

6

so directs", and, contrary to the normal operations of the Freedom of Information Act, the Oversight Board may withhold a document from public disclosure if it believes that disclosure would be contrary to the public interest.[6] In sum, FIRREA, on its own terms, makes the status of the RTC as an "agency" less than perfectly clear.

The determination of whether the RTC is an "agency" for purposes of NEPA clearly carries with it implications not only for the RTC, but also for the FDIC and other financial institutions involved in the savings and loan situation. Because we have not had the opportunity to discuss this issue with RTC staff and because of the complexity of FIRREA's mandate, CEQ is in the processing of consulting with the Office of Legal Counsel in the Department of Justice. We are aware of the importance of this issue, and will make every effort to come to a resolution in an expedient manner.

Because the particular activity which is of immediate interest many people in terms of NEPA's applicability is the disposal of the real property assets, scheduled to take place in November, 1990, it may be useful to suggest what NEPA would require should it be found to be applicable. If the RTC were determined to be a federal agency for the purposes of NEPA in the context of disposal of property, the most analogous judicial precedent would be the law articulated in Conservation Law

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6. 12 USC §1441

7. 12 USC §1441

7

Foundation of New England v. GSA, 707 F.2d 626 (1st Cir. 1983), dealing with NEPA compliance in the context of disposal of surplus federal property under the Federal Property and Administrative Services Act of 1949." In that case, the General Services Administration (GSA) prepared an environmental impact statement (EIS) to support its proposed disposal of various parcels of adjacent land to local communities and other tracts of related land through public sale. The plaintiffs contended, and the district court agreed, that the EIS was inadequate because it did not analyze the environmental consequences of actual site-specific plans for reuse of the surplus land submitted by propsective buyers, and that NEPA requires GSA to consider environmental factors when choosing among propsective buyers.

The Court of Appeals agreed that GSA had to supplement its EIS with site-specific environmental analysis, including an evaluation of the consequences of the sale, and likely reuses of the property. While acknowledging that such information is speculative and therefore cannot be exhaustive, the court directed GSA to articulate a rationale for its assumptions about the probable reuses of the land, and then specify the environmental effects of such probable reuses with particular attention to those with the most significant adverse environmental effects. The court instructed GSA to evaluate the environmental consequences of construction, provision of

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utilities, sewage, and road access, traffic and other significant aspects of residential development.

The Court of Appeals diverged from the lower court's opinion, however, when addressing the question of whether GSA had to obtain development plans from the party whose bid or private offer it intended to accept, and then to supplement its final EIS with an analysis of those plans if they were significantly different from those anticipated in the final EIS. Considering the situation in light of the rule of reason and GSA's lack of authority to control development once land ownership is transferred, the court found that an informed consideration of the reuses to which the land might be put prior to sale was sufficient compliance with NEPA to support the sale.

This concludes my testimony. I will be happy to answer any questions.

TESTIMONY OF S. SCOTT SEWELL, PRINCIPAL DEPUTY ASSISTANT SECRETARY, FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR, BEFORE THE RESOLUTION TRUST CORPORATION TASK FORCE OF THE HOUSE BANKING SUBCOMMITTEE ON FINANCIAL INSTITUTIONS SUPERVISION, REGULATION AND INSURANCE OF THE COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS

Scott Sewell 9/5/90

SEPTEMBER 7, 1990

Mr. Chairman, I am pleased to be here to discuss the status of the proposed Memorandum of Understanding between the Resolution Trust Corporation and the Department of the Interior's Fish and Wildlife Service. Before I direct my comments to the specific questions contained in your August 22, 1990 letter of invitation, I would like to briefly summarize the department of the Interior's view of this subject in general.

The Department views the establishment of a Memorandum of Understanding between one of it's bureaus and another entity to be a very significant undertaking. As a routine procedure, the views of all Department of the Interior bureaus are solicited to determine the extent to which the action of any one bureau may have an impact on the others. Careful attention is also given to the substance of the Memorandum of Understanding, particularly as related to legal sufficiency and the potential for budgetary impact on the specific bureau involved and on the Department in general.

The Fish and Wildlife Service and the Resolution Trust Corporation have made excellent progress in the development of a potentially beneficial Memorandum of Understanding. The Department now must determine how such joint action would affect the Department of the Interior as a whole.

There are a number of questions contained in the August 22, 1990 letter of invitation. Those questions that apply to the Department of the Interior are answered below. We defer to the Resolution Trust Corporation on the series of questions that relate to its procedures and policies.

a. Question: What is the status of the Memorandum of Understanding?

   Answer: The document is undergoing Departmental review to insure that there is no potential conflicts among the several bureaus within the Department and to evaluate legal sufficiency and potential budgetary impact within the Department.

b. Question: Why was it not signed: If the Mou is not acceptable in its present form, what changes do you recommend? When do you expect the MOU to be signed?

Answer: Your question related to the reported August 3, 1990 signing date. That date was simply a target established to coincide with the travel schedules of the two individuals who would eventually sign the document. Departmental policy clearance was initiated approximately two weeks prior to that date. Due to the complexity of the matter it was not possible to complete the review prior to that date.

It is not yet possible for me to identify exactly what changes may ultimately be determined to be appropriate. Once the Departmental views have been formalized, we will need to work with the Resolution Trust Corporation to determine if our identified changes are acceptable.

No date for signing of the MOU has been established.

c. Question: The FWS has an agreement with the Farmers Home Administration which is similar to the proposed MOU. How do these agreements differ? Please evaluate the program with FmHA. How many properties have been reviewed by FWS? How many easements have been recommended and how many adopted?

Answer: The two agreements are essentially the same in terms of program mechanics. The Fish and Wildlife Service provides technical assistance in the identification of important resources, recommends easements and administers Fish and Wildlife easement areas that result from its recommendations. Service easement administration responsibility begins after the easement is recorded. The FmHA, as would be the case with the Resolution Trust Corporation, makes the determination when an easement recommendation is to be accepted, modified or rejected, and assumes responsibility for those actions necessary to record the easement.

There are two major differences. First, the FmHA program is based on affirmative requirements found in executive orders and FmHA regulations. The Resolution Trust Corporation program would be based on general authority found in the Federal Home Loan Bank Act. Second, FmHA has the authority to devalue a property in terms of resale price, thereby providing a financial incentive to the purchaser of property with an easement. The Resolution Trust Corporation can only establish an easement where there is no significant property devaluation.

In the FmHA program the Service has reviewed approximately 7,000 individual properties having a total acreage of approximately 2,200,00 acres. Approximately 2,100 easements have been recommended. The acreage potentially affected is approximately 265,000 acres. The FmHA has thus far recorded approximately 750 easements affecting about 74,500 acres.

