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**Folder Title:**
Civil Rights

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Paul Weyrich
Coalitions for America
721 Second Street, NE • Capitol Hill • Washington, DC 20002

White House Chief of Staff John Sununu

# THE NEW "ANTI-QUOTA" AMENDMENT TO H.R. 1 IS ACTUALLY A PRO-QUOTA PROVISION

- The amendment does nothing to change the other provisions in H.R. 1 that will drive employers to use surreptitious quotas and preferences.

- The amendment does not improve current law. On the contrary, it explicitly authorizes all quotas that are "in accordance with employment discrimination law" now in place. Therefore, any judicial decision permitting quotas could provide a defense to the use of quotas under this amendment.

- The definition of "quota" specifically allows quotas to be used so long as jobs are filled with individuals who have the "necessary qualifications to perform the job." Therefore, an employer is specifically permitted to fill quotas with less qualified persons of a particular race, sex, or religion, so long as they are marginally qualified.

  For example, suppose an employer decided he did not want more than 3% Jews working in his company. All he has to do is adopt a quota of 97% Christians. This would not be outlawed by the new amendment so long as all those he hired were minimally qualified.

- The definition of "quota" is cleverly worded so as to make it easy to evade. Under the definition, a quota is not a quota unless the fixed number or percentage "must be attained."

  Suppose, for example, that a company decides to have a quota of 50% minority hires. The company then tells its managers that if they don't meet the 50% quota for their department, the managers will not be eligible for promotions. This would not be a "quota" under the amendment since the managers are not required to adopt quotas (unless they would like to be eligible for promotions).

- This is the first time the architects of H.R. 1 have acknowledged in public that they favor quotas. They are cynically counting on public gullibility to allow them to pass off pro-quota language as an "anti-quota" amendment.

- IT WON'T WORK.

## WHY THE DEFINITION OF "BUSINESS NECESSITY" MATTERS

| Situation | "New" H.R. 1 | H.R. 1375 President's Bill |
|---|---|---|
| At the mayor's request, a fast food chain rejects dropouts below age 18 for jobs during school hours. | NO DEFENSE | DEFENSIBLE POLICY |
| A trucking company promotes from within. Dock workers (the pool for future drivers) are not allowed to have drunk driving convictions. | NO DEFENSE | DEFENSIBLE POLICY |
| A struggling company must close one of two plants. It closes the older one (80% female employees), not the newer one (50% females). | NO DEFENSE | DEFENSIBLE POLICY |
| A local school district requires all new faculty to have master's degrees in a substantive subject. | NO DEFENSE | DEFENSIBLE POLICY |
| A state police force denies employment to any applicant with a criminal conviction. | NO DEFENSE | DEFENSIBLE POLICY |
| To reduce health insurance costs, a mining company refuses to hire those who smoke (on or off the job). | NO DEFENSE | DEFENSIBLE POLICY |
| An employer routinely rejects all applicants who lie on their applications. | NO DEFENSE | DEFENSIBLE POLICY |
| None of these employers is biased against women or minorities. They want to keep their policies without being sued. How? | **USE QUOTAS** | **TREAT EVERYONE THE SAME** |

# Why the Latest Democratic "Compromise" Version of H.R. 1 Is Still a Quota Bill

| Situation | H.R. 1 "Compromise" | H.R. 1375 President's Bill |
|---|---|---|
| A 21 year old Hispanic woman applies to be a fire fighter. Because of a court approved quota system created when she was a child, the job goes to someone with a much lower score on the exam. She wants to challenge the quota scheme in court. Can she do it? | NO | YES |
| She goes to court and her case is thrown out. Other civil rights plaintiffs must pay their own lawyers, but not their opponents'. Is she treated the same? | NO. SHE MUST PAY ALL LAWYERS. | YES. SHE PAYS ONLY HER LAWYER. |
| A lawyer wants to hire law students as interns because she chooses new lawyers based on their performance as interns. Can she do this? | NO | YES |
| A black-owned business, located in a white suburb where there is prejudice against working for blacks, hires mostly blacks by word-of-mouth from a nearby city. EEOC sues. What happens next? | EMPLOYER MUST PROVE HE DID NOT CAUSE THE PROBLEM | EEOC MUST IDENTIFY WHAT THE EMPLOYER DID WRONG |
| The American Cancer Society refuses to hire smokers. Can this meet the "business necessity" test? | NO | YES |
| A factory is located near a bus stop for a line that goes to a mainly white area but not to any black neighborhoods. The factory has three criteria for new hires:<br>1. High School Degree.<br>2. Must be 18.<br>3. No drug use.<br>No intentional discrimination takes place, but the factory winds up with "bad numbers." | COURT FINDS HIGH SCHOOL DEGREE NOT REQUIRED BY "BUSINESS NECESSITY." EMPLOYER GUILTY. | PLAINTIFF MUST IDENTIFY WHICH OF THE SIX PRACTICES, IF ANY, CAUSED "BAD NUMBERS." |
| The lawyer wants to hire only law students as interns, the black businessman wants the best workers he can find, the Cancer Society wants to avoid smokers, and the factory owner wants to keep its three criteria. But each is determined to avoid lawsuits. How? | **QUOTAS** | **HIRE ON MERIT** |

April 12, 1991

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

Dear Governor Sununu:

Many of the businesses and organizations which have consistently worked very hard to advance equality of opportunity through fair and balanced civil rights legislation are concerned over recent reports about developments between a few large companies and representatives of the civil rights groups.

As reported in the Washington Post this week, it appears that negotiations between these parties are about to reach a "make or break" point. Since the legislation currently pending in the U.S. House of Representatives is limited to H.R. 1, a bill similar to the legislation successfully vetoed by the President last year, and H.R. 1375, the President's bill, the undersigned are concerned that these negotiations may undermine the President's efforts to achieve strong enforcement of equitable federal equal employment statutes. Furthermore, many organizations representing businesses of various sizes have been totally excluded from the discussions, and since we are not familiar with the content of the pending proposals, we are quite concerned that these negotiations may produce a measure that falls short of the President's goals and does not accurately reflect our perspective.

