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WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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

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

Name of Correspondent: Mr. Hugh L. Joseph

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

Subject: Encloses background materials describing new approach to civil rights

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuffe	ORIGINATOR	91/02/14		C	91/02/21 CS
CUAT; O	Referral Note:				
Cuffe	A	91/02/14	~~NEO~~	C	91/02/21 CS
	Referral Note: Feb 21 91 NL Memo for Gray				
	I	91/02/14		C	91/02/14 CS
	Referral Note:				
		91/02/14		C	91/02/14 CS
	Referral Note:				
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	Referral Note:				

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

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

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

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

5/81

Clarence

THE WHITE HOUSE

WASHINGTON

February 21, 1991

MEMORANDUM FOR C. BOYDEN GRAY

FROM: NELSON LUND

SUBJECT: Letter from Jeffrey H. Joseph

Today I received from the West Wing the package from Jeffrey Joseph, and I have reviewed it. The materials in the package advocate that the EEOC be revamped along the lines of the NLRB, with the necessary corresponding changes in Title VII, ADA, etc.

We have previously examined this idea (and a similar idea using the OSHRC as a model) in great detail. Unfortunately, it founders because of the Seventh Amendment questions about the new monetary remedy. The Paras letter from Morrison & Foerster inexcusably misses this issue completely (see paragraph 7 on page 4).

If there is anything more I should do, please let me know.

213497CC

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

JEFFREY H. JOSEPH
VICE PRESIDENT
DOMESTIC POLICY

February 14, 1991

1615 H STREET, N.W.
WASHINGTON, D. C. 20062
202/463-5493

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

Dear Boyden:

Attached are the background papers describing the new approach to civil rights we discussed on the phone last week. It has taken a few days longer than I wanted to get this to you, but several labor lawyers from around the country wanted to have input.

The beauty of this proposal is that it addresses the merits of the civil rights debate while cutting out the plaintiff's lawyers.

Coincidentally, a small group of business lobbyists met with Allen Coffey on Tuesday to discuss civil rights, and out of the blue, Coffey threw out the thought that maybe we should work on restructuring the EEOC to refocus the debate on this issue.

We have not disclosed to Allen that we have this proposal yet, but we will after you have had a chance to see these materials.

Sincerely,

Jeffrey H. Joseph

Attachments

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DIRECT DIAL NUMBER
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February 14, 1991

Peter J. Eide, Esq.
Manager, Labor Law
Labor & Human Resources Department
U.S. Chamber of Commerce
1615 H Street, N.W.
Washington, D.C. 20062

Dear Peter:

At your request, I have considered and reviewed your proposal that the Chamber sponsor a legislative initiative that would substantially expand the authority of the Equal Employment Opportunity Commission (EEOC) as the appropriate response with respect to those who advocate fundamental and erroneous changes in our employment discrimination laws. It seems to me that this approach would strengthen the protections afforded by Title VII while avoiding the excesses inherent in Kennedy-Hawkins and its progeny.

Thus, much of the public debate surrounding the proposed Civil Rights Act of 1990 concerned the degree to which certain provisions of the Act would have either significantly expanded or merely restored legal standards established under prior employment discrimination law. This debate, however, often ignored the balance of the Act, which clearly constituted a major expansion of both the time for litigating and the ultimate scope of liability under the civil rights laws. When viewed as a whole, even the most partisan supporter of the Act would have to admit that the Act was designed to permit more lawsuits and impose more liability than ever existed under preexisting legal standards. Indeed, even the counter-proposals introduced in opposition to the Act would have expanded the amount of civil rights litigation in this country, albeit to a lesser degree.

MORRISON & FOERSTER

Peter M. Eide
February 14, 1991
Page Two

An issue that, for the most part, was totally ignored during the discussion of the Civil Rights Act is whether our current system of civil litigation over civil rights issues, as a whole, is flawed. This system of multi-tiered judicial review of employment decisions costs our country hundreds of millions of dollars each year. In addition, the litigation process typically consumes years, and sometimes decades, before a resolution is reached. Moreover, civil rights plaintiffs are made almost totally dependent on their ability to find and retain private counsel willing to handle extremely complex and difficult litigation with highly uncertain outcomes. This situation satisfies neither employers nor employees confronted with civil rights issues.

Before automatically devoting even more of our society's scarce resources to yet more drawn out judicial proceedings, serious consideration should be given to a total restructuring of the manner in which civil rights claims are reviewed in an effort to achieve a more expeditious, more economical, and more uniform result for all parties. A suggested means for accomplishing these salutary aims is to amend Title VII to substitute an effective administrative process for current judicial litigation. Ideally, such an amendment would pattern the enforcement procedures of Title VII after those used to enforce the National Labor Relations Act (NLRA). Under such a scheme, an expanded and revitalized EEOC would serve a pivotal role in ensuring compliance with civil rights laws.

The advantages of patterning Title VII after the NLRA are manifest. Complainants would be entitled to rely upon the EEOC to efficiently investigate their claims and to seek relief in <u>every</u> case in which a violation of the civil rights laws appeared to have occurred. No longer would plaintiffs be dependant upon the vagaries of an increasingly expensive market for legal services. Moreover, a system of prompt administrative hearings before an administrative law judge (ALJ) who specialize in employment discrimination matters would streamline and enhance the reliability of the civil rights enforcement process. Those who are genuine victims of discrimination in violation of Title VII would receive ample relief far more quickly than they would under the current law and employers similarly would either be vindicated on a much more timely, and far less costly, basis or would be able to resolve the dispute through prompt settlement in a timely and less expensive manner.

While many sections of Title VII necessarily would have to be modified, the bulk of the changes would occur to Section 2000e-5 (Sec. 706). This section would be amended to reflect the following:

1. The EEOC would be given stronger investigatory powers to be exercised at a regional or local level. The EEOC's mandate would include an admonition to complete every initial investigation as soon as possible, and perhaps even set specified time targets for handling claims. Moreover, the EEOC procedures would not be subject to circumvention by charging parties who currently have the right to terminate administrative proceedings by requesting right to sue letters enabling them to start a legal proceeding all over again in the judicial system.

2. A six month statute of limitations period, with appropriate tolling provisions for complainants who genuinely have a reason for not promptly initiating a claim, would enhance the possibility of settlement and the preservation of evidence necessary to enhance the accuracy of any ensuing decision on the merits if a settlement is not feasible.

3. Upon completion of the investigation, the regional or local EEOC officer would either dismiss the charge for lack of merit or issue a complaint setting the matter for an administrative trial before an ALJ employed by the agency. If the charging party refuses to withdraw the charge, without prejudice, upon learning of the decision to dismiss it, a dismissal notice would be issued promptly. The charging party would have the right to appeal such decision to the General Counsel (GC) of the EEOC for review. If the dismissal is upheld by the GC, the matter is closed without further consideration by the EEOC or any other agency or court, including those at the state and local level. If the GC determines that there is merit, the charge is sent back to the regional official with instructions to issue a complaint and prosecute the matter before an ALJ. If the charge raises class-wide allegations, the GC would be permitted to prosecute the matter on a class basis.

4. The complaint will set forth, in detail, the allegations with sufficient specificity to allow the defendant employer to prepare its case should the matter proceed to trial. The agency, with the assistance of the ALJ, will attempt to settle the case prior to trial. If a

settlement cannot be reached, the trial will commence as scheduled.

5. The trial will proceed with the General Counsel for the EEOC having the burden to establish a prima facie case of a violation. In order to establish a prima facie case, the GC may proceed under either the intentional discrimination or disparate impact theories of law. With respect to disparate impact claims, the amendment would restore the Griggs standards, while clarifying that the burden of proof is upon the defendant to establish the job-relatedness of any particular employment practice that has been shown to cause a disparate impact. In the event the GC establishes a prima facie case, the defendant would then have the burden of presenting credible evidence showing that its conduct did not violate Title VII.

6. Upon completion of the trial the ALJ would write a decision announcing the determination and supporting rationale. If the ALJ determines that a violation did occur, the ALJ will order the defendant to remedy its action by providing reinstatement and/or backpay to the discriminatee and by posting or distributing, as appropriate, a formal notice of the finding. In addition, the ALJ will order the defendant to cease and desist its discrimination and not continue the offending practice(s).

7. Unless appealed, the ALJ's determination becomes the final agency determination and is enforceable by a federal Circuit Court of Appeal. The defendant will have the right to appeal the ALJ's determination to the EEOC as will the EEOC General Counsel, on behalf of the charging party. The EEOC will consider the official record of the case, along with the parties' briefs, and decide whether the ALJ's determination is within the law. If the EEOC concludes that the ALJ's determination that the charge is without merit, it will be dismissed. If the EEOC concludes that there has been a violation, it will adopt the ALJ's determination as its own or write a decision stating its reasons for upholding the ALJ. The EEOC may award additional equitable relief not provided by the ALJ and may order an additional amount of backpay or equitable relief/damages up to $50,000 or double the discriminatee's backpay. The EEOC's determination would be enforced, if necessary, by a U.S. Circuit Court of Appeals.

The changes outlined above essentially mirror the procedures utilized by the NLRB. For over 50 years, these

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procedures have proven highly effective in enforcing the individual and collective rights granted in the NLRA. The above paragraphs do not fully describe the Board's procedures. It is intended that the proposed amendment duplicate those procedures in every meaningful respect.

An amendment like that described above will afford quick and complete relief to victims of discrimination (the avowed goal of the civil rights proponents) while at the same time giving employers the realistic hope of avoiding the absurd measures called for in H.R. 1.

If you have any questions or I can be of further assistance, please let me know.

Sincerely,

James C. Paras

JCP/vvm

DRAFT
DISCUSSION PAPER
NOT POLICY

BACKGROUND REPORT

CIVIL RIGHTS ENFORCEMENT ACT OF 1991

Last year President Bush vetoed the Civil Rights Act; a veto that was barely sustained. More onerous bills have already been introduced in Congress and another bruising battle is certain. In an effort to address the concerns of civil rights proponents, and to provide a viable alternative to their unacceptable proposals, a distinctly different approach has been developed. This approach is summarized below.

There are two principal federal civil rights laws. Foremost is Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e, et seq.) Alleged violations are brought to the attention of the Equal Employment Opportunity Commission (EEOC) by the aggrieved employee or applicant in the form of a charge filed with the agency. The agency investigates the matter and if it finds there is probable cause to believe that a violation occurred, it attempts to conciliate or settle the matter. If the agency finds that the charge lacks merit, or if it is not successful in settling a meritorious charge, it concludes its processing of the matter by issuing a "right-to-sue" letter to the charging party notifying it of the disposition of the case and advising it of the right to pursue the matter in federal court. In rare cases the EEOC will bring suit in federal court on behalf of the aggrieved party.

Like any federal civil trial, both the employee/plaintiff and employer/defendant may engage in thorough discovery of the other party's evidence. This process usually takes many months, if not years, during which the employer is forced to reveal extensive documentation and voluminous records as the plaintiff searches for evidence to support his or her claims.

Upon completion of the discovery process the matter is set for trial before a judge. A jury is not available to hear and decide Title VII claims although last year's vetoed bill provided for jury trials. The judge, after hearing the case, may dismiss the matter or, if a violation is found, award equitable damages in the form of backpay, reinstatement, frontpay, interest and an order to cease the violative activity. The judge also may order injunctive relief such as implementation of an affirmative action plan.

The other principal federal anti-discrimination law was passed in 1866 (42 U.S.C. Sec. 1981) but was not enforced until the 1960s. It prohibits racial discrimination in the making of contracts and until recently had been interpreted to prohibit such discrimination in the enforcement of contracts as well. A party seeking relief under Sec. 1981 need not file a charge with the EEOC and may file

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DISCUSSION PAPER
NOT POLICY

suit directly in federal court. Sec. 1981 claims can be heard and decided by a jury which may award compensatory and/or punitive damages. It is not unusual for plaintiffs, relying on the one set of facts, to plead violations of Title VII and Sec. 1981 simultaneously. Under both Title VII and Sec. 1981 a successful employee can recover his/her attorney's fees from the employer.

The National Labor Relations Board (created in 1935) is charged with enforcing the National Labor Relations Act which prohibits, among other things, discrimination against an employee because of his/her activities in or on behalf of a union. Thus, for over fifty years the NLRB has handled employment discrimination claims. The NLRB's procedures are vastly different from those of the EEOC. The Board, upon receipt of a charge alleging unlawful discrimination, conducts an immediate investigation. The Board succeeds in completing the investigations of almost all of its charges within an average of 30 days. The Board's General Counsel (GC) has total discretion as to whether an employer is prosecuted for an unfair labor practice.

If the charge is found to have merit, and the respondent employer is unwilling to settle the matter, a hearing is held before an Administrative Law Judge (ALJ). The hearing, or trial, normally takes place within a few weeks of the issuance of the complaint. The General Counsel's attorneys prosecute the case and have the burden to establish a prima facie case through submission of documentary and testimonial evidence. The trial is a formal proceeding with a full transcript and is governed by the Federal Rules of Evidence.

The ALJ issues a decision which may dismiss the charge or call for the employer to reinstate the charging party and/or pay backpay, with interest. The ALJ's decision may be appealed to the Board by either the GC's attorneys or the employer. The Board then considers the transcript and decides to overrule the ALJ, dismissing the charge or finding a violation, or to uphold the ALJ. A charging party or employer which loses before the Board can appeal the Board's decision to a U.S. Court of Appeals. If the court sides with the Board, it will order the employer to comply with the Board's order. An employer who refuses is guilty of contempt of court.

The Civil Rights Enforcement Act is an effort to streamline EEOC enforcement of Title VII by making the enforcement procedures almost identical to those of the NLRB. Such changes will have many beneficial effects including: rapid resolution of charges; elimination of plaintiff lawyers (and their fees); centralized and consistent interpretation and application of discrimination law, and; quick relief for genuine victims of unlawful discrimination.

COMMENTS ON PROPOSED
CIVIL RIGHTS ENFORCEMENT ACT OF 1991

DRAFT
DISCUSSION PAPER
NOT POLICY

Initiative. The Chamber predictably takes a negative position on most social legislation. This proposal allows the Chamber and its spokespersons to support a positive approach. This realistic civil rights proposal answers all of the claimed needs of the civil rights proponents.

Efficiency. In its investigations, the EEOC now conducts expensive (for the defendant employer) reviews of largely irrelevant documents culminating in a request for settlement (regardless of the merit of the charge). The EEOC process is cumbersome, superficial, inconclusive, expensive and yields mostly bitterness and frustration for both parties. This system will bog down even further when the ADA is implemented. If H.R. 1 or something like it becomes law, filing of EEOC charges will skyrocket and the federal courts, already hopelessly overburdened with backlogged civil cases drug-related criminal cases, will cease to function in any reasonably efficient manner.

A significantly improved administrative system would result in expeditious and thorough investigations, prompt disposal of charges lacking merit, and timely (as well as relatively inexpensive) adjudication of meritorious charges. The tremendous expense and delay of pretrial discovery will be eliminated. The only losers will be plaintiff lawyers.

Employer Cost. The tremendous expense of pretrial discovery will be avoided as will the endless periods of uncertainty (for the employer and employee alike) due to the current EEOC's leisurely investigations. If the charge is found to have merit after a prompt investigation, the employer will be in a good position to reach a and fair settlement, especially since vast sums would not have been invested in the investigation and pretrial discovery.

Appeal. Some claim that Title VII relief is inadequate (especially as to sexual harassment), that recent Supreme Court decisions make it too difficult to prove discrimination, that women do not have the same remedies that other minorities do under Sec. 1981, and the current laws are not strong enough to deter discrimination. This proposal for stronger and much more efficient administrative remedies answers each of these claims. Moreover, the proposal promises all parties an efficient and less expensive means of resolving discrimination claims.

Political Factors. H.R. 1 is already on the table. Alternatives are expected as is Sen. Kennedy's bill. The administration will introduce a civil rights measure. Since this proposal addresses all of the concerns of the civil rights proponents, it offers members of Congress who may not wish to vote for the Brooks or Kennedy bills an appealing pro-civil rights alternative so they can claim that they voted for civil rights legislation.

Legal. The government has demonstrated its ability to efficiently process claims of employment discrimination. The NLRB has provided such service to U.S. businesses, unions and employees since the 1930's. Restructuring of the EEOC to operate like the NLRB, and alteration of the enforcement provisions of Title VII, is readily achievable at low cost. Removal of Title VII disputes from the federal courts and placing such matters in an administrative agency would foster the development of a consistent body of law which could be interpreted and applied nationwide.

Exclusivity/Preemption. This proposal cannot work if inconsistent state and local anti-discrimination laws are not preempted. Otherwise, employers would face dissatisfied charging parties seeking additional or alternative relief in another forum. The appealing aspects of this proposal (e.g., rapid, efficient and reasonable resolution of employment discrimination claims) would be undermined, if not negated. The quid pro quo for employers submitting to a competent federal agency would be elimination of inconsistent state and local procedures.

ADA. The Americans With Disabilities Act (ADA) provides remedies contained in Title VII. If Title VII were to remain unchanged, the current EEOC is incapable of handling the anticipated inundation of ADA charges. If Title VII is amended pursuant to of H.R. 1, the EEOC's caseload would be even higher. The current situation would result in the gradual development of disability law by every federal judge in the country followed by inconsistent or conflicting interpretations by the appellate courts.

One appealing aspect of this proposal is that a revised EEOC would be staffed and equipped to efficiently process disability charges and, most importantly, this relatively new area of the law would be developed by one central source with expertise in the area. Thus, interpretation and application of the new law will be consistent and widely known to all businesses and those that assist employers in complying with the ADA.

Federal Budget. H.R. 1 and the Kennedy bill will cost the government millions or, more likely, hundreds of millions to build and staff the federal courts to process the litigation of claims these proposals will generate. This proposal will require the allocation of considerable funds to the EEOC. However, the amount necessary to accomplish a revamping of that agency, which already has most of the necessary facilities and staff, will be small compared with the amount needed by the federal courts.

Attorneys. The only parties to not gain from implementation of this proposal are plaintiffs' attorneys. Their involvement in employment discrimination claims would be unnecessary. Employer defendants would not have to deal with attorneys who pursue remunerative cases, regardless of merit, in order to survive.

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This is a concept proposal for civil rights legislation. It is only an outline of a proposal and is not framed in statutory language. It address the many details which implementation of such legislation would require.

CIVIL RIGHTS ENFORCEMENT ACT OF 1991

S. ____

H.R. ____

To amend Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e, et seq.

The intent of this amendment is to change the enforcement procedures of Title VII so that charges of discrimination prohibited by Title VII would be adjudicated in an administrative forum rather than in the federal courts, as is now the case. The EEOC would become at least as efficient, and probably more so, in enforcing Title VII as the NLRB is in enforcing the National Labor Relations Act. Such efficiency could easily be achieved, and the prohibitions of Title VII would be stronger, enforcement of the law more certain, and relief for victims of discrimination much easier and quicker to obtain than is the case under the current law. Of course, the EEOC would become much more active and more employers most likely would encounter personnel from the agency. However, genuine victims of unlawful employment discrimination would receive ample relief far more quickly than they would under the current law and employers similarly would either be vindicated on a much more timely, and far less costly, basis or would be able to resolve the dispute through prompt settlement in a timely and less expensive manner.

DRAFT -- DISCUSSION PAPER ONLY -- NOT POLICY

While many sections of Title VII necessarily would have to be modified, the bulk of the changes would occur to Sec. 2000e-5 (Sec. 706). The entire section would have to be rewritten to reflect the following:

1. The EEOC would be given (although it already possesses) strong investigatory powers to be exercised at a regional or local level. The EEOC's mandate would include an admonition to complete every initial investigation as soon as possible. Perhaps the statute should include suggested "time targets". EEOC procedures would not be subject to circumvention by charging parties solely because the EEOC has not taken action on the charge within a certain amount of time.