It is not possible to provide a reliable estimate of the number of properties or the approximate acreage that may be determined by the Service as suited to easement protection. In terms of relative percent it may be possible to draw a comparison to the FmHA program.

In the FmHA program, approximately 12 percent of the acreage has been identified as having easement potential. The FmHA properties have a relatively high incidence of wetlands and other resources, because FmHA, as the lendor of last resort, has a high incidence of marginal flood prone lands and wetlands coming into inventory. The savings and loan industry by contract, has focused on the urban and suburban industrial and residential type properties. Service personnel familiar with both programs have estimated that no more than 5 percent of the undeveloped land that eventually comes under the jurisdiction of the Resolution Trust Corporation will likely receive an easement recommendation; and undeveloped land companies a small percentage of the Resolution Trust Corporation inventory.

d. Question: Considering the legal responsibilities and the expertise of the Fish and Wildlife Service in areas of wetlands protection and restoration, threatened and endangered species, floodplain and riparian habitat, coastal barrier resources and other environmental planning matters, do you believe the role proposed for the FWS in the MOU is appropriate? Is it legally mandated?

Answer: Under the broad authorities and mission of the Service, such a role would be appropriate.

Although there is no specific mandate to establish a relationship with RTC the U.S. Fish and Wildlife Service has the authority called for and specified in the MOU.

e. Question: Considering the Land and Water Conservation Fund Act, the Outdoor recreation Act and Surplus Federal Property Program, what are the legal responsibilities of the National Park Service in regards to the RTC deposition process? What has the Service done to carry out these responsibilities?

Answer: The National Park Service has no direct legal responsibilities in the RTC deposition process. However, the spirit and intent of the legislation mentioned above does seek involvement of all Federal agencies in making recreation resources available.

The Outdoor Recreation Act of 1963 specifically calls on all levels of government to take "prompt and coordinated action to the extent practicable without diminishing or affecting their respective powers and functions to conserve, develop,

and utilize such (outdoor recreation) resources for the benefit and enjoyment of the American people." The Service is authorized under this act to cooperate with and provide technical assistance to other Federal agencies, and the heads of Federal agencies and independent agencies, when pertinent and is directed to consult with the Secretary and be consulted by the Secretary. As the RTC disposition process involves properties which may be needed to assure adequate outdoor recreation, it would be appropriate for consultation to take place.

Under the Land and Water Conservation Fund (LWCF) Act of 1965, the Park Service provides financial assistance to States to acquire or develop lands for public outdoor recreation purposes and assists States in developing a Statewide Comprehensive Outdoor Recreation Plan (SCORP) which addresses recreation land and facility needs. The SCORP would be a key document in determining the need for a particular type of property.

The Surplus Federal Real Property Program is specifically addressed in Section 303(c) of the National Parks and Recreation Act of 1978 which states that:

> "It is the established policy of Congress that wilderness, wildlife conservation, and park and recreation values of real property owned by the United States be conserved, enhanced, and developed ... [and] that utilized, underutilized, or excess Federal real property be timely studied as to suitability for ... [these] purposes."

The Service and the General Services Administration (GSA) implement this policy through studies and recommendations to agencies disposing of properties under the Federal Property and Administrative Services Act of 1949, as amended. When agreed to by GSA, properties can be given to State and local governments at no cost in return for their being used for public park and recreation purposes in perpetuity (Surplus Property Public Benefit Discount Program).

RTC does not dispose of properties through the Federal Property and Administration Services Act.

In order to carry out these responsibilities with respect to RTC disposition:

> At RTC's request, NPS coordinated a meeting, including representatives from various Federal land managing and regulatory agencies, the RTC and the Oversight Board, to inform participants about RTC and Oversight Board

responsibilities and activities. NPS, FWS, and other agency staff met subsequently to share information on RTC property and environmental screening activities.

At the request of RTC, NPS provided suggested criteria for determining significant recreational, natural, cultural, and historical resources. These criteria consisted of a list of categories of resources, such as those which may have significance under Federal or State mandates or programs for protection, (e.g. wetlands, coastal zones, developed recreational facilities, water frontage or access properties, etc.); special recognition categories (such as National Natural Landmarks, properties on or eligible for the National Register of Historic Places, and Wild and Scenic Rivers, and rivers listed on the National Rivers Inventory); as well as miscellaneous recourse concerns, such as properties adjacent to or inholdings of Federal or State public lands, or being used for recreation or conservation purposes.

NPS provided information to Federal, State, and local governments, pertaining to RTC's disposal process, the RTC inventory, and how to acquire information on properties for potential acquisition. NPS also responds to requests for information from public agencies and conservation organizations interested in the S&L inventory for park and recreation, natural or cultural resource protection purposes.

Mr. Chairman, this concludes my prepared remarks. I will be glad to answer any questions you or other members may have.

PS SEP 14 1990 10:25am

ID# 173317

HU D1 D

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: SEPTEMBER 11, 1990

NAME OF CORRESPONDENT: MR. A. K. CARVER

SUBJECT: SUPPORT FOR THE PRESIDENT'S OPPOSITION TO THE CIVIL RIGHTS ACT

COUNSEL'S OFFICE
RECEIVED
SEP 12 1990

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	DATE YY/MM/DD	TYPE RESP	DISPOSITION C D	COMPLETED YY/MM/DD
~~C. BOYDEN GRAY~~ CMOFC		ORG	90/09/11			C 90/09/16
REFERRAL NOTE:						
CMOFC LO		A	90/09/13	CS		90/09/18
REFERRAL NOTE:	Letter to A. K. Carver					
			/ /			/ /
REFERRAL NOTE:						
			/ /			/ /
REFERRAL NOTE:						
			/ /			/ /
REFERRAL NOTE:						

COMMENTS: WRITER IS THE ALABAMA LEGISLATIVE COORDINATOR FOR THE ALABAMA SOCIETY FOR HUMAN RESOURCES MANAGEMENT

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 4690 ____ ____

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

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

WASHINGTON

September 16, 1990

Dear Mr. Carver:

On behalf of President Bush, thank you for your recent letter about the proposed Civil Rights Act of 1990 and for your support during consideration of the bill by the House of Representatives.

The President supports civil rights legislation consistent with three fundamental principles. It must operate to obliterate the consideration of race, color, religion, sex, or national origin in employment decisions. It must reflect the fundamental principles of fairness and due process that apply throughout other areas of our legal system. And it should provide an adequate deterrent against illegal harassment in the workplace without creating an inappropriate lawyer's bonanza.

The President has made it clear that he cannot sign the bill recently passed by the Senate or the bill recently passed by the House of Representatives. The Administration hopes that the conference committee will be able to report a bill that the President can sign.

Thank you again for sharing your thoughts and for your support for the President's position on this very important matter.