We are writing, therefore, to state categorically that those few companies which are involved in the ongoing negotiations do not necessarily represent the views of the majority in the business community. We remain committed to supporting the President's efforts and we offer any and all assistance you deem appropriate.

Sincerely,

Associated Builders and Contractors
Chamber of Commerce of the U.S.A.
Financial Executives Institute
Florists' Transworld Delivery Association
National-American Wholesale Grocers' Association
National Association of Wholesaler-Distributors
National Machine Tool Builders Association
National Restaurant Association
National Roofing Contractors Association
National Stone Association
National Truck Equipment Association
Sheet Metal and Air Conditioning Contractors' National Association
Society of American Florists

THE WHITE HOUSE

April 16, 1991

Alan,

Your letter re Civil Rights helped —
right when we needed it! You're a pro —

Thanks

Ed R.

THE WHITE HOUSE
WASHINGTON

Mr. Alan M. Kranowitz
Senior Vice President -
Government Relations
National Association of
Wholesale Distributors
1725 K Street, N.W.
Suite 710
Washington, D.C. 20006

N · A · W

Alan M. Kranowitz
*Senior Vice President-Government Relations*

April 15, 1991

TO: The Honorable Ed Rogers
Executive Assistant to the Chief of Staff
The White House

FROM: Alan M. Kranowitz
Senior Vice President-Government Relations

In an effort to set the record straight about the position of the business community on pending civil rights proposals, a representative group of us quickly dispatched the attached letter to Governor Sununu last week. We are pleased to share a copy with you.

Attachment

**NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS**
1725 K Street, N.W. • Suite 710 • Washington, D.C. 20006 • 202/872-0885 • FAX: 202/785-0586

April 12, 1991

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Chief of Staff
The White House
Washington, DC 20500

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National Restaurant Association
National Roofing Contractors Association
National Stone Association
National Truck Equipment Association
Sheet Metal and Air Conditioning Contractors' National Association
Society of American Florists

THE WHITE HOUSE

WASHINGTON

March 20, 1991

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: BOBBIE KILBERG BK
DEPUTY ASSISTANT TO THE PRESIDENT
FOR PUBLIC LIAISON

KATHY JEAVONS KJ
ASSOCIATE DIRECTOR FOR PUBLIC LIAISON

SUBJECT: The Orthodox Union and the Civil Rights Debate

The Orthodox Union (OU) may be ready to endorse the Administration's Civil Rights proposal.

For your information, the OU represents nearly one million American Jews through its 800 member synagogues nationwide. The OU's Institute for Public Affairs is the think tank action center responsible for representing and mobilizing the world's largest Orthodox Jewish community. The Institute for Public Affairs (IPA) has 1000 member synagogues and nearly half a million members. The IPA serves as the Orthodox communities' link to the Conference of Presidents of Major American Jewish Organizations and the National Jewish Community Relations Advisory Council (NJCRAC).

The significance of the OU's endorsement of our civil rights proposal is threefold. First, it would be the first and only major American Jewish organization to break with the civil rights coalition.* Second, its lobbying ability is quite strong. Third, its support for our proposal and opposition to H.R. 1 would prohibit NJCRAC from lobbying for or signing on to any amicus brief in support of H.R.1. (NJCRAC is a powerful lobbying force and member of the civil rights coalition firmly supporting H.R.1. NJCRAC's charter states that any member organization opposing NJCRAC's position on any given bill vetoes NJCRAC's lobbying abilities on that bill.)

The OU's Executive Committee is meeting this evening and may reach a decision on its position. We have been actively promoting the Administration's package with OU's officers and staff and have offered a meeting with Boyden Gray and other White House officials. The OU did not want a White House meeting until after their Executive Committee session. We have discussed the situation with both Bill Kristol and Boyden Gray, and both will

* Agudath Israel of America is a smaller Orthodox Jewish organization that has been supportive of the Administration's position throughout the civil rights debate.

cc: David Demarest
Boyden Gray
Bill Kristol
Ed Rogers

THE WHITE HOUSE

WASHINGTON

**October 23, 1990**

**MEMORANDUM FOR MARLIN FITZWATER**

**FROM: JOHN UNDELAND, NEWS SUMMARY**

**RE: REACTION TO THE CIVIL RIGHTS VETO**

The following is a scorecard of reaction to the civil rights veto; President took "slings and arrows" from mostly predictable corners. Some of the highlights:

* Several Dems say veto is designed to placate extreme right wing, Reps. Lewis, Washington & AFGE's Sturdivant cite David Duke & KKK
* Sens. Kennedy, Simon & NAACP's Hooks blame WH staff for the veto; Hooks suggests some WH staff members are racist
* Ron Brown, Jesse Jackson & Ralph Neas accuse President of trying to "Willie Horton-ize" '90 campaign
* Rep. Hawkins not inclined to take up House override effort
* Sen. Kennedy puts political onus on GOP for Senate override
* GOP members lay low following veto
* GOP strategists say veto is political winner if quota element is argued effectively

**DEMOCRATS AND GROUPS OPPOSING**

**REP. HAWKINS**

Hawkins, the chief sponsor, acknowledged Monday that a new push for civil rights legislation likely will have to wait until next year. Hawkins said he would not seek a House override vote unless he was certain it would succeed. "I'm just not going to waste any more time," he said, noting, "I've been assured the bill will be introduced as soon as Congress meets next year."
(Mike Robinson, AP, 10/23)

Hawkins said Bush had "become commander-in-chief of a national retreat from civil rights and the goal of equal justice."
(Linda Campbell, Chicago Tribune, 10/23)