2. It seems that a six month statute of limitations is appropriate, especially if the EEOC routinely processed charges on a timely and efficient basis. Political reality suggests, however, that given the statute of limitations where a state anti-discrimination agency exists, a longer period may be required. In any event the period should not exceed 12 months.

3. In order for the pervasive and powerful remedial scheme outlined herein to work, a preemption provision is absolutely necessary. State and local workplace anti-discrimination provisions would be preempted by a revised Title VII and the relief they afford to workplace discrimination victims would be redundant and unnecessary. Essential to the entire scheme of this proposal is that the employment discrimination prohibitions

be identical throughout the nation and be enforced in a consistent and predictable manner.

4. Upon completion of the investigation, the regional or local EEOC officer would either dismiss the charge for lack of merit or issue a complaint setting the matter for a hearing before an administrative law judge (ALJ) assigned to the EEOC. If the charging party refuses to withdraw the charge, without prejudice, upon learning of the EEOC decision to dismiss it, a dismissal notice would be issued promptly. The charging party would have the right to appeal such decision to the General Counsel (GC) of the EEOC for review. If the dismissal is upheld by the GC, the matter is closed without further consideration by the EEOC or any other agency or court, including those at the state and local level. If the GC determines that the charge is meritorious, the charge is sent back to the regional official with instructions to issue a complaint and prosecute the matter before an ALJ.

5. The complaint will set forth, in detail, the allegations with sufficient specificity to allow the defendant employer to prepare its case should the matter proceed to a hearing. The agency, perhaps with the assistance of the ALJ, will attempt to settle the case prior to the hearing. If a settlement cannot be reached, the hearing will commence as scheduled.

6. The hearing will proceed with the General Counsel for the EEOC having the burden to establish a prima facie case of a

violation. If the ALJ determines that a prima facie case has been established, the defendant will have the burden of presenting credible evidence showing that its conduct did not violate Title VII. The ALJ will then write a decision announcing the determination and supporting rationale. If the ALJ determines that a violation occurred, the ALJ will order the defendant to remedy its action by providing reinstatement and/or backpay to the discriminatee, by placing the discriminatee(s) in the position(s) which they would have obtained but for the unlawful conduct, and by posting or distributing, as appropriate, a formal notice of the finding. In addition, the ALJ will order the defendant to cease and desist its discriminatory conduct and not continue the offending practice(s).

7. Unless appealed, the ALJ's decision automatically becomes the final agency determination and is enforceable by a U.S. Circuit Court of Appeal. The defendant will have the right to appeal the ALJ's determination to the EEOC as will the EEOC General Counsel, on behalf of the charging party. On appeal, the EEOC will consider the official record of the case, along with the parties' briefs, and decide whether the ALJ's determination is within the law. If the EEOC concludes that the ALJ's determination that the charge is without merit, it will be dismissed and not considered by any other agency or court. If the EEOC concludes that there has been a violation, it will adopt the ALJ's determination as its own or write a decision stating

its reasons for upholding the ALJ. The EEOC may award additional equitable relief not provided by the ALJ and may order an additional amount of equitable relief to compensate the discriminatee(s) for actual damages, not to exceed $25,000, due to unlawful harassment. The EEOC's determination would be enforced, if necessary, by a U.S. Circuit Court of Appeals.

The changes outlined above essentially mirror the procedures utilized by the NLRB. These procedures have proven highly effective in enforcing the individual and collective rights granted in the NLRA. The above paragraphs do not fully describe the these procedures. It is intended that the proposed amendment duplicate those procedures in almost every respect.

An amendment like that described above will afford quick and complete relief to victims of discrimination (the avowed goal of the civil rights proponents) while at the same time giving employers the realistic hope of avoiding the absurd measures called for in H.R. 1.

While this amendment standing alone addresses almost all of the expressed concerns of the civil rights proponents, political reality suggests that any civil rights measure may have to address some of the recent Supreme Court decisions that so trouble those in the civil rights community (e.g., Price Waterhouse, Ward's Cove, Patterson). Therefore, this proposal may, at some point, have to address the impact of these cases. The Chamber is considering conceptual language which would

address these issues. Obviously, this proposal is in a rough and unpolished stage. It does not appear that there is a great deal of time to engage in a lengthy maturation process. If we are to proceed with this civil rights proposal, it is necessary to move quickly because rapid movement of H.R. 1 is likely. A handful of large corporations are engaged in "discussions" with civil rights proponents. These "discussions" may result in some corporations actually supporting civil rights legislation not unlike that vetoed last year.

CS

ID # 213526 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: Bullets on Civil Rights; nomination of John Schall

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuoco	ORIGINATOR	91/01/23		C	91/01/23 CS
	Referral Note:				
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ACTION CODES:
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FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
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Comments: _____

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

Close out

THE WHITE HOUSE

WASHINGTON

January 23, 1990

MEMORANDUM FOR JOHN SCHALL

FROM: NELSON LUND

SUBJECT: Bullets on Civil Rights

Attached, as promised, are some draft bullets on the Administration's employment discrimination initiative. I would be surprised if they need to be changed very much after the final decisions are made about what to include in our bill.

Attachment

Employment Discrimination

- The Administration is committed to strengthening the strong antidiscrimination laws that already exist. These improvements will operate to obliterate consideration of factors such as race, religion, sex, or national origin from employment decisions.

- This can be done without encouraging the use of quotas or preferential treatment, without departing from the fundamental principles of fairness that apply throughout our legal system, and without creating a litigation bonanza that brings more benefits to lawyers than to victims.

- A major objective of the Administration is to ensure that Federal law provides new and stronger deterrents against harassment based on race, sex, religion, national origin, or disability.

- The time has come for Congress to bring itself under the same antidiscrimination requirements it prescribes for others. This will promote both fair treatment for congressional employees and a greater appreciation of the consequences of new legislative initiatives.

- Other improvements, including changes in certain statutes of limitations and attorney fee rules, will also improve the administration of our comprehensive employment discrimination laws.

ID # 213617 CU

HU.01D 2-19 5:30P

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: C. Stuart Broad

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

Subject: "Civil Rights Bill of 1991"

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU0/C	ORIGINATOR	91/02/14		C	91/02/20 PS
CUAT 10	A	91/02/15		C	91/02/20
			See Comments		
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Referral Note:

ACTION CODES:
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Per Nelson Lund

Comments: Forwarded to Shirley Green (for standard response) please close out.

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5/81

THE WHITE HOUSE
WASHINGTON

Date: 2-20-91

TO: FRANCES SPELL

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

☐ Action

☐ Comments

☐ FYI

The attached may be responded to with SMG robo unless this is someone the President knows personally.

21361CC

C. STUART BROAD

3709 WILLIAMS LANE
CHEVY CHASE, MARYLAND 20815-4951
(301) 657-4755

February 11, 1991

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

Dear Mr. President,

Thank you for your letter of January 29 regarding the Persian Gulf crisis. Your leadership is continuing to see us through with the heroic efforts of Secretary Baker and many others.

However, on the home front the Kennedy - Metzenbaum crowd is at it again with the so-called "Civil Rights Bill of 1991". Rev. Jesse Jackson even seems to be making veiled warnings about the support of black troops in the war effort and relating this to his demands for job quotas. Demonstrating, one surmises, that nothing is sacred to the Rev. Jackson.

Let us Republicans hold the line. We slid down the long slope to government rationing of job opportunities for 25 years of the Johnson-Nixon-Carter years. A program that was intended to open doors to productive effort was trasmuted into a quotas requirement by clever lawyers and compliance officers of the EEOC and Department of Labor. The Supreme Court has called a stop to this during the past Term.

I am sure you and the Attorney General have completed a full analysis of this matter and have decided to make a stand on principle; that is, the principle of elementary fairness. Enclosed is my recent letter to the Wall Street Journal on this issue.

Thank you for your inspired leadership.

Sincerely,

C. Stuart Broad

C. Stuart Broad, Esq.

C. STUART BROAD

3709 WILLIAMS LANE
CHEVY CHASE, MARYLAND 20815-4951
(301) 657-4755

February 6, 1991

TO THE EDITOR
The Wall Street Journal
200 Liberty Street
New York, NY 10281

Ladies & Gentlemen:

I refer to the editorial page article "Civil Rights Bill: The Way to Religious Quotas" by former Mayor Edward L. Koch. It is a fine lawyers analysis, equal to his vanquishing the famed law professor Alan Dershowitz in your letters column on the issue of admission into evidence of recordings.

As a former Federal government attorney and civil rights official I became an eyewitness to the transformation of "affirmative action" into employment quotas by clever lawyers, some government compliance officers and a few persons claiming minority leadership roles. When Secretary of Labor Arthur Goldberg , and his Assistant Secretary Daniel Patrick Moynihan, wrote Presidential Executive Order 11246 (signed on September 24, 1965) they coined the phrase "affirmative action" to break down the then-current barriers to black employment and upward mobility. Possibly an historic example of mistaken means toward an acceptable goal.

However, within a few years the agenda sub silentio of employment quotas began to infect the entire system, and does so today. It seems that quite a few beneficiaries, and many compliance officials, came to believe that equal results were the goal of this program. It was named, however, Equal Opportunity.

In 1991 we are faced with another Senator Edward Kennedy attempt to roll back the clock to the 1960's and reinstate employment quotas by indirection(Congressman Augustus Hawkins has retired). This at a time when enormous gains have been made in minority and female employment, and we face a performance crises in American to meet international competition.

Hopefully, calmer heads will prevail and the 1991 Kennedy Bill to restore employment quotas will find its way into history. Equal Opportunity is still the name of the program.

Sincerely,

C. Stuart Broad

C. Stuart Broad, Esq.

Civil Rights Bill: The Way to Religious Quotas

By Edward I. Koch

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

Because, like the 1990 version known as Kennedy-Hawkins, the legislation finds that an unlawful employment practice is established when "a complaining party demonstrates that an employment practice (or group of practices) results in a disparate impact on the basis of race, color, religion, sex or national origin, and the respondent fails to demonstrate that such practice is required by business necessity."

The employer would have the burden of proving that the hiring practice or group of practices bear a "significant relationship to successful performance of the job." Contrary to the claims of the legislation's supporters, this standard is more stringent than the standard consistently applied in this area by the Supreme Court. The court says that employers may justify hiring practices if they bear a "manifest relationship to the employment in question."

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

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

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

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

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

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

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

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

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

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

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

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

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

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HLL010 2/21 9 A.M.

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

Name of Correspondent: M. L. Shirk, Jr.

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

Subject: Requests clarification of wording on 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
CU/C	ORIGINATOR	91/02/15 TC		C	91/02/26 PS
CU/AT/10	Referral Note:				
	A	91/02/19	NLØ	C	91/02/26
	Referral Note:		Memo for Green		
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THE WHITE HOUSE

WASHINGTON

February 26, 1991

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

FROM: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Letter from K. L. Shirk, Jr. Re: Civil Rights

The captioned letter can probably be handled by sending the President's new bill and section-by-section analysis after it is introduced.

214008cm

SHIRK, REIST, WAGENSELLER AND SHIRK

KENELM L SHIRK, JR
ROGER S REIST
DAVID WAGENSELLER, III
KENELM L SHIRK, III
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JOSEPH JOHN KAMBIC
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ATTORNEYS AT LAW
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K L SHIRK, SR (1915-1956)

PRINCIPAL OFFICE
132 E CHESTNUT STREET

AREA CODE 717
LANCASTER-394-7247
TELECOPIER (717) 394-1080
AKRON-859-1742

IN REPLY REFER TO

February 6, 1991

The Honorable George Bush
Office of the President
1600 Pennsylvania Avenue, NW
Washington DC 20500

Dear Sir:

Your position on Civil Rights is really not know except within Congress and some persons within the media.

The issues are definitely not clear.

Please advise what specific wording changes you would require to the bill submitted to you last year (which I understand is embodied in HR1) that would make it acceptable to you.

Specifically, I understand the bill says that it is not a bill to create quotas or even to encourage them, yet you say it does. Please advise your wording to avoid quotas.

The only thing we beyond the "outer rim" know about the bill is that it is allegedly a quota bill (much of which philosophy is opposed, even by many who support the idea of civil rights very strongly).

Any help you can give would be appreciated.

Respectfully yours,

K. L. Shirk, Jr.

KSLJR:ern

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Name of Correspondent: Bill Prince

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

Subject: Civil Right issue; favors quotas until there is a better alternative

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Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOfc	ORIGINATOR	91/02/15 TC		C	91/02/27
	Referral Note:	TC			
CUAT 10	A	91/02/19		C	91/02/27
	Referral Note:		See comments		
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	Referral Note:				
	_	1 1		_	1 1
	Referral Note:				
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[redacted]

THE WHITE HOUSE
WASHINGTON

Date: 2-22-91

TO: Frances Shirley Green

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

[redacted]

- ☐ Action
- ☐ Comments
- ☐ FYI

O.K. for Smg
robs - "civil rights"

[redacted]

403 Dewey Pl. E.
Seattle WA 98112
January 1, 1991

President George Bush
Washington, DC

Dear President Bush,

I have been watching your actions in the area of civil rights over the last few months, and have seen your veto of the civil rights bill, as well as your administration's ban on race-based scholarships. I understand your positions on these issues to be determined by an opposition to quotas.

I agree that quotas are an inferior system of redressing ongoing racial discrimination. Until you have an alternative other than returning to unrestrained active discrimination, however, I am in favor of quotas. Ethnic minorities lag behind whites in statistics of health, employment, income, education, and other areas. This is not an accident. Until you have a better plan, then you have not vetoed a civil rights bill, you have vetoed civil rights.

Yours,

Bill Prince

ID # 214420 CU

HU 010 R 2/21 9:00

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Lance W Seberhagen

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

Subject: Recommendations re Civil Rights Act of 1991 regarding disparate impact discrimination

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU OK	ORIGINATOR	91/02/19		C	91/02/21
CU AT 10	A	91/02/20		C	91/02/21
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Comments: No Further Action Required

T. Lund 2/21/91

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214420cc

Seberhagen & Associates
Consultants in Personnel Management

February 14, 1991

Mr. C. Boyden Gray
The White House
1600 Pennsylvania Ave, NW
Washington, DC 20500

RE: Civil Rights Act of 1991

Dear Mr. Gray:

Please accept the enclosed recommendations for the proposed Civil Rights Act of 1991, regarding disparate impact discrimination (Sections 3 and 4 of the Act).

As a consulting industrial/organizational psychologist who specializes in employee selection, I have attempted to resolve the differences between Congress and the White House, while at the same time making sure that the Act complies with generally accepted professional standards in employee selection. Key points include:

- Definition of "disparate impact."
- Definition of "significant relationship."
- Definition of "successful performance of the job."
- Simplified wording regarding a "group of employment practices."
- Requirement that plaintiffs specify which procedures caused disparate impact, provided that employers keep necessary data.
- Requirement of more reliable evidence to prove "business necessity."

H1 is not a "quota" bill, but the best way to eliminate discrimination and avoid any possibility of "quotas" would be simply to require employers to validate all selection procedures, regardless of disparate impact, as once required by the Labor Department's Office of Federal Contract Compliance in its 9/24/68 testing order under EO 11246. However, my recommendations below stay within the general framework of H1.

Please call me if you have any questions about my recommendations.

Sincerely,

Lance Seberhagen

Lance W. Seberhagen

Lance W. Seberhagen, Ph.D. • 9021 Trailridge Court, Vienna, Virginia 22182
Telephone 703-790-0796

PROPOSED REVISIONS

CIVIL RIGHTS ACT OF 1991[1]

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 **"disparate impact"** means the selection rate for one group of applicants or employees is less than four-fifths (or eighty percent) of the selection rate for another group and is unlikely to have occurred by chance, with a probability of not more than one in twenty (five percent). Disparate impact is normally computed on an annual basis for each job classification but may be computed on other bases if appropriate to the analysis.

(o) The term **"job classification"** (or "job class" or "job") means a group of positions, updated at least every five years, that are similar enough in their duties, responsibilities, and necessary worker characteristics that they may be properly placed under the same job title and treated alike for purposes of personnel administration (such as recruitment, hiring, promotion, training, and base salary). Some positions within a job class may have other special requirements (such as night shift or bilingual ability), provided that the basic work of the position otherwise fits within the general definition of the job class.

(p) The term **"job description"** (or "job class specification") means a written statement, updated at least annually, of the official duties, responsibilities, necessary worker characteristics, working conditions, and other information used to define a job classification. Job descriptions need not be all-inclusive but should provide a reasonably accurate and complete description of the important aspects of each job.

(q) The term **"position"** means a set of work duties and responsibilities, assigned or delegated by competent authority, that are normally performed by one employee.

(r) (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 must bear a significant rational or empirical relationship to successful performance of the job; or

---

[1] Based on bill H1, 1/3/91. Additions are underlined. Deletions are not shown.

(B) in the case of employment practices that do not involve selection, the practice must bear a significant rational or empirical relationship to a legitimate 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 of a reliable nature is required. The defendant shall provide a job description plus other appropriate evidence (such as statistical reports, validation studies, cost/benefit analyses, program evaluation studies, independent expert testimony, and other evidence of a comparable nature), 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 *Ward's Cove Packing Co., Inc. v. Atonio* [109 S.Ct. 2115 (1989)].

(s) 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).

(t) The term **"significant relationship"** means a relationship that is large enough to have a practical effect and is unlikely to have occurred by chance, with a probability of not more than one in twenty (five percent).

(u) The term **"successful performance of the job"** means the extent to which job incumbents achieve the legitimate management objectives for the job. Job performance may include not only the performance of specific job duties and responsibilities but also other work-related employee behavior (such as attendance, safety, integrity, cooperation, courtesy, grooming and dress, and compliance with established policies and procedures).

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, except that:

(1) 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;

(2) the complaining party shall be required to demonstrate which specific practice is responsible for the disparate impact in all cases unless the court finds after discovery that the respondent has (1) destroyed, concealed, or refused to produce existing records that are necessary to make this showing, or (2) failed to keep such records; or

(B) regardless of (A) above, a complaining party demonstrates the availability of an alternative employment practice, having no more than the same cost and no less than the same effectiveness, that will reduce the disparate impact, and the respondent refuses to adopt such alternative.

(2) Respondents shall maintain job descriptions, documentation on employment practices, applicant data, selection data, and other records and information needed to assess disparate impact resulting from employment practices. Respondents shall assess the disparate impact analyses of their employment practices on at least an annual basis.

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

(4) 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 race, color, religion, sex, or national origin.

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

[End of proposed revisions.]

APPENDIX

EXPLANATION OF PROPOSED REVISIONS TO CIVIL RIGHTS ACT OF 1991

SEC. 3. DEFINITIONS

1. **Disparate impact** (page 1, lines 14-18). No definition exists in current statute, resulting in confusion and uncertainty caused by present inconsistencies among EEOC guidelines and court decisions. Proposed definition combines "practical significance" (EEOC's "80% Rule") and "statistical significance" (not more than 5% chance probability) to ensure meaningful and reliable differences. Also reflects most commonly used method to assess adverse impact in accord with generally accepted professional standards.

2. **Job classification** (page 1, lines 20-26). No definition exists in current statute or EEOC guidelines, causing inconsistent measurement of adverse impact. Reasonably homogeneous groupings of positions are needed to facilitate job identification and statistical reporting, as well as development of job-related employment practices. Most employers already have some type of position classification system. Employers normally update the assignment of positions to job classes at least every five years, while updating job descriptions at least annually, because a more detailed study is required to assign individual positions to job classes. Reflects generally accepted professional standards.