Yours truly,

Nelson Lund
Associate Counsel to the President

Mr. A. K. Carver
Alabama Legislative Coordinator
Alabama Society for Human Resources Management
570 Marshall Drive
Prattville, AL 36067

CB Gray

570 Marshall Drive
Prattville, AL 36067
August 28, 1990

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

Dear Mr. President:

On behalf of the Alabama Society for Human Resources Management (SHRM), I want to thank you for opposing what Congress has recently passed as a civil rights act. However, as you have stated in the past, this is more of a quota hiring bill than a civil rights act. While a rose by any other name may smell as sweet, a quota bill still stinks even if it is called a civil rights act.

In addition to leading to employment by quota, this bill also contains provisions to increase costly and frivolous litigation for employers. Whether employers must defend themselves through litigation or settle out of court to avoid the time and expense of litigation, employers will still be at the mercy of anyone with the inclination to bring suit against them.

For the private sector, this cost increase will be reflected in price increases for the product. For the public sector, taxes will have to increase and/or funds will have to be diverted from the services needed to offset litigation expenses. For example, I work for the Department of Veteran Affairs. An increase in litigation costs caused by the bill will require either an increase in taxes, a reduction in service and/or a reduction in veterans benefits. The bill would reduce quality of goods and services produced in this country because employers will be forced to make employment decisions based upon race and sex rather than upon being able to choose the individual best qualified to perform the job. In addition, these goods and services will become more costly as litigation costs begin to escalate. In other words, inferior products at a higher cost. These are two factors this country does not need in a time of ever increasing international trade competition.

It is unfortunate that party politics prevented our Congressmen from voting their convictions on the House version of this bill. I personally called each Alabama Congressmen's office less than 48 hours before their vote on the bill and every single office expressed a commitment to oppose this bill. However, after

the party threatened to withdraw all support and to remove Congressmen from committee assignments, all our Democratic Congressmen failed to represent our interests. Our SHRM members have written their Congressmen to express our disappointment with their decision and to solicit their support for your veto. I have enclosed a sample letter for your information.

Again, thank you for your commitment to oppose this bill and we look forward to your veto.

Sincerely,

A. K. Carver
Alabama Legislative Coordinator

AKC/jac

Enclosure

cc: SHRM National Legislative Representative
Chapter Legislative Coordinators

570 Marshall Drive
Prattville, AL 36067
August 17, 1990

The Honorable Claude Harris
House of Representatives
1009 Longworth House
Office Building
Washington, D. E. 20515-0107

Dear Congressman Harris:

On behalf of the Society for Human Resources Management (SHRM) in Alabama, I want to thank you for all the support you have given us in the past and also to express our disappointment with your recent vote on HR 4000. A vote which was entirely different from statements made by your office less than 48 hours prior to your vote. Enclosed is a copy of the letter from Congressman Callahan's office which is very similar to the position your office held when I called a few days prior to your vote.

You are probably aware of the fact that SHRM has 17 chapters in Alabama with approximately 1,000 members and controls the personnel functions of a large percentage of the state's work force. A copy of this letter along with Congressman Callahan's letter will be distributed to our membership. If the President stands behind his commitment to oppose this bill, you may again be afforded the opportunity to demonstrate your support of the SHRM members, employers, and employees within your district. In that case, we hope that your voice in Congress will reflect your commitment to us and you will again oppose any legislation which will establish hiring quotas and increase costly litigation.

Again, thank you for your past support on other legislation and we hope that you will be able to support us on HR 4000 in the future.

Sincerely,

A. K. Carver

AKC/jac

Enclosure

cc: Chapter Legislative Representatives
National Legislative Representative

SONNY CALLAHAN
1ST DISTRICT, ALABAMA

1232 LONGWORTH BUILDING
WASHINGTON, DC 20515
(202) 225-4931

DISTRICT OFFICE:
2970 COTTAGE HILL ROAD
SUITE 126
MOBILE, AL 36606
(205) 690-2811

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

COMMITTEE ON ENERGY
AND COMMERCE

SUBCOMMITTEES:

ENERGY AND POWER

TRANSPORTATION
AND HAZARDOUS MATERIALS

August 6, 1990

Mr. Andy Carver
570 Marshall Drive
Prattville, Alabama 36067

Dear Mr. Carver:

Thank you for sharing with me your opposition to H.R. 4000, the Civil Rights Reform Act of 1990, a bill to counter six 1989 Supreme Court decisions that proponents claim narrowed the reach and remedies of laws prohibiting employment discrimination.

As you may know, the House approved H.R. 4000 by a vote of 272 to 154. I did not support this measure because I believe it will have a detrimental impact on the work force and the resolution discrimination cases. Specifically, I believe the language in the bill is such that employers will see statistical formulas for both hiring and promotion as the only way to protect themselves against costly litigation. In addition, I believe the remedies go entirely too far. Instead of promoting mediation and conciliation so as to encourage the early resolution of employment disputes, H.R. 4000 would encourage complaining parties to pursue new remedies in the courts -- damages for pain and suffering, punitive damage and jury trials.

I supported the Michel/LaFalce amendment which unfortunately was defeated by a vote of 188 yeas to 238 nays. As you may know, the Senate passed its version of the civil rights bill, S. 2104, in July. Differences in the House and Senate passed measures will be reconciled in conference. The President, however, has indicated that he will veto the measure if sent to him as adopted by the two houses.

With best regards, I am

Sincerely,

Sonny

Sonny Callahan
Member of Congress

SC:lwst

ID# 173399

HU010

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: SEPTEMBER 11, 1990

NAME OF CORRESPONDENT: MR. JOHN P. O'TOOLE

COUNSEL'S OFFICE
RECEIVED
SEP 12 1990

SUBJECT: URGES THE PRESDENT TO VETO THE CIVIL RIGHTS ACT OF 1990

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION ACT CODE	DATE YY/MM/DD	TYPE RESP	DISPOSITION C D	COMPLETED YY/MM/DD
JOHN SUNUNU		ORG	90/09/11		C	90/09/11
REFERRAL NOTE:		DJ R	90912		C	90109114
REFERRAL NOTE:		A	90109114		C	90109124
REFERRAL NOTE:		A	90109125	SS A		90109172 TC
REFERRAL NOTE: For SMG-155 reply				C → SMG reply sent		9/12/90 Mailed
REFERRAL NOTE:			/ /			/ /

COMMENTS: Restaff to Shirley Green 9/20/90 N. Lund

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

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JOHN P O!TOOLE
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JOHN SUNUNU
WHITE HOUSE
WASHINGTON DC 20500

THIS MAILGRAM IS COPY OF MESSAGE SENT TO PRESIDENT BUSH.....