"By relying on the same shop-worn excuses and code words that were offered against every great piece of civil rights legislation, George Bush plays on the worst of America's fears and the worst of America's prejudices." (Murray & Moss, Washington Times, 10/23)

"I don't understand why they sent (Bush's compromise) to us, other than political reasons. It's a collection of ideas we earlier rejected." (Thomas Ferraro, UPI, 10/22)

**-more-**

**SEN. KENNEDY**

Kennedy predicted that the "vast majority" of Democrats in both chambers would vote to override the veto, leaving it up to Republican lawmakers to determine whether the bill became law. "Perhaps out of loyalty to the President they are willing to...vote against civil rights. But sometimes loyalty asks too much -- and this is one of those times."
(Alexis Moore, Philadelphia Inquirer, 10/23)

Kennedy called Bush's veto "a sad day for America's ideals," adding that "Now it is up to Congress" to override him.
(Thomas Ferraro, UPI, 10/23)

"It is clear that some of the President's top advisers have wanted him to veto a civil rights bill, and the President has finally surrendered to their views."
(Paul Barrett, Wall Street Journal, 10/23)

"When the chips are down, the White House is against civil rights," Kennedy said following the veto. He called the action "tragic and disgraceful." (Mike Robinson, AP, 10/23)

"The President's last-minute proposal is a cynical attempt to appear to support civil rights while actually satisfying the anti-civil rights forces in his own party. The President's actions demonstrate that he is more interested in appeasing extremists in his party than in providing simple justice for the millions of working women and minorities who face bias on the job."
(Thomas Ferraro, UPI, 10/23)

**SEN. SIMON**

"The President's decision is disturbing and difficult to understand." He added that during negotiations on the measure, "we often got the impression the White House staff was looking for excuses not to support this bill, rather than for ways to achieve a fair bill and a meaningful bill. Today that impression is all the stronger." (Mike Robinson, AP, 10/23)

**SEN. MITCHELL**

"The President...is deeply and regrettably wrong."
(Murray & Moss, Washington Times, 10/23)

"The President's characterization of this as a quota bill is wholly inaccurate," Mitchell said on "Meet the Press."
(Karen Ball, AP, 10/21)

**REP. FOLEY**

"I doubt very much that we're going to go back and open up the bill all over again...." He said Bush's proposed changes were just "a recycling of previous complaints" and "for the most part, have already been considered and rejected at some point during the discussion of the legislation." (Rita Beamish, AP, 10/21)

**REP. DON EDWARDS**

Edwards, chairman of the House Judiciary subcommittee on civil and constitutional rights, called Bush's bill "a tired rehash of policies considered and rejected by the Congress.... We have nearly compromised this bill to death." (Terence Hunt, AP, 10/23)

**REP. BROOKS**

"The President's veto...effectively dooms this legislation for this Congress," said Brooks, chairman of the Judiciary Committee. "Responsibility for this action rests solely at the door of the White House." (Paul Barrett, Wall Street Journal, 10/23)

**REP. JOHN LEWIS**

"By vetoing this bill, the President is giving cover to the likes of David Duke, the Klan, the skinheads, and companies that discriminate against minorities and women," Lewis said on the House floor. (CNN, 10/23)

Lewis said the president's actions "serve as a cover for the David Dukes of the world and the Ku Klux Klan and others who engage in discrimination based on race and sex. He's taking us back 30 years. I am appalled that the President in 1990 would veto a major civil rights bill and hide behind calling it a quota bill."
(Alexis Moore, Philadelphia Inquirer, 10/23)

"I think the only thing that we can do right now in the civil rights community is to encourage the citizens to turn out and vote, to show their displeasure and sense of righteous indignation at the polls with Mr. Bush, with those who didn't support the civil rights bill." Lewis predicted that while black leaders won't break off communication with Bush, relations will take on a distinct chill. "The civil rights forces will continue to talk and negotiate, if not about this bill, about something else. But there is a rift, there will be a schism, because his action was very divisive."
(Sonya Ross, AP, 10/23)

"The veto is going to help Democratic candidates. It will inspire black voters to turn out."(Thomas Edsall, Washington Post, 10/23)

**REP. WASHINGTON**

"I think he made a political decision at the end. He had to choose between women and middle-class working people, and rich factory owners and the Klan, and he came down on the side of the Klan and the rich people," Washington said in a "Good Morning America" interview. Asked about the President's objections regarding quotas, Washington said, "That's just a buzz work to get the attention of people who, like David Duke, are interested in Klan-like activities." (Reuter Transcript, 10/23)

**REP. CONYERS**

The Bush veto "guarantees that blacks will want to stay in the Democratic Party. The President's veto raises the question in many people's minds as to whether the administration is trying to placate the worst elements of our body politic."

**-more-** (Alexis Moore, Philadelphia Inquirer, 10/23)

Conyers said it was "absolutely a straw argument to call it a quota bill." (Benjamin Shore, Copley, 10/22)

**REP. BOXER**

"This veto...is another body blow to middle-class America and to middle-class women of America. Every American family or every race, creed and color that has a working woman within it now has lost the protection it needs from job discrimination."
(CNN, 10/23)

**REP. TORRICELLI**

Torricelli contended that while "George Bush believes that he can cast himself as the protector of working-class whites," Democrats will place the focus of the debate on women as well as minorities. Bush's veto, combined with the impact of the budget debate over taxes, "will confirm the most serious doubts people have about the Republican Party -- that it is trying to protect those with extraordinary wealth and is not really committed to working women and minorities." (Thomas Edsall, Washington Post, 10/23)

**ANONYMOUS CONGRESSIONAL AIDE**

"There was a time Sununu wanted to make a deal," said one congressional source familiar with the lengthy negotiations over the bill. "There was never a time Thornburgh and Gray wanted a deal." (David Lauter, LA Times, 10/23)