3. **Job description** (page 1, lines 28-32). No definition exists in current statute. EEOC guidelines presently require job descriptions as necessary but not sufficient evidence to show that employment practices are job-related. Job descriptions also play an important role in the Americans with Disabilities Act, which Congress has linked to Title VII. Most employers maintain a formal, organization-wide system of job descriptions, while position descriptions tend to be more informal, frequently updated documents that are maintained only by the immediate work unit. Employers normally update the assignment of positions to job classes at least every five years, while updating job descriptions at least annually, because a more detailed study is required to assign individual positions to job classes. Updating of job descriptions is a simpler function that is normally done annually. Reflects generally accepted professional standards.

4. **Position** (page 1, lines 34-35). No definition exists in current statute or EEOC guidelines. Definition is needed to avoid common confusion between "position" and "job classification." Most employers maintain a formal, organization-wide system of job descriptions, while position descriptions tend to be informal, frequently updated documents that are maintained only by the immediate work unit. Proposed Act does not require position descriptions. Reflects generally accepted professional standards.

5. **Business necessity**. Renumbered as "r" (page 1, line 37).

   a. Add "rational or empirical" (page 1, line 41; page 2, line 5) to ensure that the Act accepts all validation methods presently accepted by EEOC guidelines and generally accepted professional standards. Of the validation methods most used by employers, "content validation" is designed to show a rational relationship based on job analysis and expert judgement, while "criterion-related validation" is designed to show an empirical relationship based on the statistical correlation between scores on a test and measures of work performance. Both methods have been proven to work well.

   b. Replace "significant" with "legitimate" (page 2, line 5) because there is no good way to assess the significance of business objectives beyond a basic determination of legitimate versus illegitimate.

   c. In "(r)(2)" (page 2, line 9), divide the first sentence into two sentences to improve readability.

   d. Add "of a reliable nature" (page 2, line 10) to indicate more clearly that the evidence should be based on a formal study whose results are consistent with what other professionals would find if they conducted a study in accord with generally accepted professional standards.

   e. Add "The defendant shall provide a job description plus other appropriate evidence..." (page 2, lines 10-11) to identify the job in question and to provide part of the evidence needed to show that the employment practice is job-related. Reflects generally accepted professional standards.

EXPLANATION OF PROPOSED REVISIONS TO CIVIL RIGHTS ACT OF 1991 (cont.)

f. Add "(such as ... cost/benefit analyses, program evaluation studies, and independent expert testimony, and other evidence of a comparable nature)" (page 2, lines 11-13) to the examples of acceptable evidence. Only formal studies should be accepted, not personal testimonials or other casual reports, which are unreliable. Expert testimony should be allowed only from "independent" experts (i.e., those not directly involved in the development, administration, or use of the practice in question) to avoid conflict of interest. Reflects generally accepted professional standards.

NOTE: Contrary to what some have said, validation studies are not that hard to do. A typical validation study takes about 1-3 months and costs about $2,000-$20,000 per job. The net cost is less than zero because the dollar value of increased employee efficiency and productivity from using valid selection procedures is usually 10-100 times the cost of test development, validation, and use. The American Psychological Association, American Psychological Society, International Personnel Management Association, and Society for Industrial and Organizational Psychology have over 120,000 members who are qualified to supervise and conduct validation studies, and more persons would seek this training if employers had jobs for them.

6. **Significant relationship** (page 2, lines 26-28). No definition exists in current statute. Proposed definition is consistent with EEOC guidelines and generally accepted professional standards.

7. **Successful performance of the job** (page 2, lines 30-34). No definition exists in current statute. Proposed definition recognizes that "successful performance" is a continuous dimension from poor to excellent, not just a pass-fail measure of "acceptable" versus "unacceptable" performance. Recognizes that "job performance" includes not only the performance of specific job duties and responsibilities but also includes other work-related employee behavior (e.g., attendance, safety, integrity, courtesy) that affects legitimate business objectives. Does <u>not</u> include discriminatory customer preferences. Reflects generally accepted professional standards.

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

1. **Unlawful practice** (page 3, line 6). Add "except that:" to end of Sec. 4(k)(1)(A).

2. **Separation of elements** (page 3, lines 8-10). The complaining party should be required to identify each specific employment practice that causes a disparate impact, unless the elements of the decision-making process are so interrelated that their effects cannot be separated. For example, when an employer uses subjective ratings that vary at the whim of the person doing the rating, the <u>person</u> doing the rating is the "selection procedure." Uses simpler wording from Bush Administration's final alternative to Civil Rights Act of 1990.

3. **Identification of practices** (page 3, lines 12-15). The complaining party should identify each specific practice that causes disparate impact, unless the employer cannot provide the basic data needed. Complies with EEOC guidelines and Supreme Court's decision in **Wards Cove v. Atonio** (1989). This is not an unfair burden on plaintiffs, provided that respondents are required to maintain relevant data. Adapts wording from Civil Rights Act of 1990.

4. **Alternative practices** (page 3, lines 17-20). Prohibits employment practices that are a pretext for discrimination. Paragraph is similar to the last part of Sec. 4(k)(B)(1) of the Civil Rights Act of 1991 but clarifies meaning of "would serve the respondent as well" in terms of cost and effectiveness. Recommendations are consistent with EEOC guidelines and Bush Administration's final alternative to Civil Rights Act of 1990.

5. **Maintenance of data** (page 3, lines 22-25). Requires respondents not only to maintain raw data but also to perform analyses needed to monitor disparate impact on at least an annual basis. Necessary if plaintiffs are required to specify which practices have disparate impact. Recognizes that disparate impact analysis may be appropriate on less than an annual basis (e.g., when a practice is designed for a one-time use only). Implements basic Title VII policy that respondents should monitor disparate impact regularly, not just collect raw data and ignore it until someone files a lawsuit. Recommendation is consistent with EEOC guidelines and Supreme Court's decision in **Wards Cove v. Atonio** (1989).

6. **Renumbering**. Remaining paragraphs of Section 4 are renumbered due to additions above.

ID # 215082 CU
HU 010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Phillip D. Brady

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

Subject: Fact Sheet: An Action Plan for Expanding Civil and Economics Rights of Individuals, Families, and Communities

ROUTE TO: Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CMAC	ORIGINATOR	91/02/22		C	91/02/25 PS
CMAT 19	Referral Note: A	91/02/22		C	91/02/22 PS
Rest of Cmat 10	Referral Note: A	9/10222	NLO	C	9/10225 PS
	Referral Note: Memo for Williamson	/ /			/ /
	Referral Note:	/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
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A - Answered
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Type of Response = Initials of Signer
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THE WHITE HOUSE

WASHINGTON

February 25, 1991

MEMORANDUM FOR HOLLY WILLIAMSON
ASSOCIATE DIRECTOR
OFFICE OF CABINET AFFAIRS

FROM: NELSON LUND
ASSOCIATED COUNSEL TO THE PRESIDENT

SUBJECT: Fact Sheet: An Action Plan for Expanding Civil and Economic Rights of Individuals, Families, and Communities

At the request of Phillip D. Brady, Counsel's office has prepared the attached bullets on the Administration's employment discrimination initiative for the captioned fact sheet.

Attachment

cc: Phillip D. Brady (with attachment)
John Schall (with attachment)

ENFORCING AND STRENGTHENING ANTI-DISCRIMINATION LAWS

- With President Bush's strong support, the Americans with Disabilities Act became law last year. This is the most important expansion of civil rights protections in a quarter of a century. The Administration is now undertaking major implementation initiatives.

- [BULLET ON DOJ ENFORCEMENT ACTIONS]

- [BULLET ON HUD ENFORCEMENT ACTIONS]

- The Administration is committed to strengthening the strong employment discrimination laws that now exist. These improvements will operate to obliterate consideration of factors such as race, religion, sex, or national origin from employment decisions.

- This can be done without encouraging the use of quotas or preferential treatment, without departing from the fundamental principles of fairness that apply throughout our legal system, and without creating a litigation bonanza that brings more benefits to lawyers than to victims.

- A major objective of the Administration is to ensure that Federal law provides strong new remedies for harassment based on race, color, sex, religion, or national origin.

- The Administration also proposes to codify a cause of action for "disparate impact," involving employment practices that unintentionally exclude disproportionate numbers of certain groups from some jobs. The burden of proof will be shifted to the defendant on the issue of "business necessity."

- The time has also come for Congress to bring itself under the same antidiscrimination requirements it prescribes for others.

- Other improvements, including changes in certain provisions affecting statutes of limitations and encouragement for the use of alternative dispute resolution mechanisms, will also enhance the administration of our comprehensive civil rights laws.

Document No. 2150825S

WHITE HOUSE STAFFING MEMORANDUM

DATE: 2/22/91 **ACTION/CONCURRENCE/COMMENT DUE BY:** 2/26/91 11:00 AM

SUBJECT: FACT SHEET: AN ACTION PLAN FOR EXPANDING CIVIL AND ECONOMIC RIGHTS OF INDIVIDUALS, FAMILIES, AND COMMUNITIES

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	MCCLURE	☑	☐
SUNUNU	☐	☑	NEWMAN	☐	☐
SCOWCROFT	☐	☐	PORTER	☑	☐
DARMAN	☑	☐	ROGICH	☐	☐
BRADY	☐	☑	UNTERMEYER	☐	☐
CARD	☐	☑	BOSKIN	☑	☐
DEMAREST	☑	☐	ANDERSON	☑	☐
FITZWATER	☐	☑	_____	☐	☐
GRAY	☑	☐	_____	☐	☐
HOLIDAY	☐	☑	_____	☐	☐

REMARKS:

Please forward any comments directly to Holly Williamson, Rm. 231, x6630, no later than 11:00 AM, Tuesday, February 26, with a copy to this office. Thank you.

RESPONSE:

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

DRAFT

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release February 28, 1991

FACT SHEET

AN ACTION PLAN FOR EXPANDING CIVIL AND ECONOMIC RIGHTS OF INDIVIDUALS, FAMILIES, AND COMMUNITIES

The Administration is dedicated to increasing choice, expanding opportunity, and providing hope to distressed communities. The Administration is committed to breaking down barriers to opportunity wherever they exist. This means giving people access to jobs and the ability to make choices that will better their own lives and the lives of their families and communities. People with access to property, jobs, and quality education have a stake in their community, and greater incentive for productive social behavior. More important, people with new and abundant economic opportunity have hope for the future -- an important and powerful weapon against poverty and despair.

The Administration is seeking to expand economic opportunity for low-income individuals through numerous administrative, regulatory, and budgetary channels. For example, the President's Fiscal Year 1992 Budget recommends $2.1 billion for the HOPE (Homeownership and Opportunity for People Everywhere) program guaranteeing public and assisted housing residents the right to buy their homes.

As part of these continuing overall efforts, the President today announced that the Administration will soon transmit legislation to Congress or seek Congressional action that will promote choice and opportunity on several fronts: 1) educational choice; 2) educational flexibility; 3) homeownership for low-income persons; 4) enterprise zones; 5) anti-discrimination laws; 6) community opportunity areas; 7) the social security earnings test; and 8) anti-crime efforts.

GIVING PARENTS AND STUDENTS CHOICE IN EDUCATION:

- The **Educational Excellence Act of 1991** would encourage the adoption of educational choice programs in States and localities throughout the nation.

- Choice provides parents the opportunity to choose the appropriate school for their children -- based on informed judgments about which school offers the best education. Thus, choice leads to healthy competition among schools by focusing on proven educational quality as the way to attract students.

- The legislation would create an Educational Choice Program Support Fund authorized at $200 million in Fiscal Year 1992. Through this fund, the Department of Education would provide grants to State and local education agencies that adopt programs in which parents are permitted to select among a variety of public and nonpublic educational programs.

- The bill would also authorize $30 million in Fiscal Year 1992 in demonstration grants for model programs of educational choice.

- The bill will include amendments to allow use of Local Agency Grants and Education Block Grants under Chapters 1 and 2 of the Elementary and Secondary Education Act for educational choice programs.

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

PROVIDING EDUCATIONAL FLEXIBILITY IN RETURN FOR ACCOUNTABILITY:

- The **Educational Excellence Act of 1991** would also promote educational reform that leads to successful educational outcomes. Schools would be held accountable for achieving specific educational goals in exchange for increased flexibility in the use of their resources.

- Flexibility will enable school administrators, teachers, and parents to work together to develop effective education programs that meet the needs of all students, particularly those students who are educationally disadvantaged.

- A State education agency and one or more local education agencies would submit an application to the Department of Education describing impediments to improved educational outcomes, identifying Federal requirements to be waived, and indicating measurable educational goals to be attained.

DRAFT

- Waivers could cover not only programs administered by the Department of Education but also programs administered by other Federal agencies if such agencies agree that waivers should be granted.

- Waivers could be granted for three years (and extended for another two years if a project has demonstrated substantial progress in meeting its goals). Each project will submit an annual report assessing its progress.

PROVIDING HOMEOWNERSHIP:

- The HOPE initiative is a new grant program to fund resident management and buyouts of public and assisted housing. By offering residents greater control and access to property, the HOPE program will increase pride of ownership, enhance incentives for maintenance and self-improvement and give poor people a greater stake in the community.

- The President is requesting 1991 supplemental funding to start the HOPE program immediately, along with the HOME program -- a $1 billion housing block grant incentivized for housing vouchers.

- HOPE grants are provided in the following areas: public housing homeownership and resident management; urban homesteading of FHA multi-family properties; and non-profits and affordable housing.

- Assistance will be made available through competitions to resident management corporations, resident councils, cooperative associations, non-profit organizations, cities and States, and public and Indian housing authorities. Planning and technical assistance grants as well as implementation grants will be available.

- The HOPE initiative also targets $258 million in 1992 for a new "Shelter Plus Care" program to help the homeless, combining shelter with the support services -- job training, health care, and drug treatment -- that help people achieve dignified and independent lives. The Shelter Plus Care program housing with the full range of services needed by the homeless.

CREATING JOBS IN ENTERPRISE ZONES:

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

- The Secretary of Housing and Urban Development will designate 50 (urban, rural, and Indian) enterprise zones based on the level of distress, as well as on the nature and extent of State and local efforts to improve livability and to eliminate government burdens to economic activity. Designation will be for a maximum of 24 years.

- The legislation will provide tax incentives to attract seed capital, stimulate employment, and reduce income taxation for the working poor:

  -- A 5 percent refundable tax credit for the first $10,500 of wages, up to $525 per worker, will be provided to qualified employees for wages earned in an enterprise zone business. This credit phases out between $20,000 and $25,000 of total annual wages.

  -- Elimination of capital gains taxes for tangible property used in a business located in an enterprise zone for at least two years.

  -- Expensing of contributions to the capital of corporations engaged in enterprise zone businesses. Corporations must have less than $5 million of total assets. Expensing will be permitted up to $50,000 annually per investor, with a $250,000 lifetime limit.

- The legislation would also give enterprise zone communities priority for free trade area status.

- Enterprise zones would reduce Federal tax revenues by $1.9 billion over five years. Although increased employment and new businesses within the zones will generate revenues, the extent of these offsets cannot yet be estimated.

DRAFT

STRENGTHENING AND ENFORCING ANTI-DISCRIMINATION LAWS:

- (Additional points on specifics to be provided by Counsel's Office.)

- The Administration is committed to strengthening the strong antidiscrimination laws that already exist. Improvements proposed by the Administration will operate to obliterate consideration of factors such as race, religion, sex, or national origin from employment decisions.

- This can be done without encouraging the use of quotas or preferential treatment, without departing from the fundamental principles of fairness that apply throughout our legal system, and without creating a litigation bonanza that brings more benefits to lawyers than to victims.

- A major objective of the Administration is to ensure that Federal law provides new and stronger deterrents against harassment based on race, sex, religion, national origin, or disability.

- The time has come for Congress to bring itself under the same antidiscrimination requirements it prescribes for others. This will promote both fair treatment for congressional employees and a greater appreciation of the consequences of new legislative initiatives.

- Other improvements, including changes in certain statutes of limitations and attorney fee rules, will also improve the administration of our comprehensive employment discrimination laws.

- Enactment of the Americans with Disabilities Act in July 1990 was a major expansion of civil rights protection. The Justice Department is now actively implementing the landmark law.

- Over the past two years, the Justice Department has also moved aggressively to fight hate crimes and combat discrimination in housing, voting, employment, and education.

- The Department of Housing and Urban Development (HUD) is aggressively enforcing the 1988 Fair Housing Amendments which prohibit housing discrimination on the basis of race, color, national origin, religion, sex, familial status, or handicap. The Bush Administration has resolved nearly 12,000 of the almost 16,000 cumulative fair housing cases.

REDUCING FEDERAL BUREAUCRACY AND ESTABLISHING OPPORTUNITY AREAS:

- The **Community Opportunity Act of 1991** would enable local communities to develop "community opportunity systems" and allow them to restructure programs to provide services and benefits in the way the community deems best to meet the needs of the individuals and families to be served.

- Communities will develop opportunity delivery systems in which: 1) services and benefits can be integrated and restructured at the community level; 2) the system is neighborhood- or community-based, with a specified target group of beneficiaries; 3) the individuals and families to be served can participate in the design of the system; and 4) the delivery system offers individuals and families in the target group of beneficiaries the maximum choice and control over the range, source, and objectives of the services and benefits to be provided.

- The legislation would allow a Federal administrator designated by the President to waive Federal statutory and regulatory requirements for any Federally funded program to be included in the community's opportunity delivery system.

- Demonstrations may not exceed ten years, and the communities will evaluate effects on the target groups.

EXPANDING JOB OPPORTUNITIES FOR OLDER AMERICANS BY LIBERALIZING THE SOCIAL SECURITY EARNINGS TEST:

- If social security recipients aged 65 to 69 wish to supplement their benefits with earnings, they may earn only up to $9,270 this year before their social security benefits are reduced. Beyond $9,270, each three dollars of earnings reduces their social security benefits by one dollar.

- For retirees with sources of income other than earnings, such as private pensions and investment income, this limitation on allowable earnings may have little effect on their life-choices. But for retirees without other private sources of income, the earnings test can seriously constrain their choices of employment and their standard of living.

- The President's Fiscal Year 1992 Budget proposes an increase in this amount of allowable earnings for social security recipients aged 65 to 69. For 1992, allowable earnings would be increased $800, or 8 percent, from $10,200 to $11,000. For 1993, the increase would be $200, from $10,800 to $11,000. For 1994, allowable earnings would continue to rise to the level projected under current law, $11,400.

DRAFT

PROTECTING CITIZENS BY FIGHTING VIOLENT CRIME:

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

- The Administration's bill will extend the death penalty to drug kingpins and others committing highly aggravated crimes, including terrorist murders of American nationals abroad and murders of hostages, fatal kidnappings, murder for hire or in aid of racketeering, and murders by Federal prisoners serving a life term.

- The bill will propose reforms to curb the abuse of habeas corpus by Federal and State prisoners.

- The bill will provide a "good faith" exception to the exclusionary rule.

- The bill will increase penalties for acts of violence against witnesses, jurors, and court officers. Penalties will also be increased for certain violent crimes frequently associated with gang activities.

- The legislation will contain various provisions to strengthen Federal firearm laws: a ten-year mandatory prison term for using a semiautomatic firearm in a drug trafficking offense or violent felony; increased penalties for materially false statements in connection with firearms purchase; and a general ban on gun clips and magazines that enable a firearm to fire more than fifteen rounds without reloading.

- The bill will create new criminal offenses for acts of terrorist violence at airports, and will strengthen protections against maritime terrorism. It will provide effective procedures for removing aliens involved in terrorist activities from the United States.

- The bill contains provisions to strengthen protections against sexual violence and child abuse.

- The legislation would require drug testing for Federal offenders released on probation or parole; and would require similar State drug testing programs as a condition for receipt of Federal justice assistance funding.