DEAR MR PRESIDENT:

I AM THE PRESIDENT OF SAVE YONKERS FEDERATION, WHICH REPRESENTS 146,000 TAXPAYERS THROUGH 40 TAXPAYER GROUPS. IN A RECENT VOTE, IT WAS UNANIMOUSLY DECIDED THAT WE ASK YOU TO VETO HOUSE RESOLUTION 4000, THE CIVIL RIGHTS ACT OF 1990.
JOHN P O!TOOLE

08:02 EST

MGMCOMP

Mike - Should there this response be revised?

K Baker

If they were will get SMG-159

5241 (MM 10/89)

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

cb

ID # 174489 CU
HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Ms. Coleman

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

Subject: Response letter re civil rights legislation

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Legis		ORIGINATOR	91/09/11		C	90 09/12 PS
Cont 10		Referral Note:				
		I	91/09/11	CBG	C	91/09/12 PS
Cont 2		Referral Note: Sep 12 90 cc: Memo to Gov. Sununu				
		I	/ /			/ / PS
Cont 6		Referral Note:				
		I	/ /			/ / PS
		Referral Note:				
			/ /			/ / PS
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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
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A - Answered
B - Non-Special Referral
C - Completed
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5/81

THE WHITE HOUSE

WASHINGTON

September 12, 1990

MEMORANDUM FOR C. BOYDEN GRAY

FROM: NELSON LUND

SUBJECT: Civil Rights - Package for Gov. Sununu

Attached are the materials you requested.

Attachment

Original was hand-delivered to Mary.

O'MELVENY & MYERS

555 13TH STREET, N. W.
WASHINGTON, D. C. 20004-1109

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LONDON EC2A 1LA
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2-17-22 AKASAKA, MINATO-KU
TOKYO 107, JAPAN
TELEPHONE (03) 587-2800
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WRITER'S DIRECT DIAL NUMBER

OUR FILE NUMBER

FACSIMILE TRANSMISSION

DATE: September 11, 1990

PAGES TO FOLLOW: 2

TELECOPIER NUMBER: 456-6279

TO: C. Boyden Gray

COMPANY: Counsel to the President

FROM: William T. Coleman, Jr.

PHONE: 383-5325

MEMORANDUM:

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1050 BRUSSELS, BELGIUM
TELEPHONE 32 (2) 647 06 50
TELEX 0MSSA 20317 • FACSIMILE 32 (2) 646 47 29

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

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

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	Case Number 174489CU From C. Boyden Gray to Governor Sununu RE: Civil Rights - Discussion with Bill Coleman (1 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: 172800CU to 176393CU

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

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

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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]

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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" would have to be defended in terms of job performance even if the employer adopted it for legitimate reasons unrelated to job performance. We have always maintained that this is completely unacceptable because it would render a huge number and variety of important employment practices indefensible, and would therefore inevitably lead to quotas. The language you agreed to does not suffer from this fatal problem.

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 clearly says that the standard in the first paragraph applies to practices "primarily intended to measure job performance" and that the standard in the second paragraph applies to all other practices. Although this by itself completely refutes his argument, I also find it ironic that he is suddenly concerned about our "duty" to give complete instructions to the courts in a context where we are attempting to codify a judge-made doctrine.

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

Attachments

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.

CBG/NL
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

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September
7th
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WRITER'S DIRECT DIAL NUMBER
(202) 383-5325

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

January – 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.}

HK 4000, with amendment, as passed.

A related factor is language which provides that an unlawful employment practice is established whenever a discriminatory factor is a contributing factor for an employment practice." In other words even if an employer demonstrates that the same decision would have been made in the absence of the discriminatory factors, they would still face unlimited liability.

Mr. Chairman, the many features in H.R. 4000 would result in radical changes in title VII. In many instances it would make statistical disparities sufficient enough grounds to bring a title VII case, put the burden on the accused employer to prove its innocence and make employer defenses so narrow and difficult that companies would have no alternative but to adopt employment quota systems to avoid liability. I cannot support such a measure.

My preference is to promote opportunity as opposed to guaranteeing results. Promoting opportunity for all Americans has a unifying effect. Those who demand guaranteed results either because of their race, sex, or sexual orientation are, by definition, divisive.

The CHAIRMAN. The Chair will advise the committee that all time previously assigned under general debate has been completed.

Pursuant to the rule, an amendment in the nature of a substitute printed in part 1 of House Report 101-656 will be considered as an original bill for the purpose of amendment under the 5-minute rule in lieu of the amendments now printed in the bill, and is considered as read.

The text of the amendment in the nature of a substitute is as follows:

H.R. 4000

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.—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.".

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 CONSIDERATION 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 dis-

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SEP 20 1990 12:40 pm

ID# 174591

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

HU010

INCOMING

COUNSEL'S OFFICE
RECEIVED
SEP 17 PAID

DATE RECEIVED: SEPTEMBER 14, 1990

NAME OF CORRESPONDENT: MR. T. MARSHALL HAHN JR.

SUBJECT: STANDS BEHINDS THE PRESIDENT'S EFFORTS TO ACHIEVE FAIR AND WORKABLE CIVIL RIGHTS LEGISLATION

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C/D	DISPOSITION COMPLETED YY/MM/DD
~~C. BOYDEN GRAY~~ CMOFC	ORG	90/09/14	CS	C	90/09/26 CB
REFERRAL NOTE: CMAT 10	Sep26,90 NL	A	90/09/18	CS	C 90/09/26 CB
REFERRAL NOTE: Memo to Shirley Green					
REFERRAL NOTE:					
REFERRAL NOTE:					
REFERRAL NOTE:					

COMMENTS: _____

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 4200 ____ ____

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		

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

THE WHITE HOUSE

WASHINGTON

September 26, 1990

MEMORANDUM FOR SHIRLEY M. GREEN
SPECIAL ASSISTANT TO THE PRESIDENT
FOR PRESIDENTIAL MESSAGES AND CORRESPONDENCE

FROM: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Attached Correspondence from T. Marshall Hahn, Jr. Re: Civil Rights

It appears that Mr. Hahn may know the President. If so, perhaps he should get something more than the robo.

Georgia-Pacific Corporation

T. Marshall Hahn, Jr
Chairman of the Board and
Chief Executive Officer

133 Peachtree Street, N.E.
P. O. Box 105605
Atlanta, Georgia 30348
Telephone (404) 521-5220

174591

September 11, 1990

President George Bush
The White House
Washington, DC 20500

Dear Mr. President:

I want to thank you and your staff for the excellent work you did in trying to negotiate a fair and reasonable civil rights bill. I also want to thank you for making the strong commitment you did to veto legislation which would result in employment quotas.

Even with the amendments that were adopted during floor debate, both the House and Senate versions of the bill remain objectionable to Georgia-Pacific and, to my knowledge, to the rest of the business community.