**RON BROWN**

"The issue for the President isn't quotas -- it's politics. George Bush got to the White House by pandering to fear.... Today he chose Willie Horton over Abraham Lincoln."
(Terence Hunt, AP, 10/23)

"At the crossroads of his presidency, George Bush has made clear where he and his Republican Party really stand."
(Steven Holmes, NY Times, 10/23)

**GOV. CUOMO**

"For the first time since 1866, when Andrew Johnson was President, a president has vetoed a major piece of civil rights legislation {Cuomo overlooks the Reagan veto of 1988 here}. (The act) was fair and balanced, and I regret it did not become law."
(Susan Page, NY Newsday, 10/23)

**MAYOR DINKINS**

"The President is wrong. This is no quota bill. It is a justice bill. It is a fairness bill. It is a rights bill."
(Sonya Ross, AP, 10/23)

**JESSE JACKSON**

Jackson said Tuesday the veto was "a call to a return to massive direct action." He said that could include street demonstrations and other forms of non-violent protest. Jackson accused Bush of a "closed-door policy and he has a closed-mind policy -- he is betraying the American dream." (Sonya Ross, AP, 10/23)

Jackson charged that Bush, by raising the quota issue, was employing a "race-conscious political scheme" that was intended to help GOP candidates in white neighborhoods during the Nov. 6 elections. "It is a clear attempt to incite fear in white workers, to incite fear in white businesses. We hope that President Bush will not Willie Horton-ize the 1990 campaign as he did the 1988 campaign." (Karen Ball, AP, 10/21)

**BOB SHRUM, Democratic consultant**

"There are no pluses politically for any president to veto a civil rights bill. At a moment when maximum attention is focused on him, Bush 'stands tall' by opposing civil rights and 'stands tall' by opposing a surtax on millionaires."
(Watson & Talbott, Chicago Sun-Times, 10/23)

**PAUL MASLIN, Democratic analyst**

Maslin said he thought the issue would be a wash for Bush. He said the President could gain some support from "bayou" voters, a reference to conservative whites who backed David Duke in LA. But Maslin said Bush might also lose support among suburban whites who support civil rights, as well as among blacks.
(Watson & Talbott, Chicago Sun-Times, 10/23)

**GEOFF GARIN, Democratic pollster**

What Republicans are counting on is that "if George Bush says this is quota bill, a lot of people will be inclined to take his word for it. The quota issue is a hot button for a lot of white voters." (Peter Brown, Washington Times, 10/23)

**RALPH NEAS, Leadership Conference on Civil Rights**

Civil rights supporters scoffed at the [quotas] argument. "It's pure poppycock. The bill has nothing to do with quotas. The President's veto...and his repeated efforts to pin the false label of quotas on this legislation are part of a disreputable tactic to appeal to public resentment and prejudice."
(Mike Robinson, AP, 10/23)

Neas said it was clear "the President has not put the politics of Willie Horton behind him." (Karen Ball, AP, 10/22)

Neas said Bush's veto "will victimize his presidency forever. He joins Andrew Johnson and Ronald Reagan as the only presidents to veto a civil rights bill." (Terence Hunt, AP, 10/23)

"This veto will define the Bush presidency."
(Thomas Ferraro, UPI, 10/22)

"The rhetoric may be gentler and kinder, but the policies of George Bush are no less dangerous and regressive than those of Ronald Reagan and Ed Meese." (Ann Devroy, Washington Post, 10/23)

"The President's so-called alternative is dead on arrival (on Capitol Hill). It's much worse than any previous White House plan...." Neas labeled the Bush version a "cynical cover up" aimed at masking the administration's opposition to progress.
(Karen Ball, AP, 10/21)

**BENJAMIN HOOKS, NAACP**

Asked on "Nightline" if the President vetoed the bill because of a racist motive, Hooks said, "It is difficult for me to accuse Mr. Bush of being racist. It is not difficult for me to accuse some of his advisers of being racist.... I'm at a loss to understand why a man who's created such good will, who had done so many magnificent things in the realm of racial relations, with one fell swoop tried to destroy all of that for reasons I cannot understand." (Reuter Transcript, 10/23)

"Now that the bill has been returned to Congress, the NAACP is committed to mobilizing its considerable resources to persuade Congress to override the veto."
(Murray & Moss, Washington Times, 10/23)

Hooks called the veto a "shocking disappointment" and said the civil rights community had made "every conceivable effort" to address Bush's objections to the bill. "Instead the White House has chosen to describe the measure as promoting quotas, which as any objective analysis will show, it does not. We are at a loss to understand why the White House maintains its position." Hooks said the veto would mean "that the kinder, gentler nation that we have been looking forward to won't come to pass."
(Thomas Ferraro, UPI, 10/23)

**ARTHUR KROPP, People for the American Way**

Kropp accused Bush of trying to "out-Reagan Reagan."
(Ann Devroy, Washington Post, 10/23)

**JOHN STURDIVANT, American Federation of Government Employees**

Sturdivant accused Bush of "political rhetoric designed to please Jesse Helms, David Duke and their followers in the ultra-right-wing of the Republican Party." (Ann Devroy, Wahsington Post, 10/23)

**THOMAS HOMBURGER, National Civil Rights Committee of the Anti-Defamation League of B'nai B'rith**

"We share the President's commitment against discriminatory quotes and numerical preferences. But this act simply is not a quota bill." (Steven Holmes, NY Times, 10/23)

**JUDITH LICHTMAN, Women's Legal Defense Fund**

"President Bush today told millions of hard-working American women struggling to support themselves and their families during frightening economic times that it is okay for their bosses to discriminate against them." (Ann Devroy, Washington Post, 10/23)

**MARCIA GREENBERGER, National Women's Law Center**

The veto showed "complete and callous indifference to working women." (David Lauter, LA Times, 10/23)