- The Administration's legislation will strengthen assurances of equal justice regardless of race. For example, the bill will prohibit imposing or carrying out the death penalty where decisionmakers acted with discriminatory purpose; increase penalties for racial discrimination in selection of jury; explicitly prohibit racially discriminatory use of peremptory challenges by both prosecutors and defense attorneys; and make the capital sentencing option consistently available for racially motivated murders in violation of Federal civil rights laws.

OTHER INITIATIVES INCLUDED IN THE FISCAL YEAR 1992 BUDGET TO INCREASE CHOICE, EXPAND OPPORTUNITY, AND PROVIDE HOPE TO DISTRESSED AREAS:

- Child Care and Health Insurance Tax Credits and funding for the new Child Care Block Grant.

- Use of IRAs for first home purchases.

- Reforms in Labor programs, including the Job Training Partnership Act (JTPA), the Federal-State Employment Service, and Davis-Bacon requirements.

CS

ID # 215195 CU

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Name of Correspondent: Newt Gingrich

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

Subject: Encloses editorial By Ed Koch on 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
CMOfc	ORIGINATOR	91/02/22 CS		C	91/03/05 CS
CMAFIC	Referral Note: A	91/02/25 CS		C	91/03/05 CS
CMGray	Referral Note: I	91/02/25 CS	See comments CS	C	91/02/25
	Referral Note: _	/ /		_	/ /
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NEWT GINGRICH
6TH DISTRICT, GEORGIA
REPUBLICAN WHIP

1620 LONGWORTH BUILDING
Washington, DC 20515
(202) 225-0197

Congress of the United States
House of Representatives
OFFICE OF THE REPUBLICAN WHIP
Washington, DC 20515

February 21, 1991

To: Bill Kristol
Dick Thornburgh
John Sununu
Boyden Gray
Clayton Yeutter

From: Newt Gingrich

I recommend that you read the attached editorial by former Mayor Ed Koch that appeared in the Wall Street Journal on February 5. I think we should recruit Koch to help in our anti-quota effort.

WSJ 2/5

Civil Rights Bill: The Way to Religious Quotas

By Edward I. Koch

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

Because, like the 1990 version known as Kennedy-Hawkins, the legislation finds that an unlawful employment practice is established when "a complaining party demonstrates that an employment practice (or group of practices) results in a disparate impact on the basis of race, color, religion, sex or national origin, and the respondent fails to demonstrate that such practice is required by business necessity."

The employer would have the burden of proving that the hiring practice or group of practices bear a "significant relationship to successful performance of the job." Contrary to the claims of the legislation's supporters, this standard is more stringent than the standard consistently applied in this area by the Supreme Court. The court says that employers may justify hiring practices if they bear a "manifest relationship to the employment in question."

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

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

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

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

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

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

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

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

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

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

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

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

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

CS

ID # 215532 CU

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Name of Correspondent: Secretary Jack Kemp

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

Subject: Encloses his remarks on Chapter II of Civil Rights Resolution made before CA GOP State Convention

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Code	Completion Date YY/MM/DD
CMOS	ORIGINATOR	91/02/22		C	91/03/07 CS
CMAT 10	A	91/02/22	BG	A	91/03/07 CS
CMGray	I	91/02/22	letter to Kemp	C	91/02/22
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CBG:NL:smm
CBGray
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Chron.

THE WHITE HOUSE

WASHINGTON

March 7, 1991

Dear Mr. Secretary:

Thanks very much for sending copies of your recent remarks on Chapter II of the Civil Rights Revolution and on empowerment. I wholeheartedly agree that we must now focus on education and jobs, not on legalisms. I think we're making progress in getting this message out, and I'll do everything I can to help.

Sincerely,

C. Boyden Gray
Counsel to the President

The Honorable Jack Kemp
Secretary of Housing and
Urban Development
Washington, D.C. 20410

THE WHITE HOUSE

WASHINGTON

March 6, 1991

MEMORANDUM FOR C. BOYDEN GRAY

FROM: NELSON LUND

SUBJECT: Response to Secretary Kemp

Attached for your review and signature is a response to Secretary Kemp's February 21 note to you.

Attachment

FEB 21 1991

Dear Boyden:

Here are the remarks I made last March for Pete Wilson's campaign on Chapter II of the Civil Rights Revolution. They may provide some ideas for our efforts to stress opportunity, education, homeownership and jobs as the Bush Admin.'s contribution to a "New Chapter".

Regards,

THE WHITE HOUSE

WASHINGTON

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Comments:

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Remarks by

Secretary Jack Kemp

U.S. Department of Housing and Urban Development

before the

California Republican Party State Convention

Saturday, March 10, 1990
Santa Clara, California

What a thrill it is to stand before the great men and women from my home State of California. I've been privileged to be back here many times.

I am proud to serve with this President at this revolutionary moment in history. I believe Abraham Lincoln's axiom that we serve our Party best by serving our country first. In 1990, particularly here, we can serve our country best by electing Pete Wilson the next Governor of California.

I have learned that the greatest speeches in history are the shortest speeches. Mr. Lincoln's Gettysburg address was five minutes long. His second inaugural was three and a half minutes long. Washington's second inaugural was eight minutes long. John F. Kennedy's "Ich bin ein Berliner" speech was eleven minutes. William Henry Harrison was sworn in as President of the United States in 1841 on a cold March day. He spoke three and a half hours in 6 above zero weather, caught pneumonia and died.

My speech may not be short enough for greatness; but I'll keep it brief enough for our mutual health.

A few weeks ago a New York Times editorial said, "If a man from Mars came to the earth today and said take us to your leader, we, the New York Times, would have to take him to meet Gorbachev." I want to say that if a man from Mars had come to earth in the 1980s we would have taken him to meet Ronald Reagan and, if he came today in the '90s, we would have to take him to meet President George Bush. And by the way, if Jerry Brown ever

comes back to earth, and wants to be taken to California's leader, we'd have to take him to Sacramento to meet, Governor Pete Wilson!

I believe we're living in the most exciting time in the history of this beloved Nation. It's as if its 1776 all over again, except this time there's one huge difference; today we have television sets and we can watch Thomas Jefferson speak his own words, "We hold these truths to be self evident that all men are created equal, endowed by their creator with certain inalienable rights that among these rights are life, liberty and the pursuit of happiness." And what makes this even more exciting is that you can listen to Jefferson in Chinese, in Russian, in Polish, in Lithuanian, and you can see and hear it in the Ukraine and from Bucharest Square and Sofia Square to Wenceslas Square and downtown Managua Square.

No where in the world are people quoting Marx, Lenin, or Mao Tse-tung, except maybe in Cuba and North Korea. Today, young people are quoting Jefferson and Patrick Henry. They're saying "Give me democracy or give me death." The inalienable rights -- human rights, civil rights, legal rights, and voting rights -- and the boundless opportunities that are ours by virtue of our birthright, are now increasingly recognized as the birthright of men and women all over the globe.

Mr. Lincoln founded our Republican Party on an idea -- the idea that the great promises of the Declaration of Independence belonged to <u>all</u> people for <u>all</u> time, not just for some men at one

time in history; the idea that human freedom is an inalienable God-given right. It was a radical idea in 1776. In Latin, of course, "radical" means going back to the roots. Our Republican Party must be radical in our commitment to the idea that all people have talent, potential, and possibility. We must guarantee that every child of God has the equality of opportunity to be what he or she was meant to be.

Mr. Lincoln said before his first inaugural, "I would rather be assassinated on this spot than give up my beliefs in the Declaration of Independence." That passion, that belief, was our Party's moral foundation -- and at the same time a very practical idea for human progress. Indeed, it made our Party the majority Party.

Up until the 1980s, there had been three great political realignments in our Nation's history.

The first began when Mr. Jefferson's party, the Democratic-Republican Party, defeated the Federalists in 1800. By the way, I like that phrase, "democratic republican," small "d" of course. It means a fundamental belief in people, a belief in markets, a belief in human potential. Our Party must be the party that believes in possibilities, not limits; in people, not elites; in democracy, not bureaucracy.

The second great political realignment was Mr. Lincoln's realignment -- the founding of the Republican Party out of the old Whig Party. Do you know why the Whig Party died? It stood for nothing. It couldn't decide whether it was <u>for</u> slavery or

against slavery. It collapsed. It had no heart, no soul, no moral compass. It stood for nothing - no guiding moral or political principles.

Mr. Lincoln founded our Republican Party on the profound ideas of freedom and emancipation; and within four years our Party became the majority party. I am convinced that the reason he was so successful and the reason that so many listened to him, was that they knew he believed, people knew he cared. You see "people don't care how much you know until they know that you care."

The third great political realignment took place when Mr. Roosevelt led the Democratic Party to majority status in 1932.

And today, I believe we are living in the midst of the fourth great political realignment in America's history. It began in 1980 when Ronald Reagan was elected president, and is based on the idea of peace through strength, restoring economic growth, and entrepreneurial opportunity to our Nation. While Ronald Reagan may not have been Time's Man of the Decade, his accomplishments make Man of the Century!

Today, President George Bush is deepening that realignment, extending it and expanding it. And ladies and gentlemen, we must advance this economic growth and opportunity into every single pocket of poverty and despair in the United States of America, and indeed the whole world.

As the Berlin wall comes down President Bush, has suggested that other walls need to come down, too, -- the walls of

prejudice and the walls of poverty and despair and dependency that keep many poor people from realizing their dreams and aspirations.

And how can we tell the world that democracy is the preferable political, economic and social development tool for them if we can't make it work right here at home, in our own communities, in the urban and rural pockets of poverty, where the incentives are the reverse of everything that needs to be done to create productive human behavior and wealth

As in all great revolutionary times as Dickens writes, it can be both the best of times and the worst of times. Today, it's the best of times in terms of the great national recovery of both our spirit and our economy.

But there's so much more to be done. As de Tocqueville taught us, the greatness of America is not only in her fertile fields and boundless prairies, in her ample harbors and great rivers -- it can't be measured by GNP. The ultimate strength and genius of America is people -- their talents, their ideas, their hopes, their ambitions, and most importantly their goodness.

Some call the 80s the decade of greed. I say it's been a decade of renewal and opportunity. But not for everybody. That's what I want to speak about for just a moment. Because candidly, it's the worst of times for people who are without homes; the worst of times for people who can't afford to buy their first home; the worst of times for people without jobs who are living in despair. It's the worst of times for some in

California, where only 10 percent of the people can afford a medium-priced home.

What can we, as a Party, do about these problems? The first thing we can do about it is realize that problems, after all, are opportunities, and that we can do something positive to combat poverty, despair, and hopelessness. Secondly, our Party must return to our roots -- dug deep by Abraham Lincoln and Thomas Jefferson -- and wage an all-out war on poverty using the tools of democracy, private property, and free-enterprise. And this time we have to win the war on poverty. We can't afford to lose. It helps to know what went wrong and why.

We have learned all too well how to <u>create</u> poverty. First, create a very steeply graduated income tax system, and then rely on inflation to push all working men and women up into higher tax brackets.

Then, if you want to create more poverty, reward welfare and unemployment more than you reward working and being productive.

If you want to create even more poverty, reward the families that break up more than you reward the families that stay together.

If you want to create still more poverty, reward people that stay in public housing and on welfare rather than those who move through welfare, out of public housing, and up the ladder of economic opportunity. Believe or not, when I came to HUD, I found that families who had stayed the longest in public housing were getting awards from the agency. Well, we've cancelled those

awards!

Allowing rewards for illicit capitalism out on the street to be greater than the rewards for the entrepreneur who creates wealth and jobs legally will create more poverty.

And lastly, if you really want to expand poverty, weaken the link between effort and reward.

So what must we do? First of all realize that our Party has been given a second chance by history.

There was a great civil rights revolution in this country in the Fifties and Sixties. It was led by a woman named Rosa Parks on Cleveland Avenue in downtown Montgomery, Alabama in December of 1955. It started a flame that has grown and has inspired people all over this country. It was sparked by Doctor King, who said he dreamed that one day we would judge all children not by the color of their skin but by the content of their character. We weren't there for the first civil rights movement, but we're here now.

So I want to outline the second great civil rights revolution in America. This one is about economic opportunity for all - the dream of owning a home, owning a piece of property, having a chance to get a good education, living in a drug-free neighborhood and community, being able to own a stake in the system. It means each of us having the opportunity to be what God meant us to be.

There are positive and progressive ways to combat poverty. We know intuitively and historically that jobs, home ownership,

housing, education, and freedom of enterprise work. To help eliminate poverty and despair, President Bush has launched a program called HOPE. HOPE stands for Homeownership and Opportunity for People Everywhere. I believe it's the most incentive-oriented, populist, private enterprise approach to fighting poverty ever offered.

The President has rightly called for a lower capital gains tax, not to help the rich, but to help the poor who want to become rich or at least richer. Not to help the people who've established existing wealth, but to help those who want to create new wealth.

And then he proposes to eliminate capital gains tax in the pockets of poverty so that men and women with entrepreneurial skills and ideas can create jobs and new wealth. He believes everyone can contribute to the wealth of our cities and to the great wealth of our country. In short, President Bush wants to greenline the inner cities of America. Greenlining our inner cities will allow venture capital to flow into minority businesses. Frankly, there are not enough minority business men and women in America -- less than 500,000 black-owned businesses in America and not enough hispanic-owned businesses in America. There are 14.1 million small businesses in America, and we want minority businessmen and women to have the same opportunity to realize their dreams that other Americans in the free-enterprise system have.

We must concern ourselves, in this new war on poverty, with

the mother on welfare struggling to make it, who faces the highest marginal income tax in the United States of America, higher, incidentally, than any man or woman in this room. Because when she takes a job at McDonald's or McDonnell Douglas in Southern California, the government both takes away welfare and taxes her income. We should work to eliminate the tax on the first several rungs of the ladder, so that the reward for working is much greater than the reward for not working or being on welfare.

Basically, the Democratic Party sees itself as an agent of redistributing America's wealth. They believe that the only way you can help some is to take it away from others -- that life, or at least the economy, is a giant zero sum game. But ladies and gentlemen, that's not the America Dream. We can't allow an America in which only the fittest survive. Republicans must bring more chairs to the table, and build a bigger table.

The centerpiece of the President's HOPE package is to help not only restore low income housing opportunities in America, but also give more people the chance to own their own home. We must take public housing in America and give residents the opportunity to homestead, to manage, and to control their own destinies. It's a radical idea, but has deep roots in our Party's history.

Mr. Lincoln suggested that we carve out of the wilderness opportunities for people to own a piece of land, to own their property, to own a home, no matter how humble. He said, "every man should have the means and opportunity of benefitting his

condition ... I am in favor of cutting up the wild lands into parcels so that every poor man may have a home." We must now homestead in urban America by giving public housing residents a chance to own their own homes a get a stake our democratic system.

Some have said the only thing to do in public housing is blow it up. But President Bush and I want to build, not tear down. We want children raised in an America that exalts their boundless potential instead of imposing limits. We want people treated as resources, not as a drain on resources. We want children in the inner city to have the same opportunity to realize their dreams as children in the suburbs.

I've been in inner cities ghettoes and barrios of America, and I've see the talent that is there waiting to be tapped. I've seen what happens in public housing communities when human potential is liberated. I've visited Alicia Rodriguez at Estrada Court in East L.A., and Kimi Gray at Kenilworth-Parkside in Washington, D.C. I've talked to Loretta Hall and Bertha Gilkey in St. Louis, with Irene Johnson in Chicago.

And what a thrill it was to be at Garfield High School in East L.A. yesterday and Jaime Escalante. He cares! Boy does he care! There's a huge sign on the wall of his classroom that says "ganas" -- that's Spanish for desire. Escalante teaches that any student with desire, ambition, aim, i.e. "ganas," can succeed. This is the possibility and potential that our Party must celebrate, encourage, and hold out to all Americans, in contrast

to the welfare dependency and despair that liberals offer. We must not treat poverty as a perpetual condition. It is an opportunity to defeat and overcome.

Our Party wants to get the private sector back into the housing market by incentivizing the tax code. The low income housing tax credit needs to be extended and expanded.

Our Party wants first-time homebuyers to be able to use their IRA's as down payments on their homes. The President has asked Congress to allow families to use IRAs without penalty to purchase that first home.

Our Party wants to eliminate the local and federal barriers to affordable housing, whether they are exclusive zoning, development fees, no-growth policies or rent control. Our Party must be the Party that creates housing opportunity zones to remove those barriers and help make housing and homeownership more affordable for every single man and woman in this country.

The Federal Housing Administration is now back in the business of helping low and moderate income people have a chance to own a home. It is helping the first-time home buyers, not building or insuring swimming pools, golf courses, and vacation sites.

Our friends on the left in Congress want day care credit only for those who go out to work, but with all due respect, day care credit and an earned income tax credit should go to all families, to all women -- those who work and those who stay at home and take care of their children. We need a pro-family child

care system in America.

Finally, schools and public housing need to be drug-free. Many influential business men and women have told elementary school students, "If you study, stay in school and get good grades, you can go to college." I believe this country is affluent enough for the public and the private sectors to guarantee a college education to every boy and girl in America who stays in school and gets the grades no matter how low their income level. I know America can do it, and we Republicans must advance equal opportunity of higher education.

All of these proposals are based on a radical idea: our goal of strengthening the link between effort and reward, especially for those in need. The Democratic Party measures compassion in America by how many people need welfare and food stamps and government assistance. Let our Party measure the welfare and the compassion of America by how few people need it because they have moved from public assistance to economic independence.

As President Bush has said, "while we can have our disagreements, the unity of our Party does not require unanimity." We don't have to look alike or say it all the same way; but we must have a common purpose, a common foundation, a common goal of recapturing the American Dream for all people everywhere. Mr. Lincoln laid that foundation. He taught us that we can only be the majority party if we act on behalf of the hopes and dreams and aspirations of every single person.

I believe the greatest target of opportunity for our Party

today is in the inner cities of America among those who might never have voted GOP, but because of President Bush's leadership are looking to us as never before. We must go into pockets of poverty and help unleash that untapped human potential -- that caged eagle of human talent that is just ready to soar. Let us be the party that recognizes the wisdom of the Talmudic philosopher Maimonides, who said that "the noblest charity is to prevent someone from having to take charity."

In ancient Jerusalem there was a Housing Secretary by the name of Nehemiah. He rebuilt the city of Jerusalem, he did not turn his back on it. Our Party today should be builders like Nehemiah. We must rebuild our cities, rebuild families, build better education, build housing and opportunity for those in need. We can rebuild America, but this time with democracy and free-enterprise, not central planning and dependency.

Yes, we will have our critics just as Nehemiah had Sanballat and Tobiah and Geshem who ridiculed him; but he never gave up, he never left the wall, he never quit.

We have such a man in Pete Wilson. We have such a man in President George Bush. And I believe we're building that city on a hill that John Winthrop and, yes, President Reagan talked about. Never has it been more important to this country to fulfill its promise, because the whole world today is looking to us for that type of leadership.

The greatest leadership the world has ever known, is to lead by example -- to do the right thing for the right reason at the

right time in history. That's why the emerging leaders today like Vaclav Havel, Lech Walesa, President Lansbergis, Andre Sakharov, Natan Sharansky, Violetto Chamarro, and the students in Tiananmen Square, are not just quoting America's founding fathers -- they're looking to us for the model on democratic capitalism and freedom.

Right here in California we have a chance to carry on the great legacy of President Ronald Reagan and a great California governor, George Deukmejian. Pete, we wish you Godspeed; you've got a great team and a great cause. I can't think of a better way to help America, and show the world the right way, than to recapture that dream right here in the State of California under your leadership. God bless you. Thank you very, very much.