The amendments do not change the fact that the bills are quota bills. Our attorneys continue to advise me that implementing quotas may still be the best way to avoid lawsuits. The managers of our mills do not have the time to learn the complex hiring rules which would accompany passage of the bill as written. The easiest course of action for them may be to simply hire by quota. The language stating that the bills are not intended to be quota bills is for all practical purposes meaningless.

The most important issue to the business community, especially to small business, is the question of remedies. Title VII was originally intended to be a conciliatory statute, to provide a "make whole" remedy for aggrieved persons. By allowing jury trials and damages, the proposed legislation thoroughly contradicts that intent. It turns every employment decision into a potential lawsuit.

Thank you for your support. We stand behind you in your efforts to achieve fair and workable civil rights legislation.

Sincerely,

Marshall

PS

ID # 174591 CU
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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Mr. T. Marshall Hahn, Jr.

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

Subject: Civil Rights

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuoco		ORIGINATOR	90/11/26		C	90/11/26 PS
Civil 10		Referral Note: A	90/11/26		C	90/11/26 PS
[illegible]		Referral Note: A	90/11/26	C6	A	90/11/26 PS
		Referral Note:	letter to Mr. Hahn			
		_	/ /		_	/ /
		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:
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B - Non-Special Referral
C - Completed
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Comments: _____

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THE WHITE HOUSE

WASHINGTON

November 26, 1990

Dear Mr. Hahn:

On behalf of the President, thank you for your letter about the Kennedy-Hawkins employment discrimination bill. I apologize for the long delay in replying, but I want to assure you that we did review your letter when it arrived and that we gave it careful consideration.

As you know, the President was compelled to veto the bill that was presented to him by the Congress. His reasons, which were substantially similar to those discussed in your letter, are set forth in his veto message and an accompanying memorandum from the Attorney General. I am enclosing copies of these documents for your review.

The President remains committed to the enactment of a sound and workable civil rights bill. During the next Session of the Congress, the Administration will be working hard to achieve this goal. Thank you again for writing.

Yours truly,

Original signed by CBG

C. Boyden Gray
Counsel to the President

Mr. T. Marshall Hahn, Jr.
Chairman of the Board and
Chief Executive Officer
Georgia-Pacific Corporation
133 Peachtree Street, N.E.
P.O. Box 105605
Atlanta, GA 30348

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.

more

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

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: <u>all</u> 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 <u>every</u> 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 <u>shall not</u> 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 <u>all</u> 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.

THE WHITE HOUSE

WASHINGTON

November 26, 1990

MEMORANDUM FOR C. BOYDEN GRAY

FROM: NELSON LUND

SUBJECT: Civil Rights Letter from CEO of Georgia-Pacific

The incoming letter seemed to me to suggest that the writer knows the President personally, although we have no hard evidence of this. Jan Burmeister defers to us as to who should sign the reply.

Given the possibility that the man knows the President, and in light of his fairly substantial position, and because Roger Porter answered an earlier letter from him, I'm inclined to think that a letter from me isn't good enough. Accordingly, I've drafted the reply for your signature.

Attachment

THE WHITE HOUSE
WASHINGTON

R: 10-15
9:30 A
(10)

Date: 10/12/90

TO: N. Lund

Can Economists office
suggested you route
Signature

Gloria Chonka

FROM: GLORIA CHONKA
Presidential Correspondence,
Mail Analysis
Room 58, Extension 6600

THE WHITE HOUSE
WASHINGTON

Date: 10/9/90

TO: J Burnette

Has attached letter been checked out with P. Prewock?

OK for Smig 159 response?

Thanks-

gloria

FROM: GLORIA CHONKA
Presidential Correspondence,
Mail Analysis
Room 58, Extension 6600

Gloria-
Send back to N. Lund and let them make the call on GB sig or not. We have not had a chance to

Ask Patty if he is friend or not.
Thanks so much!
Courtney P.
Rm. 19

THE WHITE HOUSE

WASHINGTON

September 26, 1990

MEMORANDUM FOR SHIRLEY M. GREEN
SPECIAL ASSISTANT TO THE PRESIDENT
FOR PRESIDENTIAL MESSAGES AND CORRESPONDENCE

FROM: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Attached Correspondence from T. Marshall Hahn, Jr. Re: Civil Rights

It appears that Mr. Hahn may know the President. If so, perhaps he should get something more than the robo.

Jan — record of friend?

1) Not in PCON

2) No exchange during VP days

3) CTRK shows his first letter was answered by Roger Porter on substance 3/89

4) 9/89 his term on the President's Export Council was up.

5) They can draft for GB sig if they want, but he should get a substantive reply which only they can draft.

6) We'll put him in our next batch of questions for Patty.

Georgia-Pacific Corporation

C. Boyden Gray

T Marshall Hahn, Jr
Chairman of the Board and
Chief Executive Officer

133 Peachtree Street, N E
P O Box 105605
Atlanta, Georgia 30348
Telephone (404) 521-5220

174591

September 11, 1990

President George Bush
The White House
Washington, DC 20500

Dear Mr. President:

I want to thank you and your staff for the excellent work you did in trying to negotiate a fair and reasonable civil rights bill. I also want to thank you for making the strong commitment you did to veto legislation which would result in employment quotas.

Even with the amendments that were adopted during floor debate, both the House and Senate versions of the bill remain objectionable to Georgia-Pacific and, to my knowledge, to the rest of the business community.

The amendments do not change the fact that the bills are quota bills. Our attorneys continue to advise me that implementing quotas may still be the best way to avoid lawsuits. The managers of our mills do not have the time to learn the complex hiring rules which would accompany passage of the bill as written. The easiest course of action for them may be to simply hire by quota. The language stating that the bills are not intended to be quota bills is for all practical purposes meaningless.

The most important issue to the business community, especially to small business, is the question of remedies. Title VII was originally intended to be a conciliatory statute, to provide a "make whole" remedy for aggrieved persons. By allowing jury trials and damages, the proposed legislation thoroughly contradicts that intent. It turns every employment decision into a potential lawsuit.

Thank you for your support. We stand behind you in your efforts to achieve fair and workable civil rights legislation.

Sincerely,

Marshall

174591 DOCUMENT= 1 OF 1

OPID JV
DOCDATE 900911
RECTYP IBA
MEDIA L
STAFF PRESIDENT BUSH
PRBUSH
NAME MR. T. MARSHALL HAHN JR.
TITLE CHAIRMAN OF THE BOARD AND CHIEF
EXECUTIVE OFFICER
ORG GEORGIA-PACIFIC CORPORATION
STREET POST OFFICE BOX 105605
ADDR ATLANTA GA 30348
SUBJECT STANDS BEHIND THE PRESIDENT 'S EFFORTS TO
ACHIEVE FAIR AND WORKABLE CIVIL RIGHTS
LEGISLATION
SUBCODE HU010
LE
INDCODE 4900
RPTCODE MI
ACTION CUOFC ORG 900914
CUAT10 RSA 900918 S 900928

I0601 * End of documents in list. Press ENTER or enter another command.