**DICK GREGORY**

In a last-minute appeal, black activist Gregory marched in front of the White House Monday carrying a sign that read: "Mr. President, before you veto the civil rights bill, please think about the number of black African Americans you have sent to the Persian Gulf willing to die for someone else's human rights."
(Terence Hunt, AP, 10/23)

**JOHN CURTAIN, ABA**

Curtain urged a congressional override. "We are deeply disappointed that the President has vetoed this important legislation, particularly after Congress included language suggested by the White House to end any lingering concerns about quotas and 'mixed motive' claims." (Thomas Ferraro, UPI, 10/22)

**WILLIAM SCHNEIDER**

Schneider said Bush's veto allows Democrats to paint him as "no different than Ronald Reagan. That's news because Bush is supposed to be different from Ronald Reagan. He's supposed to be kinder and gentler." But Schneider said the damage to Bush will not be as severe among blacks, who were skeptical of the President anyway, as among some middle-class whites who don't want to support a candidate to seems to be anti-civil rights.
(Sonya Ross, AP, 10/23)

**REPUBLICANS AND GROUPS SUPPORTING**

**SEN. HATCH**

"I don't see how anybody could dare change (a vote) at this point," Hatch said when asked about chances of an override in the Senate.
(Murray & Moss, Washington Times, 10/23)

Hatch said the veto would not hurt the President politically. "Most people, knowing George Bush's moderate views, will probably say there must be something wrong with the bill."
(Steven Holmes, NY Times, 10/23)

**SEN. SPECTER**

Specter said a number of Republicans who voted against the measure when it was brought before the chamber in July were uncomfortable with voting to sustain a veto. "I have heard some word that senators are unhappy about voting to sustain a veto. But I don't know if it's sufficient to turn votes."
(Steven Holmes, NY Times, 10/23)

**SEN. COCHRAN**

"Politically he loses in the short term to the civil rights activists, but what the President is doing is better for the country" in the long term. (Lee & Phillips, USA Today, 10/23)

**ANONYMOUS WHITE HOUSE OFFICIAL**

"It's just a few days of bad headlines. Otherwise, it means nothing to most voters. They don't know. They don't care. It doesn't mean a thing." (Murray & Moss, Washington Times, 10/23)

**FRED STEEPER, RNC pollster**

"If Bush does a good job labeling the bill as a quota bill, it will be okay (for the GOP). Americans want to be fair, and reverse discrimination in their minds has never been fair, even to make up for past wrongs. That does not sell.... Quotas have been a very strong issue, one that has been hurting Democrats in presidential elections." (Thomas Edsall, Washington Post, 10/23)

**MARC NUTTLE, RNC**

Nuttle contended that the veto will help stop what he said was a sharp, 10-to-12 percentage-point decline in voter identification with the GOP during the past three weeks of the budget debate. "This helps us get back to our themes of individual freedom versus government intervention." (Thomas Edsall, Washington Post, 10/23)

**CONGRESSIONAL CANDIDATE GARY FRANKS**

During a debate Sunday night in Connecticut, Democratic former Rep. **TOBY MOFFETT** said it was a disgrace that Gary Franks opposed the bill. "Do not talk to me about civil rights," said **FRANKS**, who is black. "I had a cross burned in front of my house" when he was 9 years old. (Donald Rothberg, AP, 10/23)

**FORMER NJ GOV. KEAN**

"I don't think it's going to play very well in the black community," Kean said of the quota argument. Kean...said he believed Bush did what he thought was right, "although I'd like to have seen him sign it." ...Kean said he wished the President had found a way to negotiate a compromise. "What bothers me is, while the disagreements loomed large, they are only over at most 10 to 20 percent of the bill." At the same time "certain people in the political world wanted a presidential veto more than they wanted a civil rights bill." (Donald Rothberg, AP, 10/23)

**ROGER STONE**

"Given where he is on the budget battle, the President is wise to stick to his guns on quotas," said Stone, a GOP consultant who has been a strong advocate of the need for the GOP to reach out to black voters. "It will anger a certain constituency. It will also, if Bush continues to push his opposition to quotas, help him with his base constituency." (Donald Rothberg, AP, 10/23)

**BOB TEETER**

Tetter said it was essential that the President make it clear "he's in favor of civil rights." Teeter noted that in recent polls Bush has received high marks from more than 40% of blacks.... Teeter insisted [the veto will not make blacks give Bush the low marks they gave Reagan]. "He is not, has not been, will not be perceived the same as Reagan." (Donald Rothberg, AP, 10/23)

**FRANK DONATELLI**

"He has made a real effort to reach out to the black community, and this will obviously stall that effort. But I think it sends a positive signal to many middle- and working-class Americans that make up the core of the Republican coalition."
(Karen Hosler, Baltimore Sun, 10/23)

**CLINT BOLICK, Landmark Legal Foundation**

LLF, a conservative legal think tank, applauded the veto as "a tremendous act of political courage" by the President. Bolick said the civil rights leadership is "out of touch with the people it claims to represent." (Ann Devroy, Washington Post, 10/23)

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Document No. _____

# WHITE HOUSE STAFFING MEMORANDUM

DATE: 10/22/90 ACTION/CONCURRENCE/COMMENT DUE BY: ---------

SUBJECT: VETO MESSAGE ON S. 2104 -- THE CIVIL RIGHTS ACT OF 1990

| | ACTION | FYI | | ACTION | FYI |
|---|---|---|---|---|---|
| VICE PRESIDENT | ☐ | ☑ | MCCLURE | ☐ | ☑ |
| SUNUNU | ☐ | ☑ | NEWMAN | ☐ | ☑ |
| SCOWCROFT | ☐ | ☑ | PORTER | ☐ | ☑ |
| DARMAN | ☐ | ☑ | ROGICH | ☐ | ☑ |
| CARD | ☐ | ☑ | UNTERMEYER | ☐ | ☑ |
| CICCONI | ☐ | ☑ | ROGERS | ☐ | ☑ |
| DEMAREST | ☐ | ☑ | WINSTON | ☐ | ☑ |
| FITZWATER | ☐ | ☑ | PINKERTON | ☐ | ☑ |
| GRAY | ☐ | ☑ | BOSKIN | ☐ | ☑ |
| HAGIN | ☐ | ☑ | DELAND | ☐ | ☑ |
| HOLIDAY | ☐ | ☑ | GREEN | ☐ | ☑ |

REMARKS:

The attached is for your information.