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THE WHITE HOUSE

WASHINGTON

March 7, 1991

Dear Mr. Secretary:

Thanks very much for sending copies of your recent remarks on Chapter II of the Civil Rights Revolution and on empowerment. I wholeheartedly agree that we must now focus on education and jobs, not on legalisms. I think we're making progress in getting this message out, and I'll do everything I can to help.

Sincerely,

C. Boyden Gray
Counsel to the President

The Honorable Jack Kemp
Secretary of Housing and
Urban Development
Washington, D.C. 20410

ID # 215567 CU

H.CIC

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

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

Name of Correspondent: Jerry Lee

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

Subject: Appreciation for vetoing 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
CMOfc	ORIGINATOR C	91,02,22		C	91,07,24 cs
CMAT ID	Referral Note: A	91,02,25		C	91,07,29 cs
	Referral Note: _	/ /		_	/ /
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	Referral Note: _	/ /		_	/ /
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ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

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

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

Comments: OBE 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

Nov. 14, 1990

Dear President Bush: 215567CU

CB Wray

This note is to convey my appreciation for vetoing "that" "Civil Rights" bill. Anything that encourages "quotas" is a mistake/injustice.

My family and I are hard workers - in school and on the job - and we don't want to lose out to someone less qualified because of skin color.

I had a very unhappy experience when I left a Community Corrections program. The administrators position was filled by a black man who was not qualified - because of pressure to appoint a minority. As a Result of his incompetence the program failed and the young men were sent to prison. This program was part of the Wilder Foundation and had a very successful history - it was sad!

A very disturbing affirmative action type program is also present in our liberal state government operations. Thanks again

Jerry Lee

Jerry Lee
6304 Washburn Avenue South
Richfield, Minnesota 55423

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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Marion Stricker

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

Subject: Wants memo by Attorney General explaining the items which make S. 2164 unacceptable to President

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Code	Completion Date YY/MM/DD
Cuoco	ORIGINATOR C	91/02/22		C	91/03/25
CUAT 10	Referral Note: A	91/02/25		C	91/03/25 PS
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ACTION CODES:
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DISPOSITION CODES:
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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: Mailed copy of attached memo 3/25/91 en response to request —

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

December 7, 1990

2155.70cc

The White House Office
Executive Office of the President
1600 Pennsylvania Ave. N.W.
Washington, DC 20500

CBdwg

Recently I received the October 30th "releases" regarding the vetoed S. 2104, the Kennedy-Hawkins "Civil Rights Act of 1990." Thank you for these general statements. I am most interested, however, in the memorandum from the Attorney General explaining in detail the defects that President Bush thinks make S. 2104 unacceptable. (This detailed explanation was not included with the press releases to the Congress, the Senate, or the "Statement by the President" — which were sent to me.)

Would you please send me this memorandum from the Attorney General. Thank you.

Marion Stricker

1300 ADAMS AVE. 3-C
COSTA MESA, CA 92626

THE WHITE HOUSE

WASHINGTON

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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: all practices that combine to produce, say, hiring decisions -- for example, use of a high school graduation requirement, plus an interview, plus job references, plus a requirement of a clean criminal record -- all could be lumped together as a single "group." Thus, if an employer's bottom line numbers are "wrong," the employer can be forced to prove that every practice is required by "business necessity."

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

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

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

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

B. THE BUSINESS NECESSITY DEFINITION AND THE EVIDENTIARY RESTRICTIONS

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

1. The Business Necessity Definition

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

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

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

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

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

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

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

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

2. Evidentiary Restrictions

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

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

C. CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

ID # 215680 CU
HU 010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Name of Correspondent: VIP

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Subject: Talking pts to Senator Bryan

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CU OFC	ORIGINATOR	1 1		C	9 10 11 9 P
	Referral Note:				
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ACTION

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THE WHITE HOUSE

WASHINGTON

February 19, 1991

MEMORANDUM FOR C. BOYDEN GRAY

FROM: NELSON LUND

SUBJECT: Talking Points: Senator Simpson

o Our bill, which will be introduced next Wednesday during a Presidential event at the White House, is very similar to the bill that your staff has drafted.

o We would like you to sponsor our bill (and it is hard to see what useful purpose would be served by having two bills that are so similar introduced separately).

o Our bill contains the following major elements:

  o Codification of Griggs/Wards Cove with the burden on the defendant to demonstrate business necessity. Definition of business necessity taken from Kassebaum-Gorton bill (Griggs and Beazer language).

  o Codification of Martin v. Wilks.

  o Overrule Patterson, Lorance and Crawford Fitting.

  o New anti-harassment statute, to serve as the exclusive Federal remedy for harassment based on race, color, national origin, religion, sex, and disability.

    Remedies to include injunctive relief, back pay, and a monetary award capped at $100,000.

    Small employer exception identical to that in Title VII (fewer than 15 employees).

    Affirmative protections from liability for employers who maintain strong anti-harassment policies and complaint procedures.

  o Anti-quota language similar to that proposed by Senator Dole last year.

  o Coverage of congressional employees, with enforcement powers assigned to Congress, followed by a private right of action for aggrieved employees. (Executive

branch will have no role in enforcing the law against Congress.)

- o New alternative dispute resolution provision permitting parties to use arbitration mechanisms (instead of the courts) so long as the decision to use such alternatives is knowing and voluntary.

- o Prospective operation, with no application to pending cases (Stevens and Murkowski issue).

The principal elements in the bill drafted by your staff that we have not included are:

- o Codification of Price Waterhouse (we could go along with this if you think it's important).

- o Provisions outlawing "race norming" and limiting the use of employment "testers." We like both these ideas on the merits, but are afraid that including them in our bill will be counterproductive because it may distract attention from other issues and make it harder to attract the support of moderate Republicans.

CS

ID # 91 [illegible] CU

H1010 R. 2/28
4:30p

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Name of Correspondent: Cecilia M. Long

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

Subject: Disappointed in veto of 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
CMOfc	ORIGINATOR	91/02/25		C	91/07/24 CS
CMAT 10	Referral Note: A	91/02/26		C	91/07/24 CS
	Referral Note:	/ /			/ /
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January 4, 1991

President George Bush
The White House
Washington, D. C. 20002

Dear President Bush:

I am writing to express my disappointment and concern for your veto of the Civil Rights Act of 1990 (CRA-90). I, too, would agree with you that you should not support any bill which would promote hiring those who are not qualified just for the sake of having numbers of people on the payroll. I would, however, strongly urge you not to let the quotas issue be used as a smokescreen to turn back the clock on civil rights enforcement. It is my understanding that the act addressed the ability of victims of discrimination to go into court and prove their cases. It was not meant to be a quota bill.

Fairminded citizens are depending on you to keep this country free from discrimination of any type. The civil rights of all women and men remains a critical issue for all persons regardless of their ethnic origin.

I urge you to support the Civil Rights Act of 1991 which will contribute to fairness, prosperity and stability by returning the Equal Employment Opportunity law to eliminate discrimination. This law would benefit the whole country.

Please don't veto the Civil Rights Act of 1991.

Sincerely,

Cecelia M. Long

ID # 216402 CU

H1010 R. 2/28 H.00P

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

Name of Correspondent: James B. Mooney

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

Subject: Civil Rights Act of 1990; racial quotas

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CWOJC	ORIGINATOR	91/02/25		C	91/07/24
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JAMES B. MOONEY
3045 BRAELOCH CIRCLE EAST
CLEARWATER, FLORIDA 34621-2708

TELEPHONE
813/796-9696

February 15, 1991

President George Bush
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Mr. President:

President Bush is criticized for vetoing the misnamed Civil Rights Act of 1990. This bill was designed to make it easier to win suits against employers whose workforces didn't mirror the racial makeup of their communities. This meant that employers would have to hire on the basis of racial quotas, not ability, to avoid costly litigation. Assistant Secretary of Education Michael L. Williams was severely criticized last month for ruling that scholarships based on race violate our civil rights laws. Williams, a black lawyer, was reviled as a "zealot," but no one could show that he had misinterpreted the law. It's time the media quit giving the criticisms more coverage than the facts.

James B. Mooney

JBM:cc.

CS

ID # 216437 CU

R: 2/25

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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Y: 08

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Name of Correspondent: Evan J. Kemp, Jr.

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

Subject: Civil Rights Act materials - includes charts.

ROUTE TO:

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CUOfc	ORIGINATOR	91/02/25		C	91/03/05 CS
	Referral Note:				CS
CUAT 10	A	91/02/25		C	91/03/05
	Referral Note:				See comments. CS
Cugray	I	91/02/25		C	91/02/25
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3-5-91

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TO : C. Boyden Gray
OFFICE : Counsel to the President
ROOM : 2nd Flr., West Wing
REMARKS : PERSONAL / CONFIDENTIAL

FROM : Evan J. Kemp, Jr., Chairman
OFFICE : OFFICE OF THE CHAIRMAN
PHONE NUMBER : 663-4001
FAX NUMBER : 663-4110

CONFIRMATION REQUESTED? YES ✓ NO ___

IMMEDIATE DELIVERY REQUESTED? YES ✓ NO ___

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Mary.

Evan J Kemp, Jr.	302-32-2942	5-5-37
James Sharf	203-32-6411	5-10-43
Robert Funk	272-40-8481	12-18-44
[illegible]	[illegible]	8-12-43

SEC. PROHIBITION AGAINST THE DISCRIMINATORY USE OF TEST SCORES ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

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

> "(1) PROHIBITION AGAINST THE DISCRIMINATORY USE OF TEST SCORES ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN. It shall be an unlawful employment practice, with respect to any ability test used to select or to refer applicants or candidates for jobs or promotions, to adjust test scores, or to use different cut-off scores, or otherwise to make discriminatory use of test scores, on the basis of race, color, religion, sex, or national origin.

SEC. PROHIBITION AGAINST THE DISCRIMINATORY USE OF TEST SCORES ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

This section clarifies the law by expressly stating that it is impermissible to make adjustments in scores on ability tests, or to use different cut-off scores, or otherwise to use them in a discriminatory manner on the basis of the test takers' race, color, religion, national origin, or sex.

If an ability test has a disparate impact on members of a certain group, and the test is not justified by business necessity as defined in Section 3 of this bill, the test should not be used. If business necessity can be shown, then the disparate impact need not be reduced or eliminated (absent the charging party's demonstrating the availability of an alternative employment practice, comparable in cost and equally effective in predicting job performance or achieving the respondent's legitimate employment goals). In neither event is it permissible to adjust test scores, or to use different cut-offs for members of different groups, or otherwise to use the test scores in a discriminatory manner on the basis of race, color, religion, sex, or national origin. Such discrimination violates Title VII, whether practiced by an employer, an employment agency, or any other "respondent" as defined in this Act.

ARGUMENT FAVORING ADDITION OF NEW SECTION TO THE ACT: "PROHIBITION AGAINST THE DISCRIMINATORY USE OF TEST SCORES ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN"

The promise of equal opportunity requires that applicants as well as employers understand when it is appropriate to take a person's group membership into consideration in terms of race, color, religion, sex and national origin and when employment decisions are to be made without regard to an individual's race, color, religion, sex and national origin.

Under Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991, an employer is encouraged to reach out affirmatively and to recruit those groups who may still not be fully participating in the employer's workforce. Where there is reason to do so, the employer may target specific groups and be race-conscious or gender-conscious in affirmatively recruiting applicants from these groups. Such race-conscious or gender-conscious affirmative outreach is entirely within the spirit, letter and intent of equal opportunity.

When it comes to employment decision making, however, judging an individual's character on the basis of a job related employment standard without regard to that person's race, color, religion, sex or national origin is the cornerstone of equal employment opportunity. It is important that both the employer and the applicant understand that The Civil Rights Act of 1991 encourages nothing less and requires nothing more.

The Act as proposed, however, does not address race-conscious and gender-conscious discrimination that has been mistakenly pursued under the guise of equal opportunity. As presently drafted, the Act without the "DISCRIMINATORY USE OF TEST SCORES" section merely allocates burdens of proof but fails to prohibit the discriminatory use of test scores. Such uses illustrated below violate existing law but are nevertheless being done under the rationale that "fairness" requires reduction (if not elimination) of adverse impact. If the Act is silent on the issue of the discriminatory use of test scores, proponents of "equal results" will continue their self-righteous march under the banner of "fairness" by requiring race-conscious and gender-conscious implementation of valid tests.

The PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES language in the Act states that even though an employer has demonstrated that his employment test is justified as a "business necessity," "...(A)n unlawful employment practice shall nonetheless be established if the complaining party demonstrates the availability of an alternative employment practice....that will reduce the disparate impact..." Unless specifically addressed in the Act, discriminatory race-conscious or gender-conscious uses will be continued to reduce adverse impact.

"Race norming" (or "gender norming") is the generic term

describing race-conscious (or gender conscious) "alternative employment practices" including: 1) adding "preference points" to minority test scores, 2) using separate cut-off scores, or 3) waiving test requirements for minorities while requiring non-minorities to be tested. The following Federal "race norming" and "gender norming" examples of "alternative employment practices that will reduce disparate impact" will continue to be used unless the DISCRIMINATORY USE OF TEST SCORES section is included in the Act.

State Employment Service offices funded by the Department of Labor screen job-seeking candidates for over 12,000 jobs. Since 1981 under Department of Labor direction, 400 State Employment Service offices have been "race norming" the General Aptitude Test Battery (GATB), the most widely used employment test in the country. Using what they call "within-group" scoring to implement the GATB, blacks are compared only to other blacks, Hispanics compared only to other Hispanics and "others" (including whites and Asians) are compared only to "others." An individual's relative standing compared only to one's own race is then the test score reported to employers in the form of a "within group" percentile. Differences between groups are conveniently overlooked, adverse impact is minimized, and employers are mislead to believe that individuals with similar scores from different groups are equally qualified and will be equally productive when in fact they will not. (As discussed in the next section, a politicized panel at the National Research Council has recommended yet another "alternative" for implementing the GATB in a race-conscious manner in the form of giving "preference points" only to minorities).

A Federal example of recommending different cut-off scores for men and women can be found at the EEOC. In response to a complaint of sex discrimination, the Commission found that General Electric was using a proprietary employment test which consisted of assembling and disassembling two pieces of production equipment used in the manufacture of light bulbs. Women were adversely affected by this test because they took longer to complete the test. GE's validation study showed that those who took less time to complete this test were found to be better Machine Adjusters on the assembly line. The Commission's psychologist maintained, however, that GE needed to set separate cut-off scores for women. In effect, EEOC's position was that in order to reduce adverse impact, GE must hire less qualified and less productive women.

The Department of State provides an example of waiving employment tests for minorities while requiring competitive examining for non-minorities. Each year there are upwards of fifteen thousand applicants for several hundred Foreign Service Officer (FSO) openings. The FSOs had traditionally been viewed as the pinnacle of merit employment because of the rigorous written exams required of all candidates. When the Carter Administration pressured State to come up with more minority FSOs, the decision was made to waive competitive written exams for minority candidates while continuing to require them of non-minorities. No matter how exceptional a minority FSO performed thereafter, the stigma of

having been hired by a lesser standard remained.

Each of the above mentioned race-conscious and sex-conscious Federal employment practices can be found in the private sector quite likely "encouraged" (if not required) by either EEOC or the Office of Federal Contract Compliance Programs, a creation of the Executive Branch under Executive Order 11246.

WHY "RACE NORMING" MUST BE DEBATED AS A POLITICAL RATHER THAN SCIENTIFIC ISSUE AND WHY THE "DISCRIMINATORY USE OF TEST SCORES" SECTION MUST BE INCLUDED IN THE ACT

Since 1981, the Labor Department has been using the General Aptitude Test Battery (GATB) through State Employment Service offices to screen job-seekers for over 12,000 different jobs. By 1986, 400 State Employment Service offices in thirty-eight states had adopted race-conscious "within-group scoring" when Brad Reynolds threatened to bring suit on grounds of "reverse discrimination." The political "solution" was to make no decision but to study the issue. Labor announced that the question of whether there was any scientific justification for race-conscious "within-group scoring" was to be studied by a panel at the National Research Council (NRC). Justice agreed not to bring suit until the NRC's findings were announced.

In 1988 to the surprise of industrial psychologists, the NRC concluded that there was a scientific justification to be race-conscious in implementing GATB test results. Such race-conscious treatment called "within-group scoring" meant comparing blacks only to other blacks, comparing Hispanics only to other Hispanics and comparing "others" (i.e., mostly whites and Asians) only to "others." The NRC reasoned as follows.

The typical cognitive ability test reveals a one standard deviation black/white mean score difference with whites scoring higher than blacks. Because employment test validities are never perfect (i.e., a correlation coefficient of r=1.00), there are always errors of prediction. As illustrated in Figure 1, those individuals falling below any given "cut-off" who were not hired but had they been, they would have performed in a satisfactory manner are called "false negatives." (Correspondingly, those who are hired because their test score is above the "cut-off" but whose performance is not satisfactory are called "false positives").

More blacks than whites are "false negatives" and more whites are "false positives" but not because of race per se but rather because whites are more likely to score above any given cut-off and blacks are more likely to score below the cut-off. As the NRC candidly admitted in this regard: "These effects are a function of high and low test scores, not racial or ethnic identity." Yet even as it emphasizes that the effect is the same for all low scoring individuals regardless of their race, the NRC nevertheless claimed that "(T)he disprcportionate impact of selection error provides scientific grounds for the adjustment of minority scores." The NRC concluded, in other words, that the disproportions in false predictions provide a "scientific justification" for benefiting minority test takers whose scores - if anything - overpredict their job performance.

The NRC was unable to justify race norming on grounds of racial bias because when test validities are investigated separately for blacks and whites (as required by EEOC's Uniform

Guidelines on Employee Selection Procedures), minority job performance is "overpredicted." Figure 2 shows the typical regression lines found when test validity is investigated separately for minorities and non-minorities. Using a single set of norms based on the total sample actually "overpredicts" minority job performance (and correspondingly "underpredicts" non-minority job performance).

Industrial psychologists have known for over a decade that the use of total sample norms are actually unfair to non-minorities because the total sample norms overpredict minority job performance and underpredict non-minority job performance. As shown in Figure 3, even though the weight of validity research would warrant such a conclusion, no employer in his right mind would have ever required a higher test cut-off score for minorities to get a comparable level of job performance. The duplicity of the NRC panel in this regard is that it recommends a race-based solution to what it concedes is not a race-based problem: i.e., "adjust" only minority "false negatives." By so doing, NRC reaches for a "scientific justification" for what is scientifically unjustifiable.