ID # 11794 CU

HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Aaron E. Klatch

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

Subject: letter dated 9/5/90 to C. B. Gray thanking him for his Aug. 9th letter; 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
CUOFC	ORIGINATOR	90.09.13	NAN	C	90.09.18
CUHT10	Referral Note: I	90.09.14		C	90.09.18
Cuzray	Referral Note: I	90.09.14		C	90.09.18
	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: 9/18/90 -- No action necessary. NL

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

(Civil rights)

174794 CU

ORRIN G. HATCH
UTAH

UNITED STATES SENATE
WASHINGTON, D C

September 5, 1990

Dear Boyden:

Thank you for your kind letter of August 9, 1990. I just got back to the office after spending nearly a month in Utah and will certainly want to preserve that letter.

You are a great friend and a great lawyer.

Warmest personal regards,

Orrin G. Hatch
United States Senator

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

CS

ID # 175867 CU
HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Tony Schall

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

Subject: Talking Points regarding negotiations with William Coleman

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Code	Completion Date YY/MM/DD
Cuff	ORIGINATOR	90,09,18	NAN	C	90,09,18 CS
Cuff 10	Referral Note: I	90,09,18		C	90,09,18 CS
Ingram	Referral Note: I	90,09,18	ATTN: FYI	C	90,09,18 CS
	Referral Note:				
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	Referral Note:				
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	Referral Note:				

ACTION

DISPOSITION

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: 9/18/90 -- No action necessary. NL CS

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5/81

DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

FACSIMILE TRANSMISSION COVER SHEET

TRANSMITTED TO:

NAME: C. Boyden Gray

ORGANIZATION: Counsel to the President, The White House

TELEPHONE NUMBER: 456-2632

FAX NUMBER: 456-6279

==========

TRANSMITTED FROM:

Tony Schall
Assistant to the Attorney General
Office of the Attorney General
Room 5119
U.S. Department of Justice
Washington, DC 20530
(202) 514-2011

PAGES BEING SENT (EXCLUDING COVER SHEET): 2

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MESSAGE/COMMENT:

NOTE: If you have any problem in receipt of this transmission or do not receive all the pages, please call 514-2011.

TALKING POINTS REGARDING NEGOTIATIONS WITH WILLIAM COLEMAN

Coleman, evidently, has been arguing that the Sununu-Kennedy agreement on "business necessity" -- which then was rejected by Kennedy -- would have permitted businesses always to require high school diplomas as a hiring practice. We have been told that Coleman has the Hill "worried" about this argument and that the Administration needs to respond to the problem by having Governor Sununu negotiate a "fix" directly with Coleman.

* <u>Who on the Hill is "worried"?</u>

Our best intelligence is that no Member in either the House or Senate who is necessary to sustain the President's veto is bothered, concerned, or even taking serious the Coleman argument. His pitch has not had any impact on the Hill. Even other supporters of Kennedy-Hawkins are not using this argument.

* <u>Who is Coleman representing?</u>

Governor Sununu should negotiate only with a legitimate counterpart -- a principal at the highest level on the other side. As best we can tell, Coleman is operating with the acquiescence of Kennedy and the civil rights groups, but not at their direction. This creates a situation whereby the civil rights groups and Kennedy retain the power to disavow Coleman's actions while the Administration is unable to do the same. The chances are great that we will end up negotiating against ourselves.

* <u>Members supporting the Administration are stronger today than they were two months ago.</u>

Our veto strength is solid, nearly unassailable. During the August recess, Members expected to be hit hard in their districts for supporting the Administration on civil rights. It did not happen. Members have returned from the recess convinced this is an "inside the Beltway" issue. There is no clamor across the country for this legislation.

* <u>The only concern the Members have is with the commitment of the Administration.</u>

Members remain suspicious of the Administration's position. They are very concerned that they not end up to the right of the President. Members are already on the record. If the Administration cuts a new deal now, particularly one that does

not address all the problems with Kennedy-Hawkins, Members will feel betrayed and our ability to depend on our Hill allies on any issue in the future will be severely impacted.

* We must let our allies on the Hill know what we are doing.

They will view any negotiations with the civil rights groups as a disaster. But, if they hear about such negotiations from any source other than us (and they will), our coalition will begin to crumble. We must frame this issue for the Hill so that our friends don't feel abandoned. If we do not, then they will go and negotiate the best deal they can get from Kennedy, we will lose our veto strength, and the Administration will not have a significant role in the process. Keep in mind: our friends do not trust us.

* Any negotiations should be from the Kassebaum/LaFalce substitute.

The debate on the Hill was between Kennedy-Hawkins and the Kassebaum/LaFalce substitute. Our friends on the Hill did not adopt the rejected Sununu language as their vehicle. In fact, they rejected it forcefully when Sununu met with Senator Dole and others during the debate in the Senate. Any movement to soften further the rejected Sununu language is unacceptable to our allies.

Furthermore, we have framed the debate. Kennedy-Hawkins is a quota bill, the Kassebaum/LaFalce substitute is a real civil rights bill. Everyone understands the difference between the bills and we have the edge in the rhetoric. If we negotiate from any vehicle other than the substitute, we will be viewed as rejecting the substitute. That will upset at least two Members. More likely, it will upset thirty five Senators and 154 Congressmen.

* We can win.

We are on the verge on winning a battle that will set the stage for all future negotiations on civil rights. Our friends on the Hill have stood up to the civil rights groups and the sky has yet to fall. All that remains is for the President to veto a very bad bill. If he does, and the world doesn't end, we will be in a stronger position next year. If we cave, things will only get worse. And, the President won't get any credit.

In 1981, the last Administration stood up to union blackmail in the PATCO strike. The Administration's hardline response to a previously powerful opponent set the stage for a decade of union negotiations and legislation. The unions still have not recovered their past strength.