RESPONSE:

James W. Cicconi
Assistant to the President
and Deputy to the Chief of Staff
Ext. 2702

TO THE SENATE OF THE UNITED STATES:

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

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

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

- Both shift the burden of proof to the employer on the issue of "business necessity" in disparate impact cases.
- Both create expanded protections against on-the-job racial discrimination by extending 42 U.S.C. 1981 to the performance as well as the making of contracts.
- Both expand the right to challenge discriminatory seniority systems by providing that suit may be brought when they cause harm to plaintiffs.
- Both have provisions creating new monetary remedies for the victims of practices such as sexual harassment. (The Administration bill allows equitable awards up to $150,000.00 under this new monetary provision, in addition to existing remedies under Title VII.)
- Both have provisions ensuring that employers can be held liable if invidious discrimination was a motivating factor in an employment decision.

- Both provide for plaintiffs in civil rights cases to receive expert witness fees under the same standards that apply to attorneys fees.
- Both provide that the Federal Government, when it is a defendant under Title VII, will have the same obligation to pay interest to compensate for delay in payment as a nonpublic party. The filing period in such actions is also lengthened.
- Both contain a provision encouraging the use of alternative dispute resolution mechanisms.

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

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

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

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

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

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

The bill also contains a number of provisions that will create unnecessary and inappropriate incentives for litigation. These include unfair retroactivity rules; attorneys fee provisions that will discourage settlements; unreasonable new statutes of limitation; and a "rule of construction" that will make it extremely difficult to know how courts can be expected to apply the law. In order to assist the Congress regarding legislation in this area, I enclose herewith a memorandum from the Attorney General explaining in detail the defects that make S. 2104 unacceptable.

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

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

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

THE WHITE HOUSE,

October 22, 1990.

# Office of the Attorney General

Washington, D.C. 20530

90 OCT 22 PM 12:55

October 22, 1990

MEMORANDUM FOR THE PRESIDENT

FROM: DICK THORNBURGH
ATTORNEY GENERAL

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

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

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

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

## I. INCENTIVES FOR EMPLOYERS TO ADOPT QUOTAS

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

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court ruled that Title VII of the Civil Rights Act of 1964 prohibits hiring and promotion practices that

unintentionally but disproportionately exclude persons of a particular race, sex, ethnicity, or religion unless these practices are justified by business necessity. Law suits challenging such practices are called "disparate impact" cases, in contrast to "disparate treatment" cases brought to challenge intentional discrimination.

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

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

The following year, in Wards Cove, the Court considered whether the plaintiff or the defendant had the burden of proof on the issue of business necessity. Resolving an ambiguity in the prior law, the Court placed the burden on the plaintiff. Supporters of S. 2104 argue that this rule imposes an unreasonable burden on employees, and have claimed that legislation is needed to redress this imbalance. As you know, your Administration is prepared to accept the shifting of that burden to the defendant.

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

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

### A. THE PRESUMPTION OF DISCRIMINATION ARISING FROM STATISTICAL DISPARITIES

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

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

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

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

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

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

### B. THE BUSINESS NECESSITY DEFINITION AND THE EVIDENTIARY RESTRICTIONS

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

#### 1. The Business Necessity Definition

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

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

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

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

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

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

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

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

2. Evidentiary Restrictions

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

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

C. CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## IV. CONCLUSION

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

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

October 15, 1990

ED
FYI
SANCHEZ
KILBERG

The Honorable Malcolm Wallop
237 Russell Senate Office Building
Washington, D.C. 20510

Dear Malcolm:

I hope you will join me in voting against the Conference Report on the Civil Rights Act of 1990. As you may know, I was approached two weeks ago by representatives of the civil rights community about the possibility of resolving some of the major areas of disagreement about the Civil Rights Act of 1990. I understand that some have inquired about my role in the ensuing discussions with representatives of the civil rights groups, and I am writing to explain what occurred.

I agreed to meet with representatives of civil rights groups in the hope that we might be able to resolve major problems in the bill and reach a compromise that could be supported by the civil rights community, Congress, and the Administration. It was always my understanding, however, that any compromise had to be agreed to by all three sides. I also made it clear that if all three sides did not agree, I would support the President's position. As you know, we were unsuccessful in our efforts.

There were many problems with the product of our discussions. On some key issues, it did not contain my preferred language. Further, other important issues were left unaddressed. But, in the spirit of compromise, I was willing to try to resolve our differences. It has been made clear to me, however, that the Administration cannot support S. 2104, even if it includes the revisions contained in the most recent Conference Report. The Administration still believes that the numerous problems with the bill have not been adequately resolved. And, when one takes into account each of the provisions in all 30 pages of the legislation, I can understand their criticisms. I have voiced many of the same concerns repeatedly during the consideration of this bill. Moreover, one of the changes made in the Conference Report to reflect a concern I voiced in these meetings, a change which did not reflect my preferred proposal in the first place, was largely vitiated in the Joint Statement of the Conference Committee, as explained in item 3.

resolution, the bill allows these allegations to fester in the workplace, exacerbating tension and uncertainty.