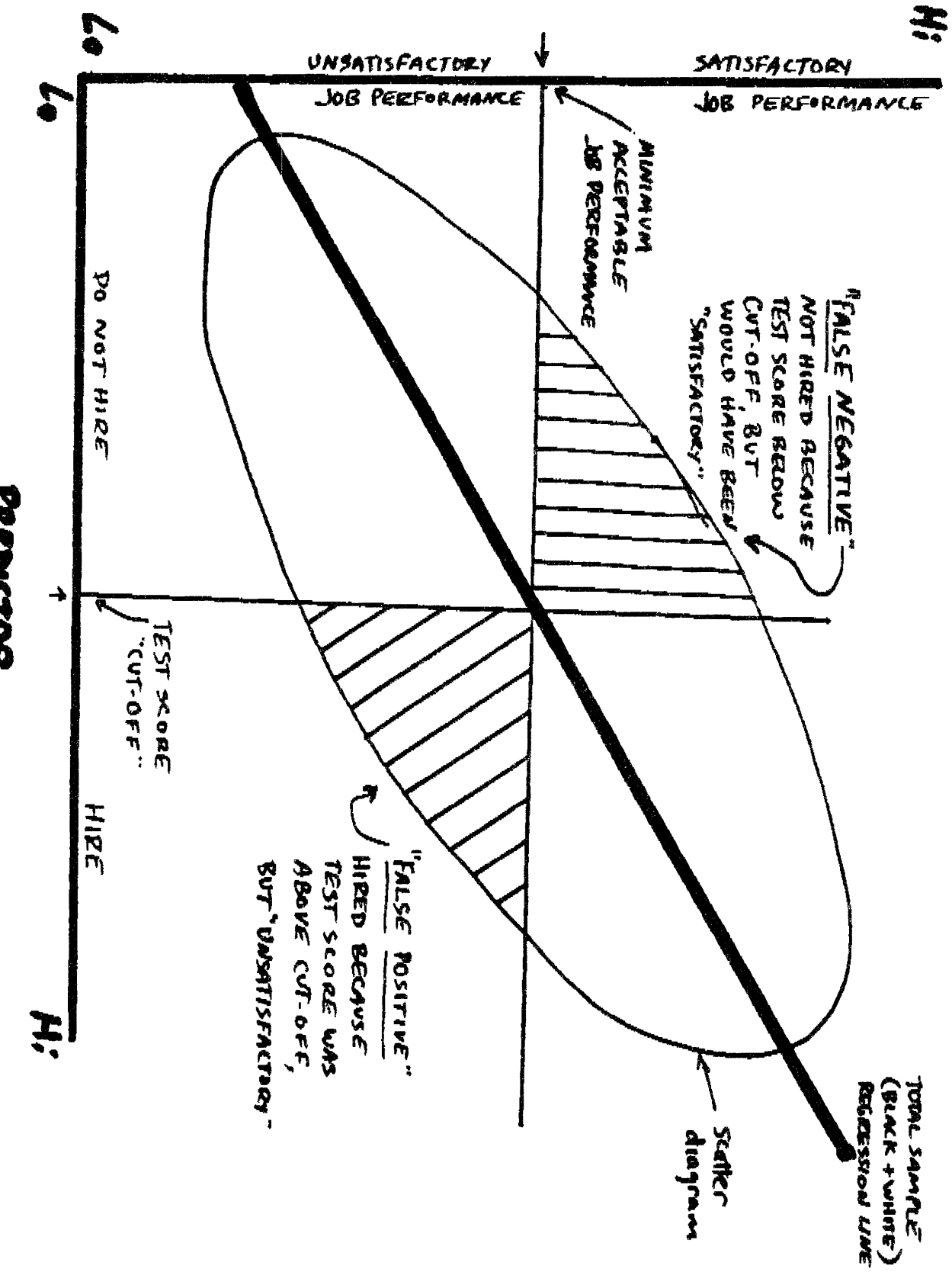
The NRC adopted a standard of "fairness" that false predictions not adversely affect minorities. By so doing, the NRC misconstrued the meaning of "discrimination" under Title VII by invoking a professionally discredited "fairness" definition that equates equal results for groups (i.e., NO "adverse impact") rather than equal opportunities for individuals.

Contrary to Title VII in the words it cites, the NRC concludes that "Title VII ... adopts a group-centered definition of discrimination, outlawing 'employment practices' that 'adversely affect' an individual's status as an employee because of that employee's race, color, religion, sex, or national origin." Thus by the NRC's sleight of hand, when they speak of "equal opportunity," they really means equality of results for groups.

What the NRC reveals is not that race-norming is scientifically justified, but that the decision to race-norm is not a scientific issue. The NRC confirms that testing's adverse impact is not caused by defects in the tests themselves. Hence the adverse impact has no technical solution, let alone one that requires adjusting minority scores to compensate for "the inadequacies of the technology (of testing)."

Thus race norming is a political question that ought to be addressed politically. To pretend that science can provide an answer to adverse impact accomplishes nothing more than tainting science by politicizing it. Since race norming is a political question, the unique opportunity in the proposed DISCRIMINATORY USE OF TEST SCORES is to elevate the debate to deal with substantive issues rather than permit the world's greatest deliberative body to regress again to lobbing slogans across the aisle.

Typical Criterion-related Validity Findings



PREDICTOR
(Typically, Test score)

FIGURE 1

Typical Criterion-related Validity Findings

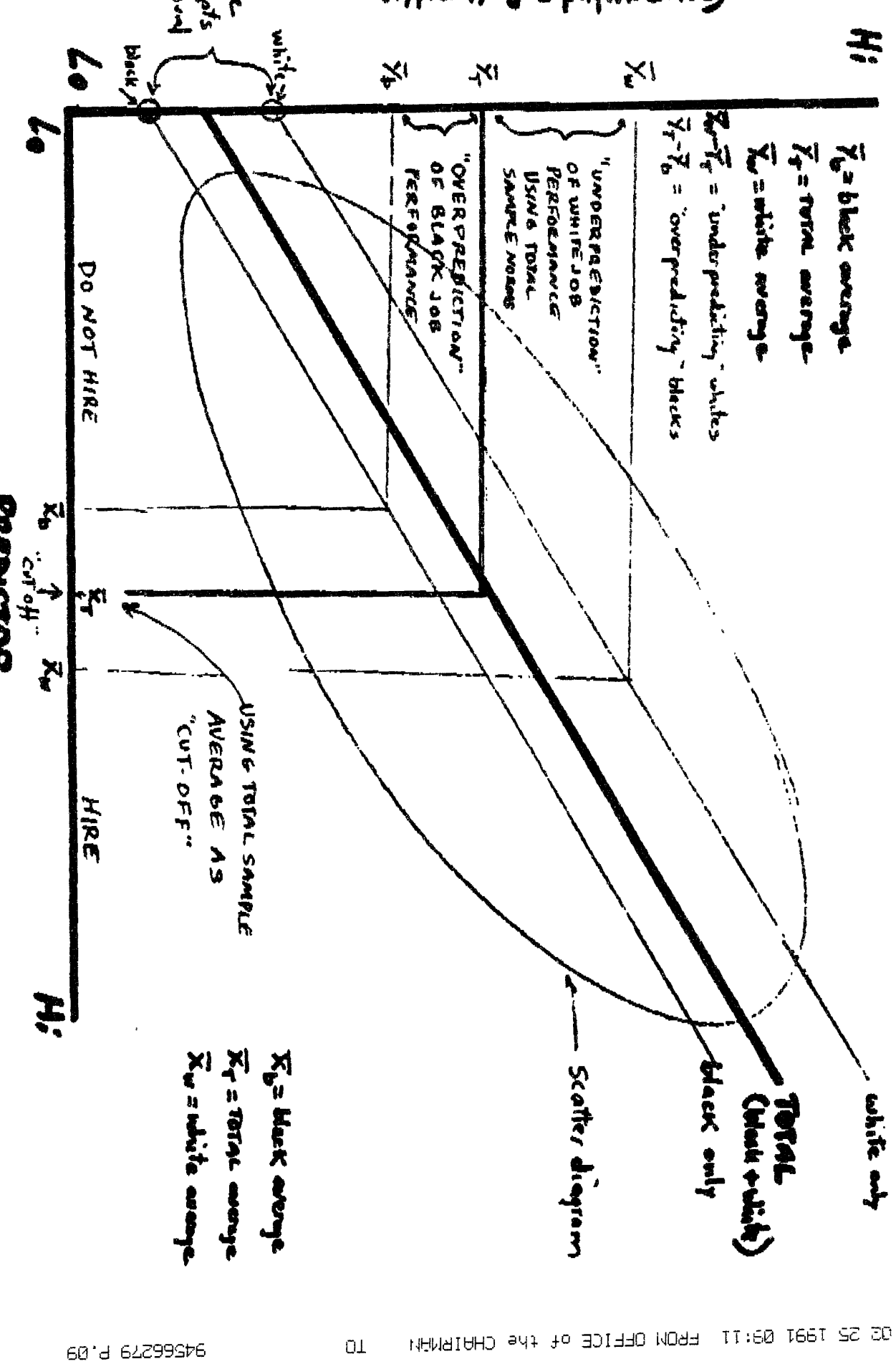


Figure 2

Typical Criterion-related Validity Findings

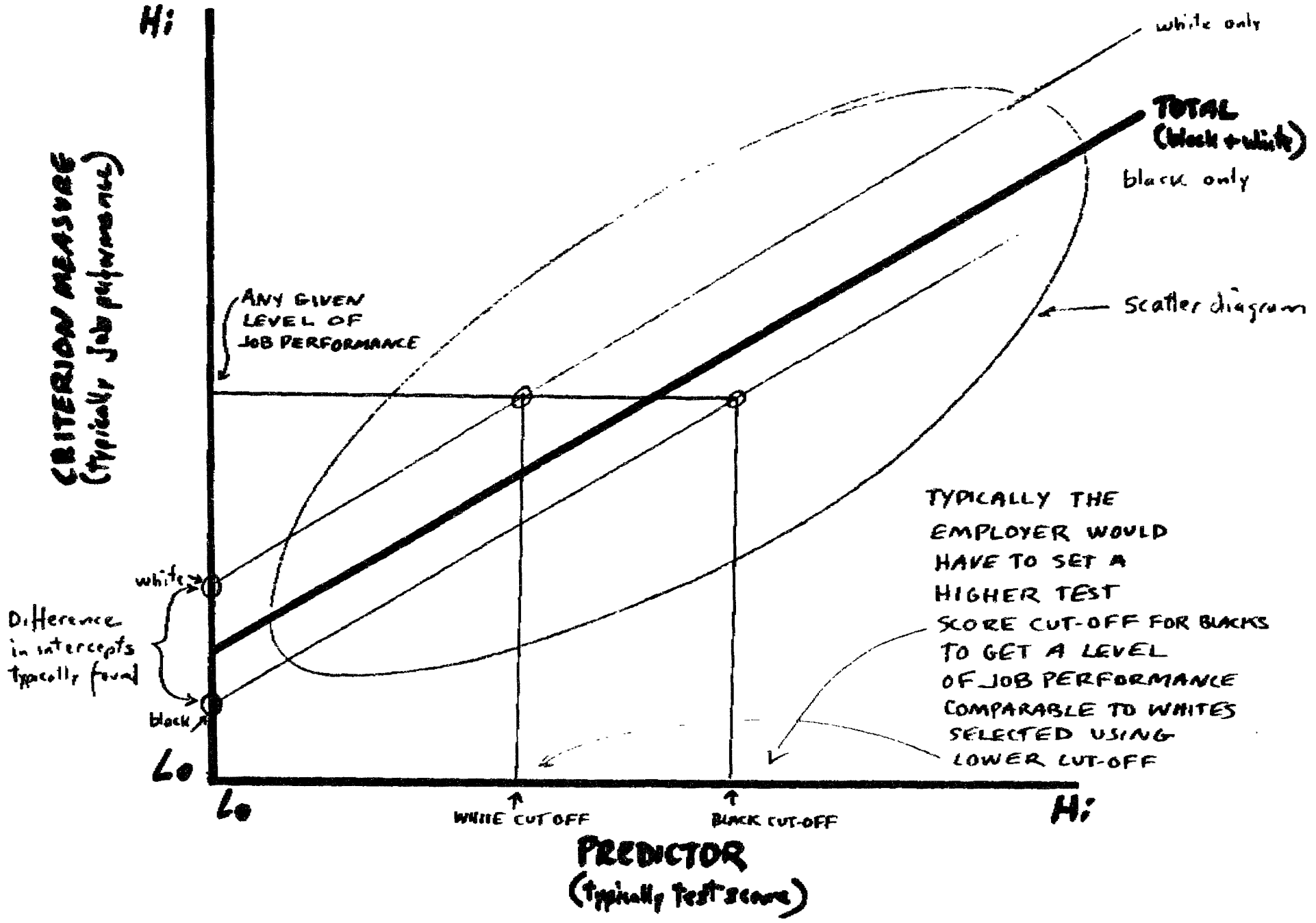


Figure 3

ID # 216110 CU
2167 [illegible] CU
R:3-4
1 Am.
HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Randy S. Harritan

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

Subject: Opposes H.R. 1 Civil Rights Bill, and any bill which imposes quotas on businesses.

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

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOFC	ORIGINATOR	91/02/26	[illegible]	[illegible]	[illegible]
	Referral Note:				
CUAT 10	A	91/02/27		S	91/03/12
	Referral Note:				
[illegible]	R	91/04/30	reply	A	91/05/09
	Referral Note:				SMG-159 sent
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

OK for SMG response

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

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.

R. S. HARRITAN & Company, Inc.
Virginia Contractor No. 17080
P.O. BOX 34605 • 2941 SPACE RD. • RICHMOND, VA. 23234 • TEL. 804/275-7821

February 14, 1991

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

Reference: H. R. 1

Dear President Bush:

It appears as though the so called Civil Rights Act has again reared it's ugly head. With the economy in the shape it's in and businesses struggling to keep alive, it seems impractical to impose more regulations on an already overburdened segment of society.

Equal employment opportunity is the law. Enforcement of the laws, already on the books is all that is needed. If government is unwilling or unable to enforce the existing laws, it is unreasonable to shift the burden to the employer.

Please lobby against this bill or any bill that would impose racial, religious or sexual quotas on our businesses.

Sincerely,

R. S. HARRITAN & COMPANY, INC.

Randy S. Harritan
President

ID # _____ CU

R 3-4
1 Pm

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Randy S. Harrison

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

Subject: Opposes H.R. 1 Civil Rights Bill, and any bill which imposes quotas on businesses.

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Code	Completion Date YY/MM/DD
Chron	ORIGINATOR	91 02 26		C	91 03 25
CMAT 10	A	91 02 27		C	91 03 25
		1 1			1 1
		1 1			1 1
		1 1			1 1

Referral Note: _____
Referral Note: _____
Referral Note: _____
Referral Note: _____

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendat
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosur

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

OK for SMG response

Comments: _____

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

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Sincerely,

R. S. HARRITAN & COMPANY, INC.

Randy S. Harritan
President

ID# 217014

HU010

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: MARCH 01, 1991

NAME OF CORRESPONDENT: MR. WALLACE ANDERSON

SUBJECT: SUGGESTS MINORITY COMPANIES VICTIMS OF DISCRIMINATION IN THEIR QUEST FOR BIDS AND CONTRACTS FOR THE RECONSTRUCTION OF KUWAIT

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
JOHN SUNUNU	ORG	91/03/01		C	91/03/04
REFERRAL NOTE:					
99 [illegible]	K	91/03/07		C	91/03/07 TC
REFERRAL NOTE:					
DOS	R	91/03/11		A	91/03/15 TC
REFERRAL NOTE:					
DOC	R	91/03/11			__/__/__
REFERRAL NOTE:					
		__/__/__			__/__/__
REFERRAL NOTE:					

COMMENTS: _____

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

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

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

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

Sally Kelley
Rm 91, OEOB

TE
IAT

ORM S/S 9104238

Date March 18, 1991

REFERENCE:

To: John Sununu

From: Wallace Anderson
Strategic Technology and Aerospace

Date:

Subject: Kuwait Reconstruction: Minority Business Participation

WH Referral Dated: March 11, 1991
NSCS ID# (if any): 217014

_____ The attached item was sent directly to the Department of State.

ACTION TAKEN:

_____ A draft reply is attached.

_____ A draft reply will be forwarded.

_____ A translation is attached.

__X__ An information copy of a direct reply is attached.

_____ We believe no response is necessary for the reason cited below.

_____ The Department of State has no objection to the proposed travel.

_____ Other (see remarks).

REMARKS:

for Sandra Sellers
Director
Secretariat Staff

United States Department of State

Assistant Secretary of State
for Economic and Business Affairs

Washington, D.C. 20520

MAR 15 199

Dear Mr. Anderson:

I am replying to your recent mailgram concerning the interest of the Strategic Technology and Aerospace Industries in contracts for Kuwaiti reconstruction. We have no record of any calls from you, but I can assure you that the Department of State is very keenly interested in seeing US firms, including minority firms, get their fair share of these contracts. Our Embassy in Kuwait was recently reopened, and Ambassador Gnehm will be very active in supporting US firms seeking to do business there.

The Corps of Engineers has a contract from the Kuwaiti Government to assist in the Kuwaiti reconstruction program. If you have not already contacted the Corps, you may wish to get in touch with them at (703)665-3683.

We have discussed your message with officials at the Minority Business Development Agency of the Department of Commerce, which is engaged in bringing minority firms into the Kuwaiti reconstruction process. As a result, I understand that the Regional Director of the Dallas office of that Agency has been instructed to contact Mr. Vanstuyvesant personally.

If the Department of State can be of any further assistance, please do not hesitate to call me or Al White, the Director of our Commercial Affairs office, at (202)647-1683.

Sincerely,

Eugene J. McAllister

Mr. Wallace Anderson, CEO
Strategic Technology and Aerospace Industries
38 W 88 Street
New York, NY 10024

9104238

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

REFERRAL

MARCH 11, 1991

TO: DEPARTMENT OF STATE

ACTION REQUESTED:
DIRECT REPLY, FURNISH INFO COPY

REMARKS: ALSO REFERRED TO COMMERCE

DESCRIPTION OF INCOMING:

ID: 217014

MEDIA: LETTER, DATED FEBRUARY 28, 1991

TO: JOHN SUNUNU

FROM: MR. WALLACE ANDERSON
CHIEF EXECUTIVE OFFICER
STRATEGIC TECHNOLOGY AND AEROSPACE
38 WEST 68TH ST.
NEW YORK NY 10024

SUBJECT: SUGGESTS MINORITY COMPANIES VICTIMS OF DISCRIMINATION IN THEIR QUEST FOR BIDS AND CONTRACTS FOR THE RECONSTRUCTION OF KUWAIT

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

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

SALLY KELLEY
DIRECTOR OF AGENCY LIAISON
PRESIDENTIAL CORRESPONDENCE

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

REFERRAL

MARCH 7, 1991

TO: DEPARTMENT OF DEFENSE

this is not a DOD issue

ACTION REQUESTED:
DIRECT REPLY, FURNISH INFO COPY

DESCRIPTION OF INCOMING:

ID: 217014

MEDIA: LETTER, DATED FEBRUARY 28, 1991

TO: JOHN SUNUNU

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AGENCY LIAISON, ROOM 91, THE WHITE HOUSE, 20500

SALLY KELLEY
DIRECTOR OF AGENCY LIAISON
PRESIDENTIAL CORRESPONDENCE

217014

STRATEGIC TECHNOLOGY AND AEROSPA
38 W 68 ST
NEW YORK NY 10024 28AM

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1-0141235059 02/28/91 ICS IPMRNCZ CSP WHSC
2127687373 MGMB TDRN NEW YORK NY 154 02-28 0254P EST

91C4238

GOVERNOR SUNUNU CHIEF OF STAFF
WHITE HOUSE
WASHINGTON DC 20500

STRATEGIC TECHNOLOGY AND AEROSPACE INDUSTRIES IS A MINORITY OWNED FIRM WITH CORPORATE HEADQUARTERS IN HOUSTON TEXAS. THE ESSENCE OF THIS MAILGRAM IS A LARGE VERY STRONG COMPLAINT AGAINST DISCRIMINATION BEING DONE TO MINORITY COMPANIES IN QUEST FOR BIDS AND CONTRACTS WITH REFERENCE TO THE RECONSTRUCTION OF KUWAIT. 75 PERCENT OF THE TROOPS THAT WERE STATIONED IN THE PERSIAN GULF WERE MINORITIES AND WE SEE NO REASON WHY WE AS A MINORITY FIRM THAT HAS THE CAPABILITY OF SUPPLYING COMPUTER HARDWARE, ELECTRONIC COMPONENTS, AUTOMOTIVE COMPONENTS, AVIONICS COMPONENTS, PRECISION INSTRUMENT AND HEAVY DUTY CONSTRUCTION EQUIPMENT COULD NOT BE GIVEN THE COURTESY OF SOMEBODY RETURNING A SERIES OF PHONE CALLS. WE WILL BE ANXIOUSLY AWAITING YOUR REPLY WHICH SHALL BE SENT TO C. ELLIOTT VANSTUYVESANT, EXECUTIVE VICE PRESIDENT INTERNATIONAL, STRATEGIC TECHNOLOGY AND AEROSPACE INDUSTRIES, 2500 WILCREST DRIVE, HOUSTON, TEXAS 77042, TELEPHONE 7139544845, FAX 7139544848

WALLACE ANDERSON, CEO

14:54 EST

MGMCCMP

5241 (MM 10/89)

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

ID# 217014

HU010

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: MARCH 01, 1991

NAME OF CORRESPONDENT: MR. WALLACE ANDERSON

SUBJECT: SUGGESTS MINORITY COMPANIES VICTIMS OF DISCRIMINATION IN THEIR QUEST FOR BIDS AND CONTRACTS FOR THE RECONSTRUCTION OF KUWAIT

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
JOHN SUNUNU		ORG	91/03/01	_____	C	91/03/21
	REFERRAL NOTE:					
[illegible]		A	91/03/07		C	91/03/07 TC
	REFERRAL NOTE:					
DOS		R	91/03/14		_	__/__/__
	REFERRAL NOTE:					
DOC		R	91/03/14	_____	A	91/03/27 LJ
	REFERRAL NOTE:					
		___	__/__/__	_____	_	__/__/__
	REFERRAL NOTE:					

COMMENTS: _____

ADDITIONAL CORRESPONDENTS: _____ MEDIA:L INDIVIDUAL CODES: _____ _____ _____

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

*ACTION CODES:	*DISPOSITION	*OUTGOING CORRESPONDENCE:
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS OF SIGNER
*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	* CODE = A
*D-DRAFT RESPONSE	*C-COMPLETED	*COMPLETED = DATE OF
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*X-INTERIM REPLY		

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

March 27, 1991

Mr. C. Elliott VanStuyvesant
Executive Vice President, International
Strategic Technology and Aerospace Industries
2500 Wilcrest Drive, Suite 300
Houston, Texas 77042

Dear Mr. VanStuyvesant:

Thank you for Mr. Anderson's telegram to Governor John Sununu, Chief of Staff to the President, regarding the participation of minority-owned firms in the rebuilding of Kuwait. Enclosed is the information I mentioned in our telephone conversation.