ID# 176119

Huaio

COUNSEL'S OFFICE
RECEIVED
SEP 24 1990

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: SEPTEMBER 20, 1990

NAME OF CORRESPONDENT: MR. FRANK J. LANDY

SUBJECT: URGES WORDING CHANGES TO THE CIVIL RIGHTS ACT OF 1990

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	DATE YY/MM/DD	TYPE RESP	C D	COMPLETED YY/MM/DD
JOHN SUNUNU		ORG	90/09/20			90/09/28 TC
CMO fc CMO to 10	REFERRAL NOTE:	R	90/09/24 TC			90/12/26 CB
	REFERRAL NOTE:	A	90/09/25			90/12/26 CB
	REFERRAL NOTE:					
	REFERRAL NOTE:					
	REFERRAL NOTE:					

COMMENTS: No Further Action Required -- Overtaken By Events -- G. Lund 12-26-90

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

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

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*ACTION CODES:          *DISPOSITION            *OUTGOING             *
*                       *                       *CORRESPONDENCE:      *
*A-APPROPRIATE ACTION   *A-ANSWERED             *TYPE RESP=INITIALS   *
*C-COMMENT/RECOM        *B-NON-SPEC-REFERRAL    *          OF SIGNER  *
*D-DRAFT RESPONSE       *C-COMPLETED            *     CODE = A        *
*F-FURNISH FACT SHEET   *S-SUSPENDED            *COMPLETED = DATE OF  *
*I-INFO COPY/NO ACT NEC*                        *             OUTGOING*
*R-DIRECT REPLY W/COPY  *                       *                     *
*S-FOR-SIGNATURE        *                       *                     *
*X-INTERIM REPLY        *                       *                     *
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176119

SOCIETY FOR INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY, INC.

Division 14 of the American Psychological Association
Organizational Affiliate of the American Psychological Society

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APA: Katherine J. Klein
SIOP: Michael A Campion

Scientific Affairs
Paul R Sackett

Society Conference
Ronald D Johnson

State Affairs
Val Markos

TIP Newsletter
Steve W J Kozlowski

President
Frank J Landy
Psychology Department
Pennsylvania State University
University Park, PA 16802
Phone (814) 863-1718

Administration Office
617 East Golf Road
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Arlington Heights, IL 60005
Phone (708) 640-0068

September 19, 1990

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

Dear Governor Sununu:

As you may remember from earlier correspondence, the Society of Industrial and Organizational Psychology is a 2400-member organization and a Division of the American Psychological Association, an association of over 90,000 psychologists. The members of our Society are centrally involved in employee selection issues. Our Society's publication entitled, **Principles for the Validation and Use of Personnel Selection Procedures** is commonly referred as a leading statement of the most current scientific thinking on personnel selection issues. They are frequently cited in Federal District Court cases on issues related to employment discrimination. In addition, our members conduct the research and practice that underlies legislative, judicial and administrative action at the local, state and federal level. Thus, we have followed with great interest the development of the Kennedy-Hawkins Civil Rights Act of 1990.

We have been monitoring the progress of the Civil Rights Act of 1990 as closely as possible during the discussions of this bill in both the House and Senate. On a number of occasions, we have suggested wording changes that would make the bill compatible with the current thinking of scientists who are expert in the area of selection testing. Unfortunately, our suggestions have not yet been implemented into the language of the bill. It appears to us that the language of HR4000 exceeds the Griggs doctrine and, further, that this non-Griggs language is technically unacceptable and at odds with professional standards. Even though there are legislative disclaimers to the contrary, it is still possible that employers might choose to adopt quotas rather than challenge what might appear to be an impossble standard of proof. For that reason, I would like to urge members of the conference committee to make the appropriate changes. Any influence you might bring to bear on this issue would be greatly appreciated. Below, I have listed our concerns.

1. In HR4000, the term "group of practices" is ambiguous. On many (if not most) occasions, employers use combinations of tests, or test "batteries" to make hiring decisions. It is well accepted in measurement theory that a combination is often more valid than any of its pieces. In other words, the predictive power accumulates across the different components of the combination. Our concern centers on Section 4 (B), i. and ii. It is our fear that this important combination principle is lost and that employers will be required to show that each of the tests in the battery either has no adverse impact or sufficient validity tro stand on its own, even though the battery combination is demonstrably job related. In this case, we have drowned the baby in the bathwater. The employer, once again, might be tempted to either eliminate a procedure that contributes to validity or to simply make sure that there is no adverse impact. It is obvious that the best way to eliminate adverse impact is through the adoption of quotas.

2. As before, we are concerned about the eventual interpretation of the term "significant" relationship. If this is interpreted as **statistical** significance, then it substantially alters the Griggs doctrine. Rather than lay the groundwork for later confusion, we continue to urge the use of the term "manifest" relationship. As I indicated in an earlier letter, this battle has been fought long ago and a compromise has been reached between those representing the interests of plaintiffs and defendants in Title VII cases. The language of HR4000 simply creates new chaos to replace order and understanding.

3. The use of the term **successful** to describe job performance creates an inappropriate dichotomy. It is a well accepted principle in our profession (a principle with wide empirical support) that performance is continuous and not dichotomous. There is no magic line that separates successful from unsuccessful performance. Rather, the generally accepted principle is that higher scores imply higher performance. This principle is clearly stated in the document that has been widely cited in Title VII litigation and published by our Society. The document to which I refer is titled "Principles for the Validation and Use of Personnel Selection Procedures" published in 1987. The following statement appears on p. 24 of that document:

> "If a selection instrument measures a substantial and important part of the job reliably, and provides adequate discrimination in the score ranges involved, persons may be ranked on the basis of its results."

It is clear from this statement that ranking of candidates from the top scorer to the bottom scorer should be the rule rather than the exception. For this reason, we are concerned about the implications of the term "successful" performance in HR4000. In addition, this terminology might suggest that the standard for comparison is minimal qualifications necessary to perform the job. Griggs, on the other hand, permitted employers to adopt higher standards rather than only minimal ones.

4. The term "performance on the job" also creates problems. As we have stated previously, many employers have legitimate concerns with employee behaviors such as absenteeism, tardiness, accident rate, and turnover. In fact, many of these outcomes are more closely related to employer profitability or effectiveness than more traditional measures of performance. For that reason, we fear that the term "job performance" is too restrictive and would like to see the concept expanded to include all relevant job behaviors (including those listed above).

5. Finally, one might construe the language in HR4000 specifying performance on **the** job to imply that a new validation study must be conducted for each and every job in each and every situation. This principle has been dubbed "situational specificity" and has been clearly abandoned by our profession. The corner stone of applied prediction (and in fact, of all science) is the notion of generalizability. We conduct research **in order to apply the results to similar situations**. This is just as true in employee testing as it is in cancer research. In medical research, when the clinical trials are completed and the results satisfactory, the drug is presented for use in a range of situations that involve particular symptoms. One does not conduct new clinical trials in each city with each doctor for each patient. The same is true in testing. When we have gathered sufficient evidence to demonstrate that a particular test is predictive of performance for a job title or job family, it is not necessary to "re-validate" that test for similar uses in other settings. To be sure, one would require that the test user demonstrate the similarity of the situations (e.g. through a comparison of job analysis results) but a new validation study would not be required. This principle is the cornerstone of the concept of validity transport, a concept well recognized in both professional (e.g. SIOP Principles) and administrative (e.g. Uniform Guidelines) documents. We urge that the use of the term "the" job be clarified so that there will be no argument about the concept of validity transportability, as currently addressed in the Uniform Guidelines.