10. Modifies the statute of limitations so that it runs not just from the time of the alleged illegal occurrence, as under current law, but also from the time the alleged illegal occurrence "has been applied to affect adversely the person aggrieved, whichever is later." This language overturns at least three Supreme Court decisions, United Airlines v. Evans, 431 U.S. 553 (1977); Delaware State College v. Ricks, 449 U.S. 250 (1980); Chardon v. Fernandez, 454 U.S. 6 (1981). This opens the door to many stale claims. For example, suppose an employer lays off an employee for intentionally discriminatory reasons in 1990, but the employee does not bring a Title VII action within six months (or within two years, if this bill is adopted). Under current law, this person has foregone his or her Title VII claim. If the person is later rehired in 1995, under this bill the person can seek retroactive seniority lost since 1990 and two years of backpay. Moreover, he or she will be able to seek uncapped compensatory damages and punitive damages of $150,000 or the total of his or her backpay and compensatory damages for lowered earnings, pain, suffering, and other damages since 1990. Oddly, here again, civil rights plaintiffs get two bites of the apple after being harmed. But, an innocent person harmed by implementation of a consent or litigated judgment is effectively barred from bringing a constitutional or statutory civil rights claim.

11. Helps lawyers by overturning a 1986 Supreme Court decision by Justice Stevens, Evans v. Jeff D., 475 U.S. 717, which allows a defendant, such as an employer, to condition a lump sum settlement offer on the plaintiff's waiver of attorney's fees, leaving the plaintiff to work out the fee with his or her lawyer. This provision of the bill will likely have a serious adverse impact on the ability of parties to settle cases.

12. Encourages lawyers to drag out cases by overturning a 1985 decision by Justice Stevens in Marek v. Chesny 473 U.S. 1 (1985), thereby making the recovery of attorney's fees much easier. Under current law, suppose a plaintiff rejects an employer's formal settlement offer and the plaintiff later obtains a judgment for less than the amount of the employer's offer. The plaintiff is not entitled to attorney's fees he incurs from the date he rejected the offer. Under this bill, however, the plaintiff is entitled to such fees after rejecting the offer. This is a further incentive not to settle a case and to pursue it all the way to trial.

13. Seeks to preserve affirmative action preferences for minorities and women, with no protection for white males. Thus, an employer may seek to prefer voluntarily minorities and women at the expense of others. The bill provides no protection for those who might be adversely affected. Moreover, if a consent or litigated judgment in favor of minorities or women is entered in a case, innocent nonparties adversely affected by the implementation of such a judgment are denied their day in court to assert their constitutional and civil rights.

14. Permits uncapped expert witness fee costs, overturning a 1987 Supreme Court decision, Crawford Fittings Co. v. J. T. Gibbons, Inc., 107 S.Ct. 2494. The current limit is $30 per day.

15. Requires broad construction of at least 70 other civil rights statutes. This provision would give bureaucrats and federal judges carte blanche to revise current interpretations of these laws.

16. Retroactively applies the bill. Persons now in litigation will be adversely affected by the bill.

Accordingly, for the same basic reasons I have set forth in earlier correspondence and statements, I will vote against the Conference Report on S. 2104, the Civil Rights Act of 1990, and will support the President if he vetoes the legislation.

Sincerely,

Orrin G. Hatch
United States Senator

OGH:mdt

# RELEASE


# Congressman Sherwood Boehlert

## *25th Congressional District ◆ New York*

1127 LONGWORTH H.O.B. • WASHINGTON, D.C. 20515 • PHONE (202) 225-3665


s90.4
FOR IMMEDIATE RELEASE
AUG. 3, 1990
CONTACT: HANK PRICE
202-225-3665
202-543-0931

NOTE: Rep. Boehlert supported the LaFalce substitute and voted for final passage.

**STATEMENT OF**
**U.S. REPRESENTATIVE SHERWOOD BOEHLERT**
**PASSAGE OF CIVIL RIGHTS ACT OF 1990**

The sad fact of the matter is the Civil Rights Bill of 1990 proved to be first and foremost an exercise in new political power.

Regretfully, both sides concentrated on maneuvering for partisan advantage and in the process failed to adequately focus on the primary objective: more progress toward eliminating the last remaining vestiges of discrimination.

I was here in 1964 as an enthusiastic young staff member and shared the euphoria upon passage of the Civil Rights Act of 1964.

I am still here in 1990 in a different capacity, and am more saddened than heartened by the contrast.

Lyndon Johnson's "we shall overcome" still echoes in my ears.

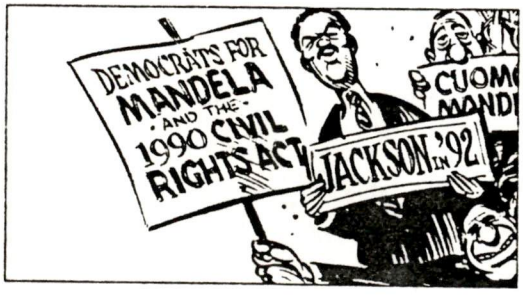
We need to. I hope and pray we will.

-30-

NOTE: I sat attentively through the debate and tried my best to be alert to developments in and around the chamber. In the final analysis I became convinced the majority was more interested in putting the President on the spot than they were in advancing the cause.

ATTN: John Sununu

# BETTING ON BUSH




For once, Republicans have a chance to uphold principle and advance their interests at the same time: wooing black voters back to the party of Abraham Lincoln by *defeating* a civil-rights bill.

**CLINT BOLICK**

A MONTH or so ago, during a conversation about the Kennedy–Hawkins civil-rights bill, I made two bets with Arch Parsons of the *Baltimore Sun*. First, that President Bush will veto the bill if it is approved without significant changes. Second, that he will win 18 per cent of the black vote in 1992 if he does.

Washington pundits would assure Arch that he'll soon pocket a crisp dollar bill from the first bet, and a second one too if his memory hangs in for two years. Moreover, most pundits would insist that my first bet is inconsistent with my second. If Bush vetoes this civil-rights bill—or *any* civil-rights bill—he's doomed among black voters.