I have also provided your name to the Minority Business Development Agency. You will be receiving a call from a member of their Gulf Task Force in the near future.

There should be a good market for computer equipment with Arabic language capability in Kuwait. If you require assistance in addition to the contact names we discussed, please do not hesitate to call our office.

Sincerely,

Signed

Karl S. Reiner
Director
Gulf Reconstruction Center

Enclosure

cc: Minority Business Development Agency

CONTROL C101845
ONE/KReiner/fm 3/27/91
cc: official Reiner ExecSec
Agency Liaison, Room 91, The White House, 20500
with return of correspondence and worksheet

****
*   *
* ES/OS *
*   *
****

CONTROLLED CORRESPONDENCE

CONTROL #: C101845

DATE DUE IN EXEC SEC: 03/20/91

WHITE HOUSE CONTROL #: 217014

PRIORITY: B

ACTION AGENCY: ITA

ADDRESSED TO: WHITE HOUSE

SIGNATURE LEVEL: AGENCY

INSTRUCTION: DIRECT REPLY--RETURN ORIG INCOMING & CY OF RESP TO ES

FROM: ANDERSON, WALLACE
(STRATEGIC TECHNOLOGY AND AEROSPACE)

TITLE: MR.

SALUTATION: MR. ANDERSON

NUMBER OF COSIGNERS: 0

SUBJECT: SUGGESTS MINORITY COMPANIES VICTIMS OF DISCRIMINATION IN THEIR QUEST FOR BIDS & CONTRACTS FOR RECONSTRUCTION OF KUWAIT

INFO COPIES: ES,TC,DFH,DKS,DC,GC,MBDA,ADMIN

RECEIVED: 03/11/91

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THE CORRESPONDENCE ANALYST FOR THIS DOCUMENT IS DM
SE

C101845

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

REFERRAL

MARCH 11, 1991

TO: DEPARTMENT OF COMMERCE

ACTION REQUESTED:
DIRECT REPLY, FURNISH INFO COPY

REMARKS: ALSO REFERRED TO STATE

DESCRIPTION OF INCOMING:

ID: 217014

MEDIA: LETTER, DATED FEBRUARY 28, 1991

TO: JOHN SUNUNU

FROM: MR. WALLACE ANDERSON
CHIEF EXFCUTIVE OFFICER
STRATEGIC TECHNOLOGY AND AEROSPACE
38 WEST 68TH ST.
NEW YORK NY 10024

SUBJECT: SUGGESTS MINORITY COMPANIES VICTIMS OF
DISCRIMINATION IN THEIR QUEST FOR BIDS AND
CONTRACTS FOR THE RECONSTRUCTION OF KUWAIT

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

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

SALLY KELLEY
DIRECTOR OF AGENCY LIAISON
PRESIDENTIAL CORRESPONDENCE

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

REFERRAL

MARCH 7, 1991

TO: DEPARTMENT OF DEFENSE

this is not a DOD issue

ACTION REQUESTED:
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MEDIA: LETTER, DATED FEBRUARY 28, 1991

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NEW YORK NY 10024

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SALLY KELLEY
DIRECTOR OF AGENCY LIAISON
PRESIDENTIAL CORRESPONDENCE

STRATEGIC TECHNOLOGY AND AEROSPA
38 W 88 ST
NEW YORK NY 10024 28AM

WESTERN UNION | MAILGRAM®

1-0141235059 02/28/91 ICS IPMRNCZ CSP WHSC
2127687373 MGMB TDRN NEW YORK NY 154 02-28 0254P EST

GOVERNOR SUNUNU CHIEF OF STAFF
WHITE HOUSE
WASHINGTON DC 20500

STRATEGIC TECHNOLOGY AND AEROSPACE INDUSTRIES IS A MINORITY OWNED FIRM WITH CORPORATE HEADQUARTERS IN HOUSTON TEXAS. THE ESSENCE OF THIS MAILGRAM IS A LARGE VERY STRONG COMPLAINT AGAINST DISCRIMINATION BEING DONE TO MINORITY COMPANIES IN QUEST FOR BIDS AND CONTRACTS WITH REFERENCE TO THE RECONSTRUCTION OF KUWAIT. 75 PERCENT OF THE TROOPS THAT WERE STATIONED IN THE PERSIAN GULF WERE MINORITIES AND WE SEE NO REASON WHY WE AS A MINORITY FIRM THAT HAS THE CAPABILITY OF SUPPLYING COMPUTER HARDWARE, ELECTRONIC COMPONENTS, AUTOMOTIVE COMPONENTS, AVIONICS COMPONENTS, PRECISION INSTRUMENT AND HEAVY DUTY CONSTRUCTION EQUIPMENT COULD NOT BE GIVEN THE COURTESY OF SOMEBODY RETURNING A SERIES OF PHONE CALLS. WE WILL BE ANXIOUSLY AWAITING YOUR REPLY WHICH SHALL BE SENT TO C. ELLIOTT VANSTUYVESANT, EXECUTIVE VICE PRESIDENT INTERNATIONAL, STRATEGIC TECHNOLOGY AND AEROSPACE INDUSTRIES, 2500 WILCREST DRIVE, HOUSTON, TEXAS 77042, TELEPHONE 7139544845, FAX 7139544848
WALLACE ANDERSON, CEO

14:54 EST

MGMCCMP

(MM 10/89)

Document No. 217066a55

HUDIO

WHITE HOUSE STAFFING MEMORANDUM

DATE: 3/1/91 ACTION/CONCURRENCE/COMMENT DUE BY: TODAY, 3/1/91 2:00 p.m.

SUBJECT: FACT SHEET ON ADMINISTRATION CIVIL RIGHTS BILL

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	MCCLURE	☑	☐
SUNUNU	☐	☑	NEWMAN	☐	☐
SCOWCROFT	☐	☐	PORTER	☑	☐
DARMAN	☑	☐	ROGICH	☐	☐
BRADY	☐	☑	UNTERMEYER	☐	☐
CARD	☑	☐	KRISTOL	☑	☐
DEMAREST	☑	☐	_____	☐	☐
FITZWATER	☐	☐	_____	☐	☐
GRAY	☑	☐	_____	☐	☐
HOLIDAY see com.ms.	☑	☐	_____	☐	☐

REMARKS:

Please forward your comments directly to Boyden Gray, 2nd FL/WW, x2632, no later than 2:00 p.m, TODAY, Friday, March 1, with a copy to this office. Thank you.

RESPONSE:

Is this done + sent?

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

FACT SHEET ON ADMINISTRATION
CIVIL RIGHTS BILL

- The Administration is committed to strengthening the strong employment discrimination laws that now exist. These improvements will operate to obliterate consideration of factors such as race, religion, sex, or national origin from employment decisions.

- This can be done without encouraging the use of quotas or preferential treatment, without departing from the fundamental principles of fairness that apply throughout our legal system, and without creating a litigation bonanza that brings more benefits to lawyers than to victims.

- A major objective of the Administration is to ensure that Federal law provides strong new remedies for harassment based on race, sex, religion, or national origin. The Administration proposes to create a new monetary remedy, with a $150,000 cap, for these forms of discrimination.

- In addition, the Administration proposes to extend 42 U.S.C. 1981 to outlaw racial discrimination in the performance of contracts, overruling Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

- The Administration also proposes legislation overturning the Supreme Court's decision in Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), which unfairly limits the time for challenging discriminatory seniority systems.

- The administration also proposes to codify the "disparate impact" cause of action for employment practices that unintentionally exclude disproportionate numbers of certain groups from some jobs. This codifies Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Administration will propose to place the burden of proof on the defendant to justify practices having a disparate impact under the rule of "business necessity." This overrules the contrary decision in Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115, 2126 (1989).

- In order to help curtail unnecessary litigation, the use of alternative dispute resolution mechanisms will be encouraged.

- The time has come for Congress to bring itself under the same antidiscrimination requirements it prescribes for others. This will promote both fair treatment for congressional employees and a greater appreciation by Congress of the consequences of new legislative initiatives.

- Other improvements, including changes in certain provisions affecting the statute of limitations and expert witness fees, will also enhance the administration of Title VII of the 1964 Civil Rights Act.

- The Administration recognizes that equal opportunity can never be a reality unless there are decent schools, safe streets, and revitalized local economies. Therefore, in addition to this bill it seeks Congressional action to promote choice and opportunity on several fronts: educational choice and flexibility; home-ownership opportunity; enterprise zones and community opportunity areas; and heightened anti-crime efforts.

THE WHITE HOUSE

WASHINGTON

ORM OPTICAL DISK NETWORK

ID# 2170655

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

_✓_ Remainder of case not scanned.

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____ Duplicate letters attached - not scanned.

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____ Only tracking sheet scanned.

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____ Bill not scanned.

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Comments:

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Document No. 217064

WHITE HOUSE STAFFING MEMORANDUM

91 MAR -1 PM 3:09

DATE: 3/1/91 ACTION/CONCURRENCE/COMMENT DUE BY: TODAY, 3/1/91 2:00 p.m.

SUBJECT: FACT SHEET ON ADMINISTRATION CIVIL RIGHTS BILL

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	MCCLURE	☑	☐
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SCOWCROFT	☐	☐	PORTER	☑	☐
DARMAN	☑	☐	ROGICH	☐	☐
BRADY	☐	☑	UNTERMEYER	☐	☐
CARD	☑	☐	KRISTOL	☑	☐
DEMAREST	☑	☐	_____	☐	☐
FITZWATER	☐	☐	_____	☐	☐
GRAY	☑	☐	_____	☐	☐
HOLIDAY	☑	☐	_____	☐	☐

REMARKS:

Please forward your comments directly to Boyden Gray, 2nd FL/WW, x2632, no later than 2:00 p.m, TODAY, Friday, March 1, with a copy to this office. Thank you.

RESPONSE:

See comments. Thanks.
Holly Williamson
3-1-91

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

91 MAR -1 PM 12:16

FACT SHEET ON ADMINISTRATION
CIVIL RIGHTS BILL

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- This can be done without encouraging disregarding the use of quotas ~~or preferential treatment~~, without ~~departing from~~ the fundamental principles of fairness that apply throughout our legal system, and without creating a litigation bonanza that brings more benefits to lawyers than to victims.

Move to (B) — next page (The thought here was that preferential treatment went further than quotas.)

- A major objective of the Administration is to ensure that Federal law provides strong new remedies for harassment based on race, sex, religion, or national origin. The Administration proposes to create a new monetary remedy, with a $150,000 cap, for these forms of discrimination.

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- In order to help curtail unnecessary litigation, the use of alternative dispute resolution mechanisms will be encouraged.

- The ~~time has come for~~ Administration will insist that Congress ~~to~~ bring itself under the same antidiscrimination requirements it prescribes for others. This will promote both fair treatment for congressional employees and a greater appreciation by Congress of the consequences of new legislative initiatives.

Move to (A) — next page

- Other improvements, including changes in certain provisions affecting the statute of limitations and expert witness fees, will also enhance the administration of Title VII of the 1964 Civil Rights Act.

insert (A)

insert (B)

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Document No. 217064

WHITE HOUSE STAFFING MEMORANDUM

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SUBJECT: FACT SHEET ON ADMINISTRATION CIVIL RIGHTS BILL

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VICE PRESIDENT	☐	☑	MCCLURE	☑	☐
SUNUNU	☐	☑	NEWMAN	☐	☐
SCOWCROFT	☐	☐	PORTER	☑	☐
DARMAN	☑	☐	ROGICH	☐	☐
BRADY	☐	☑	UNTERMEYER	☐	☐
CARD	☑	☐	KRISTOL	☑	☐
DEMAREST	☑	☐	_____	☐	☐
FITZWATER	☐	☐	_____	☐	☐
GRAY	☑	☐	_____	☐	☐
HOLIDAY	☑	☐	_____	☐	☐

REMARKS:

Please forward your comments directly to Boyden Gray, 2nd FL/WW, x2632, no later than 2:00 p.m, TODAY, Friday, March 1, with a copy to this office. Thank you.

RESPONSE: See comments

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

91 MAR -1 PM12:16

FACT SHEET ON ADMINISTRATION
CIVIL RIGHTS BILL

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ID # 217066 CU

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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Phil Brady

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

Subject: Fact Sheet on Administration 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
Cmofc	ORIGINATOR	91,03,01		C	91,03,01
CUAT 10	A	91,03,01		C	91,03,01
Cmgray CUAT02	I	91,03,01		C	91,03,01
	I	91,03,01		C	91,03,01
	_	/ /		_	/ /

Referral Note: see comments

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: Comments should be forwarded to Nelson Lund

All necessary Action Taken on Captioned Matter

N. Lund 3/1/-91

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
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5/81

Document No. 217064

WHITE HOUSE STAFFING MEMORANDUM

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DEMAREST	☑	☐	_____	☐	☐
FITZWATER	☐	☐	_____	☐	☐
GRAY	☑	☐	_____	☐	☐
HOLIDAY	☑	☐	_____	☐	☐

REMARKS:

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RESPONSE:

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

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THE WHITE HOUSE
WASHINGTON

Reed
5:02
JBE

FACSIMILE TRANSMITTAL SHEET

TO Nelson Lund

FAX NUMBER 7929

FROM Darman

TELEPHONE NUMBER

NUMBER OF PAGES (excluding Transmittal Sheet) 3

COMMENTS

Document No. 217064

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PHILLIP D. BRADY
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Share with comments.

RCD 12-30

Document No. 217064

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FITZWATER	☐	☐	_____	☐	☐
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REMARKS:

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RESPONSE:

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

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allowing damages of up to

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employer

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shift

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FRED McClure Comments

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SENT BY:Xerox Telecopier 7020 ; 3- 1-91 ; 3:08PM ; 2024566279→ 4567929;# 1

THE WHITE HOUSE
WASHINGTON

FACSIMILE TRANSMITTAL SHEET

TO Nelson Lund

FAX NUMBER 7929

FROM WH Counsel's Office

TELEPHONE NUMBER

NUMBER OF PAGES (excluding Transmittal Sheet)

COMMENTS

Enclosed are Haley Williamson's Comments.

We are sending hard copy to you via messenger.

Received too late. Talked to Richard Partn and sent oral version in time to tell him unimportant changes had been made

Document No. 217064

WHITE HOUSE STAFFING MEMORANDUM

DATE: 3/1/91 ACTION/CONCURRENCE/COMMENT DUE BY: TODAY, 3/1/91 2:00 p.m.

SUBJECT: FACT SHEET ON ADMINISTRATION CIVIL RIGHTS BILL

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	MCCLURE	☑	☐
SUNUNU	☐	☑	NEWMAN	☐	☐
SCOWCROFT	☐	☐	PORTER	☑	☐
DARMAN	☑	☐	ROGICH	☐	☐
BRADY	☐	☑	UNTERMEYER	☐	☐
CARD	☑	☐	KRISTOL	☑	☐
DEMAREST	☑	☐	_____	☐	☐
FITZWATER	☐	☐	_____	☐	☐
GRAY	☑	☐	_____	☐	☐
HOLIDAY	☑	☐	_____	☐	☐

REMARKS:

Please forward your comments directly to Boyden Gray, 2nd FL/WW, x2632, no later than 2:00 p.m, TODAY, Friday, March 1, with a copy to this office. Thank you.

RESPONSE:

See comments. Thanks.
Holly Williamson
3-1-91

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

91 MAR -1 PM 12:16

FACT SHEET ON ADMINISTRATION CIVIL RIGHTS BILL

- The Administration is committed to strengthening the strong employment discrimination laws that now exist. These improvements will operate to obliterate consideration of factors such as race, religion, sex, or national origin from employment decisions.

- This can be done without encouraging the use of quotas ~~or preferential treatment~~, without ~~departing from~~ disregarding the fundamental principles of fairness that apply throughout our legal system, and without creating a litigation bonanza that brings more benefits to lawyers than to victims.

(Move to (B) — next page) (We thought here was that preferential treatment went further than quotas.)

A major objective of the Administration is to ensure that Federal law provides strong new remedies for harassment based on race, sex, religion, or national origin. The Administration proposes to create a new monetary remedy, with a $150,000 cap, for these forms of discrimination.

In addition, the Administration proposes to extend 42 U.S.C. 1981 to outlaw racial discrimination in the performance of contracts, overruling Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

- The Administration also proposes legislation overturning the Supreme Court's decision in Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), which unfairly limits the time for challenging discriminatory seniority systems.

- The administration also proposes to codify the "disparate impact" cause of action for employment practices that unintentionally exclude disproportionate numbers of certain groups from some jobs. This codifies Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Administration will propose to place the burden of proof on the defendant to justify practices having a disparate impact under the rule of "business necessity." This overrules the contrary decision in Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115, 2126 (1989).

- In order to help curtail unnecessary litigation, the use of alternative dispute resolution mechanisms will be encouraged.

- The ~~Administration~~ Administration will insist that Congress ~~do~~ bring itself under the same antidiscrimination requirements it prescribes for others. This will promote both fair treatment for congressional employees and a greater appreciation by Congress of the consequences of new legislative initiatives.

(Move to (A) — next page)

- Other improvements, including changes in certain provisions affecting the statute of limitations and expert witness fees, will also enhance the administration of Title VII of the 1964 Civil Rights Act.

insert (A)

insert (B)

- The Administration recognizes that equal opportunity can never be a reality unless there are decent schools, safe streets, and revitalized local economies. Therefore, in addition to this bill it seeks Congressional action to promote choice and opportunity on several fronts: educational choice and flexibility; home-ownership opportunity; enterprise zones and community opportunity areas; and heightened anti-crime efforts.