As scientists heavily involved in the development and administration of tests, we can see the logic behind the Civil Rights Act of 1990 and, in principle, are in favor of this type of legislation. Our concerns are with language that may do more harm than good. Once again, we urge you to adopt language defining business necessity that we proposed in earlier correspondence.

"The term 'required for business necessity' means shown to be (1) predictive of or significantly correlated with work behavior(s) comprising or relevant to the job or job family for which the procedure or combination of procedures is in use, or (2) representative of one or more important components of the job, or (3) otherwise manifestly and demonstrably job related.

We encourage the conference committee to consider these suggestions. We stand ready to assist in any way in the further development of the Civil Rights Act of 1990.

Sincerely,

Frank J. Landy, President

FJL/jls

ID # 176119 CU
HU 01D R: 9/24
8:30A

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Frank J. Landy

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

Subject: Civil Rights Act of 1990 -- Affirmative Assistance with Language

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOFC	ORIGINATOR	90/09/20	CS	C	90/10/26 CB
CUATO	A	90/09/21	CS	C	90/10/26 CB CS
		/ /			/ /
		/ /			/ /
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Referral Note:
Referral Note:
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ACTION CODES.
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

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A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

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

Comments: No further action required. Nelson Lund 10-26-90

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Sincerely,

Frank J. Landy, President

FJL/jls

/cb

ID# 176291 9/24 8:30

HU 010

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: SEPTEMBER 20, 1990

NAME OF CORRESPONDENT: MR. MICHAEL E. BARODY

SUBJECT: URGES THE PRESIDENT TO VETO THE KENNEDY-HAWKINS BILL

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION ACT CODE	DATE YY/MM/DD	DISPOSITION TYPE RESP	C D	COMPLETED YY/MM/DD
~~C. BOYDEN GRAY~~ CUOFC		ORG	90/09/20	CS		90/12/28 CS
Cuofc	REFERRAL NOTE:	A	90/09/21	CS		90/12/28 CS
	REFERRAL NOTE: Dec 28, 90 NL memo to the file					
	REFERRAL NOTE:					
	REFERRAL NOTE:					
	REFERRAL NOTE:					

SEP 20 1990

COMMENTS:

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 4900 4200 1111

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

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*ACTION CODES:          *DISPOSITION            *OUTGOING             *
*                       *                       *CORRESPONDENCE:      *
*A-APPROPRIATE ACTION   *A-ANSWERED             *TYPE RESP=INITIALS   *
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*S-FOR-SIGNATURE        *                       *                     *
*X-INTERIM REPLY        *                       *                     *
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THE WHITE HOUSE

WASHINGTON

December 28, 1990

MEMORANDUM FOR THE FILE

FROM: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Letters from Michael E. Baroody, National Association of Manufacturers Re:Kennedy-Hawkins Bill

Subsequent contacts with Mr. Baroody by phone and in person have obviated the need for replies to these letters (tracking sheets #s 176291, 176497, and 176291).

Three Tracking Sheets Attached For Close Out.

10-HD

176291

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

CS

ID # 176291 CU

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

HU010 R: 9/24 8:30A

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

Name of Correspondent: Michael E. Baroody

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

Subject: Encloses a letter to the President urging a veto of the Kennedy-Hawkins/Civil Rights Bill

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOFC	ORIGINATOR	90/09/20 CS		C	90/12/28 CS
CUATIO	A	90/09/21 CS	NLO	C	90/12/28 CS
	Referral Note: MEMO FOR THE FILE				
		/ /			/ /
	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: See: ID#176291 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

National Association
of Manufacturers

MICHAEL E. BARODY
Senior Vice President
Policy and Communications

September 19, 1990

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

Dear Boyden:

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 # 176341 CU

HUDIO R: 9/24
8:30 A

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Michael Cowne

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

Subject: Urges veto of the Civil Rights Act of 1990

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Code	Completion Date YY/MM/DD
CUOFC	ORIGINATOR	90/09/19		C	90/09/26
CUATIO	Referral Note: A	90/09/20		C	90/09/26
	Referral Note:	/ /			/ /
	Referral Note:	/ /			/ /
	Referral Note:	/ /			/ /
	Referral Note:				

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C - Completed
S - Suspended

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

Comments: Restaffed 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.
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5/81

D&F

Electrical Contractors

176341CC

September 17, 1990

President Bush
The White House
Washington, D.C. 20500

SEP 19 1990

Dear President,

In the best interests of small businesses nationwide, we strongly urge you to veto the Kennedy-Hawkins Civil Rights Act of 1990.

Sincerely,

Michael Corum

Michael Corum

cc: John Sununu
Chief of Staff

cc: C. Boyden Gray
White House Counsel

D & F Electric, Inc. • 4616 Bittersweet Rd. • Louisville, Ky. 40218 • (502) 964-3327

CS

ID # 176393 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: Rights to William Coleman re Civil Rights

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuoco	ORIGINATOR	90/09/10	C		90/09/10
	Referral Note:				
		/ /			/ /
	Referral Note:				
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	Referral Note:				

ACTION

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DISPOSITION

DISPOSITION CODES:
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- Completion Date = Date of Outgoing

Comments: _____

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5/81

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. Memo	Case Number 176393CU From Nelson Lund to C. Boyden Gray RE: Reply to William Coleman (1 pp.)	09/10/90	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: 172800CU to 176393CU

Open on Expiration of PRA
(Document Follows)
By JL (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]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE

WASHINGTON

September 10, 1990

MEMORANDUM FOR C. BOYDEN GRAY

FROM: NELSON LUND

SUBJECT: Reply to William Coleman

Attached is a revised draft of a response to Mr. Coleman. The most significant change is that I would list the post-Wards Cove decisions in favor of plaintiffs rather than attach the DOJ analysis. I have two reasons for thinking this is important. First, by offering analyses of the cases I think we would set up fatter targets for attack. Second, one of the cases (O & G Spring) was decided against the plaintiffs on the disparate impact issues and for the plaintiffs only on the disparate treatment claims; accordingly, it might not be wise to enlist this case in favor of our argument.

THE WHITE HOUSE

WASHINGTON

September 10, 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 may 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 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 (CA11 July 9, 1990)
- Green v. USX Corp., Nos. 86-1554 and 86-1568 (CA3 Feb. 23, 1990)
- Emanuel v. Marsh, 897 F.2d 1435 (CA8 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. 2101 (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 groundless, I see no reason to alter the second prong 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.")

I recognize that you feel that Griggs itself has not produced a proportionally representative workforce, and that only a generation of experience with such a proportionally representative workforce will produce a proper climate in which government regulation is no longer necessary. Whatever the merit of these concerns, they extend well beyond the issues raised by Wards Cove or by the stated objectives of the legislation before us.

Sincerely,

C. Boyden Gray
Counsel to the President

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