CS

ID # 217165 CU

HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Katie Nikelsjohn

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

Subject: letter from Senator Slade Gorton to Gov. Sununu re: Civil Rights Bill Proposals

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CMOC	ORIGINATOR	91,02,28		C	91,03,05 CS
CUAT 10	Referral Note: A	91,02,28		C	91,03,05 CS
CUGray	Referral Note: See comments. CS I	91,02,28		C	91,02,28 CS
CUAT 07	Referral Note: I	91,02,28		C	91,02,28 CS
CUAT 02	Referral Note: I	91,02,28		C	91,02,28
	Referral Note:				

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

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

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

Comments: No Further Action Required per M. Lund CS

3-5-91

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

5/81

THE WHITE HOUSE
WASHINGTON

Date: 2-28

TO: Bayden

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

☑ FYI

☐ Appropriate Action

☐ Let's Discuss

☐ Per our conversation

>16646

SLADE GORTON
WASHINGTON

730 HART SENATE OFFICE BUILDING
(202) 224-3441

TOLL FREE ISSUES HOTLINE
1-800-282-8095

TDD 202-224-8273

United States Senate

WASHINGTON, DC 20510-4701

COMMITTEES

APPROPRIATIONS

COMMERCE, SCIENCE, AND TRANSPORTATION

INDIAN AFFAIRS

INTELLIGENCE

February 27, 1991

VIA HAND DELIVERY

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

Re: Civil Rights Bill Proposals

Dear John:

Here are certain reflections with respect to our ongoing discussions of an appropriate civil rights position for the Administration and its supporters in the House and Senate. There seem to me to be, in order of importance, only three major issues that rise to the stature of public consciousness and public debate. They are (1) gender discrimination, (2) business necessity, and (3) burden of proof. The latter two, of course, encompass the heart of the Supreme Court's decision in Wards Cove.

1. I continue to believe, very firmly, that the question of gender discrimination will be the key to this year's debate. It is clear to me that the Democrats and the so-called "civil rights" community realize this, and that they will attempt to move the debate from one over quotas to one over the proposition that Republicans and the White House treat gender discrimination as being less significant and less outrageous than racial discrimination. As a matter of policy and politics both, we should not be put in this position.

Ideally, perhaps, the solution might be to fold Section 1981 into Title VII, and to abandon unlimited compensatory and punitive damages in cases alleging racial discrimination. As a practical matter, that dog won't hunt. In addition, none of the half way measures we proposed during the course of last year's debate immunize us from the valid and emotional criticism to which we are subjected by our opponents. It is for that reason that I have made the suggestions outlined to you by Marianne McGettigan. I believe that we should simply authorize Section 1981 suits in cases of gender discrimination (as well as other Title VII protected classes) on the same terms and conditions under which the courts have authorized them for racial discrimination.

3206 JACKSON FEDERAL BUILDING
915 SECOND AVENUE
SEATTLE, WA 98174
(206) 553-0350

130 FEDERAL BUILDING
500 WEST 12TH STREET
VANCOUVER, WA 98660
(206) 696-7838

697 U.S. COURT HOUSE
W. 920 RIVERSIDE AVENUE
SPOKANE, WA 99201
(509) 353-2507

MORRIS BUILDING ROOM 219
23 SOUTH WENATCHEE AVENUE
WENATCHEE, WA 98801
(509) 663-2118

As you well know, I hold no brief for the American Trial Lawyers Association. I am firmly convinced that there is far too much litigation in this country and that it damages both societal peace and appropriate concepts of justice in business and in industrial productivity. I support significant limitations on such litigation in fields like product liability and medical malpractice. As a consequence, I do not come easily to this conclusion to expand Section 1981.

Nevertheless, I am persuaded that if losing parties in Section 1981 litigation, including gender discrimination, are not only required to pay the winners' attorneys' fees but are also subject to punitive damages to exactly the same extent that punitive damages are risked by an unsuccessful defendant, such litigation will be sharply reduced. If we add to that risk the imposition of the risk on lawyers bringing such actions when they are the true parties in interest, which is an essential part of my suggestion, then we will have effectively discouraged the overwhelming vote of Section 1981 litigation, and will have encouraged primary reliance on Title VII remedies.
(Incidentally, only the first of these three proposals is the "English practice"; the second two go beyond it.)

Nor do I believe it sufficient for me and others simply to offer this as an amendment to the Administration bill. Neither in committee nor on the floor of either House will we be dealing with the Administration bill but with Kennedy's. To have a chance of success, the Administration's proposals and our own must be identical and presented in the form of a single amendment.

2. I believe that you are now persuaded that we should not change the definition of business necessity established in Wards Cove. I believe this to be an entirely sound decision. Business necessity is already a court construct, not a statutory one, and should be left to the courts. The majority in Wards Cove was right.

3. Nor would I give in to the Kennedy crowd on the burden of proof. We should not allow the debate to be over how wrong Wards Cove was; the high ground is to defend the correctness of the entire decision of a Court which, after all, we and our predecessors appointed. I find it easy to defend the proposition that if you accuse me of racism or sexism you should have the burden of proving that I have engaged in such activities, rather than being able to impose on me the burden of proving that I did not.

This is the least important of the three issues, and is the only one I think that we should be willing to give up during the

course of negotiations. As a consequence, we should not give it up before we start.

As a final note, I believe it is imperative that the overall debate focus squarely on civil rights and not be confused by related, but inapposite, arguments. We cannot permit the Democrats to promote affirmative action programs under the guise of a civil rights title as they successfully did last year, especially in connection with Wards Cove.

The present "civil rights" and "affirmative action" communities clearly are one and the same and would be delighted to win passage of an affirmative action or quota bill under the guise of civil rights. As you will note from the attached article, Morton Halperin of the ACLU conceded after last year's debate concluded, "We thought that, given the current Supreme Court and its demonstrated hostility toward civil rights, that the language (of the bill) had to be stronger to get the result we think Griggs mandated." Their real agenda is clear.

I would encourage the President to set the tone of the debate at the outset and clarify we propose a civil rights bill and our opponents are pushing affirmative action legislation. Dr. Martin Luther King and the civil rights community took to the streets of Selma, Alabama to bring about equality for all Americans, not preferential treatment for a selected few. That should be our objective as well.

This is a battle we can win both in Congress and in the minds of people of the country because we are right.

Sincerely,

Slade Gorton
United States Senator

SG/cdh/L00713
Attachment

On Job Rights Bill, a Vow to Try Again in January

New York Times
10/26/90
A-25

By STEVEN A. HOLMES
Special to The New York Times

WASHINGTON, Oct. 25 — In the wake of the Senate's failure to override President Bush's veto of a major job discrimination bill, the measure's backers said today that they would introduce an even stronger version of the legislation when Congress reconvenes next January.

And conservatives who opposed the measure said its defeat signaled the waning influence of the civil rights movement on Capitol Hill.

On Wednesday, the Senate vote fell one short of overriding the veto of the Civil Rights Act of 1990, a bill that the Administration asserted would force employers to adopt quotas in hiring and promotion.

'His Untenable Position'

"George Bush killed the Civil Rights Act of 1990," said Ralph G. Neas, executive director of the Leadership Conference on Civil Rights, a Washington-based lobbying group. "After being rejected by decisive bipartisan majorities in both houses of Congress, he relied on a small minority to sustain his untenable position."

Clint Bolick, director of the conservative Landmark Legal Center for Civil Rights, which opposed the bill, said, "This is the first civil rights bill in the last 10 that failed to get a veto-proof majority." He added: "I think the civil rights establishment is slowly losing its clout, and members of Congress are

Has a consensus on civil rights shifted?

beginning to grow cynical about race-conscious measures. It really proves that slapping a civil rights label on a bill no longer means automatic passage."

Leaders of groups representing minorities and women contended that a one-vote defeat did not herald a loss of consensus on civil rights issues. They also noted that several important initiatives in the 1980's, including legislation strengthening Federal housing discrimination law and guaranteeing civil rights to the disabled, had not been passed initially by Congress, but eventually became law.

In the end, proponents of the bill said they believed that their willingness to compromise — they made some 30 changes in the measure to satisfy Administration objections — had allowed them to be seen as reasonable and the Administration as intransigent. That, they believe, will greatly aid their cause when the bill is reintroduced next year.

Still, the defeat of the legislation was a major setback for civil rights groups and women's organizations that had made it their top legislative priority. Moreover, the proponents of the bill made missteps and miscalculations that hurt their cause.

The measure was aimed at overturning six Supreme Court decisions — five of them handed down last year — that made it harder to prove job discrimination and, in some cases, impossible to collect monetary damages for flagrant racial bias. It also would have given to juries the right to award unlimited amounts in monetary damages to victims of intentional discrimination based on sex or religion. Currently, juries may award such damages in some cases of intentional racial bias.

But the bill was exceedingly complex and legalistic. Important as it may have been, the legislation did not have the sweep and moral weight of a statute conferring rights on people.

Instead, the bill focused essentially on the rules of litigation, and with its legal terminology it was hard for supporters to foster understanding for the measure among reporters or the excitement among members of the public that might have helped their cause.

"We're not talking about voting rights or fair housing," said Mr. Bolick. "You're talking about burdens of proof and statistical analysis."

While the bill's supporters said they were trying to restore the law to its status prior to the court rulings, there were clearly some areas in which they went further. For example, while current law gives six months to plaintiffs to file a case after an incident of discrimination, the bill increased that to two years.

Issue of Standards

On the contentious issue of the standards that businesses must meet to justify a practice that results in discrimination, the bill's initial language went beyond the 1971 Supreme Court ruling in Griggs v. Duke Power.

In that decision, the court ruled that an employer could be guilty of discrimination if its practice had a result, even if unintended, of excluding minorities or women. The bill's proponents argued at first that their bill did not go beyond Griggs, and that because there had not been a pervasive use of quotas since Griggs, the measure would not foster quotas.

"We thought that, given the current Supreme Court and its demonstrated hostility toward civil rights, that the language had to be stronger to get the result we think Griggs mandated," Morton Halperin, director of the Washington office of the American Civil Liberties Union, conceded today in an interview.

Later, facing assertions that such language would force businesses to adopt quotas, the supporters made changes, watering down the bill.

The bill's supporters also failed to exploit the Administration's seemingly contradictory position of backing jury trials and monetary damages for racial harassment on the job, but opposing them in cases of sexual harassment. Justice Department officials had argued that the history of blacks in the UnitedStates called for special remedies in court.

"We fought a Civil War for blacks, we didn't fight a Civil War for women," former Deputy Attorney General Donald Ayer once told a group of business lobbyists who beseeched the Administraton to change its stance.

But supporters also could not exploit the divisions among many conservatives who opposed the bill because they

believed it would lead to quotas and businesses that fought it because it allowed unlimited compensatory and punitive damages in cases of intentional discrimination.

"If they had come forward with a total cap on damages of $150,000, business opposition would have lessened considerably," said one lobbyist who asked not to be named.

Mr. Neas said such a proposal could have driven away some support in Congress among those who were reluctant to place caps on any damages awards.

But if the supporters were unable to make the case that the measure was a women's rights bill, they were thrown on the defensive by the Administration's often-repeated contention that it was a "quota bill."

In a sense, the proponents walked into what they now feel was an Administration trap. Civil rights lawyers and aides to Senator Edward M. Kennedy, a Massachusetts Democrat and the measure's sponsor in the Senate, had entered into negotiations over the bill in May at the invitation of Mr. Bush, who said he wanted to sign a civil rights bill.

Doubts About Intentions

They now say they believe the Administration never intended to reach an agreement because it supported several of the Supreme Court rulings the bill would overturn. For their part, Administration officials say it was the bill's backers who refused to compromise.

While the two sides conducted weeks of fruitless negotiations, the Administration relentlessly repeated the theme that the bill would foster quotas.

"By going down to the White House when they did, they gave the Administration eight weeks to run down the clock and hammer us over the head on the quota argument," said a supporter of the bill who asked not to be named.

Proponents said that when they were asked by the President, they had no choice but to negotiate. But during that period, they did not effectively build a grass-roots political movement that would pressure Congress and the Administration to come to an agreement.

"There was a time when some of us felt too much time was spent sitting around a table instead of building grass roots," Bill Taylor, a civil rights lawyer, told Congressional Quarterly magazine.

While supporters had difficulty generating public support for the bill, lawmakers also had to contend with the specter of David Duke tapping into the resentment by some toward what they viewed as Federal efforts to give an unfair advantage to minorities and women.

Mr. Duke, a former Ku Klux Klan leader who made a serious bid for a Senate seat from Louisiana, watched the override vote from the Senate gallery. "It looks like the President and the Congress are getting my message," Mr. Duke told reporters after the vote.

But Administration officials and Republican opponents of the bill disavowed any association with Mr. Duke.

TB Receipt

ID# 217852

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: MARCH 05, 1991

NAME OF CORRESPONDENT: THE HONORABLE JON KYL

SUBJECT: LOOKS FORWARD TO WORKING WITH THE ADMINISTRATION ON A CIVIL RIGHTS PACKAGE THAT WILL SERVE TO SECURE GREATER PROTECTION AGAINST DISCRIMINATION

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
FREDERICK MCCLURE	ORG	91/03/05	FM TC	A	91/03/12 TC
REFERRAL NOTE: PD Port	R	91/03/18 TC			/ /
REFERRAL NOTE: 93 HS	I	91/03/18		C	/ / TC
REFERRAL NOTE:		/ /			/ /
REFERRAL NOTE:		/ /			/ /
REFERRAL NOTE:		/ /			/ /

COMMENTS: _____

ADDITIONAL CORRESPONDENTS: 20 MEDIA:L INDIVIDUAL CODES: 1240 ____ ____

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

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

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

March 12, 1991

Dear Jon:

Thank you for your recent letter to the President, cosigned by 20 of your colleagues, regarding the Administration's civil rights proposal.

We appreciate being apprised of your support of the package's efforts to secure greater protection against discrimination. Please know that I have shared your comments with President Bush. Additionally, I have taken the liberty of providing your comments to the President's advisors on this matter so that they, too, are aware of your support.

Thank you again for your interest in writing.

With best regards,

Sincerely,

Frederick D. McClure
Assistant to the President
for Legislative Affairs

The Honorable Jon Kyl
House of Representatives
Washington, D.C. 20515

FDM/TSB/efr (3FDMG)
Civil.pf

bcc: w/copy of inc to Office of Domestic Policy - for Direct Response
bcc: w/copy of inc to HHS - FYI

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

February 27, 1991

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

Dear Mr. President:

Civil rights will again emerge this year as an important issue for Congress. Civil rights will not be advanced by legislation which has the effect of mandating quotas. Unfortunately, this would be a major result of the Democratic leadership's bill, H.R. 1. We are pleased that the Administration has taken the initiative to prepare a more reasonable and just civil rights proposal that will adequately protect against discrimination. At the same time, we are pleased with your empowerment program that is designed to assist America's disadvantaged, regardless of race, religion or sex.

Together, your civil rights package will serve to secure greater protection against discrimination and to provide greater opportunity to those outside the economic mainstream. We believe that a strong link between discrimination-based litigation reform and empowerment is the only way to address the more fundamental civil rights problems confronting the disadvantaged. Until all Americans are afforded the opportunity to compete and choose, whether in education, home ownership, having and keeping a good job, starting a business or personal security, our society will not fully achieve civil rights for all.

We look forward to working with you on this important matter.

Sincerely,

Andy Ireland 188

Craig Thomas 399

[illegible] 438

Don Ritter 330

Dana Rohrabacher 335

Dick Armey 13

Barbara Vucanovich 416

Tom DeLay 87

Carlos Moorhead 271

Cass Ballenger 19

John Boehner 36

Charles H Taylor 397

Duncan Hunter 184

Robert K. Dornan 99

John T. Doolittle 97

Bill McCollum 247

Hal Hyde 186

PHOTOCOPY
MISC. HANDWRITING

ID# 217881

HU010

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: MARCH 05, 1991

NAME OF CORRESPONDENT: MR. RUSSELL HAWKINS

SUBJECT: OBJECTS TO THE TERM USED BY MARINE BRIGADIER GENERAL RICHARD NEAL WHO REFERRED TO IRAQI-HELD TERRITORY IN KUWAIT DURING A BRIEFING AS "INDIAN COUNTRY"

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
MARY MCCLURE	ORG	91/03/05	MM	A	91/03/12 TC
REFERRAL NOTE:					
99DOD	I	91/03/12		C	__/__/__ TC
REFERRAL NOTE:					
	__	__/__/__		_	__/__/__
REFERRAL NOTE:					
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REFERRAL NOTE:					
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REFERRAL NOTE:					

COMMENTS: _____

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

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

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

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

THE WHITE HOUSE

WASHINGTON

March 12, 1991

Dear Chairman Hawkins:

President Bush has asked me to thank you for your kind letter regarding the President's leadership during the liberation of Kuwait. Your expression of confidence in his actions meant a great deal to him.

We are aware of reports that Brigadier General Neal referred to Iraqi-held territory as "Indian Country." While it is doubtful that the statement was maliciously intended as a slight to Indians, it is nevertheless insensitive and unacceptable.

American Indians have served bravely in all branches of the Service in many of our past wars. The President has received letters from numerous tribes informing him of their many members serving in the Persian Gulf.

I have taken the liberty of sharing your letter with appropriate officials in the Department of Defense to inform them of your disapproval of this incident.

We appreciate the concern which prompted you to bring this matter to the attention of the Administration.

Sincerely,

Mary McClure

Mary McClure
Special Assistant to the President
for Intergovernmental Affairs

Mr. Russell Hawkins
Tribal Chairman
Sisseton-Wahpeton Sioux Tribe
Lake Traverse Reservation
P.O. Box 509
Agency Village, SD 57262

Sisseton-Wahpeton Sioux Tribe

Lake Traverse Reservation

P. O. Box 509
Agency Village, South Dakota 57262
Phone (605) 698-3911

OFFICE OF THE TRIBAL CHAIRMAN

March 1, 1991

President George Bush
The White House
Washington, DC

Dear President Bush:

First, I wish to express our strong support and congratulations to you, as our "Commander in Chief," for your dedicated and articulate leadership in the successful effort to free Kuwait.

Your tempered and just direction of the American Armed Forces, in this fight with Iraq, has re-established the international credibility of the U.S. role in the cause of freedom and justice.

Second, I bring to your attention to the fact that American Indians were once again well represented in this most recent armed conflict. American Indians have fought with valor and courage in World War I, World War II, The Korean War and Vietnam War. Our ties to "Mother Earth," and this continent, and particularly the United States of America, have always assured a strong willingness to serve and protect our country. Our heritage and customs are well in line with bravery and courage in battles in defense of our Nation. We refer to these warriors as "Akicita."

I would also request your attention to a more recent and disparaging remark made by a senior member of the U.S. Armed Forces Command in Saudi Arabia. This was the term used by Marine Brigadier General Richard Neal who referred to Iraqi-held territory in Kuwait as "Indian Country" during his report about the rescue of an F-16 pilot on Monday, February 25th. This remark came shortly after we conducted funeral services for a Tribal Member killed in the Desert Storm Operations. Corporal Stephen Bentzlin, 1st Marine Division, was killed in action in Khafji on January 29, 1991, just before midnight.

While we understand it was likely not intended as a derogatory remark about American Indians, it nevertheless, is an outdated, archaic and negative term. It did no justice to the loyal service of American Indian veterans or our various U.S. Tribes.

Mr. President, I would request that such negative terms as "Indian Country" be "struck" in unofficial and/or official usage in Armed Forces references, except in instances of historical value.

Thank you for your review, and again, please know that we strongly support your outstanding leadership in this cause.

Sincerely,

RUSSELL HAWKINS
Tribal Chairman
Sisseton-Wahpeton Sioux Tribe