The reason I'm bucking conventional wisdom is that I sense that something important is happening beneath the surface in the debate over the civil-rights bill. That leads me to believe that if Bush plays his cards right, he will in fact double the black vote he received in 1988—a development that would make him invincible in 1992. And—again contrary to popular wisdom—playing his cards right *requires* him to veto the bill if Congress passes anything resembling the original version.

At a Rose Garden ceremony on May 17, Bush laid down three conditions for acceptance of a civil-rights bill: it can't require or encourage racial quotas, it can't be absurdly complex, and it can't reverse the due-process principle that a person is innocent until proven guilty. These are refreshing, common-sense principles that most Americans can easily support.

By definition, the bill's sponsors cannot satisfy those principles. The heart of the bill—provisions overturning six Supreme Court decisions of last year, especially the *Wards Cove* decision—violates all three. The motive behind it is to induce employers to adopt quotas "voluntarily" by rigging the rules against them in statistics-based employment-discrimination cases. Under *Wards Cove*, plaintiffs may use statistics to prove discrimination, but they bear the burden of proof every step of the way. Under Kennedy–Hawkins, statistics *by themselves* would establish a presumption of discrimination, with employers bearing the burden of proving their innocence. Facing that threat, employers would almost always seek the safe harbor of informal quotas. No middle ground exists: to modify or overturn *Wards Cove* is to create an irresistible impulse for quotas. Of course, anyone who has read the newspapers lately has every right to be skeptical about Bush's resolve.

## *Scooping the Democrats*

JUST AFTER the Supreme Court issued its *Wards Cove* ruling, the White House called me to ask for ideas for a "Civil Rights Act of 1989." Amazingly, the Bush Administration wanted to scoop the Democrats. Hooray! I thought; our time has come at last, after eight years of the Reagan Administration's benign neglect of opportunities to fashion a genuine civil-rights strategy based on individual rather than group rights.

I urged the White House to shift the terms of the debate. I suggested that the President immediately appoint a highly credible commission on economic mobility, headed by someone like Tom Kean (who received over half the black vote when he won re-election as governor of New Jersey in 1985). In terms of strengthening civil-rights laws, he could add compensatory and punitive damages for victims of egregious discrimination (as an alternative to quotas, which help not known victims but a whole class of presumed victims). Finally, and most importantly, he could urge legislative action on educational choice, economic opportunity, and anti-crime measures aimed at helping minorities.

As it turned out, Bush had plenty of time to devise such a strategy if he had wanted to, since it took Ted Kennedy and Ralph Neas, a top lobbyist for the civil-rights establishment, over half a year to come up with a bill to overturn the six Court rulings. But Bush did nothing, announcing that no action was necessary with respect to the recent Court decisions.

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*Mr. Bolick is director of the Landmark Legal Foundation Center for Civil Rights in Washington, D.C., and author of the forthcoming* Unfinished Business: A Civil Rights Strategy for America's Third Century *(Pacific Research Institute).*

Meanwhile, several House Republicans got themselves into trouble by signing on to a bill by freshman Representative Tom Campbell, a bright and ambitious California Republican who wanted to establish his civil-rights credentials. He convinced several conservatives to join him, but when they realized they had been co-sponsoring a quota bill, they abandoned Campbell and demanded the White House provide an alternative.

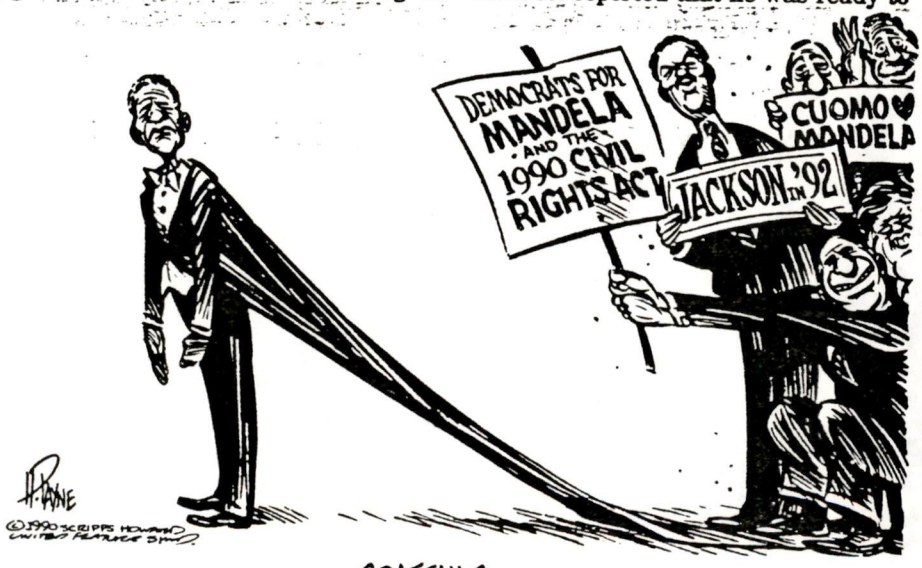
The Administration obliged, but the product did not quite meet the standards of a viable alternative. The Administration bill proposed to overturn two of the six decisions targeted by Kennedy–Hawkins, while keeping *Wards Cove* intact. But the way the Administration sliced it, the law would make monetary damages available to victims of racial harassment but not sexual harassment. No one —liberals, conservatives, or the business community—liked that alternative. The point man for the bill, Don Ayer, couldn't defend it, a factor that may have contributed to his recent departure from the Justice Department.

But the other side was having its problems too. After the Court's decisions came down last June 16, the NAACP's Ben Hooks threatened widespread civil disobedience and announced a mass march on Washington. When the troops failed to heed the call, Hooks was forced to reclassify the mass rally as a more modest "silent vigil," which registered barely a blip on the evening news.

It also took considerable effort by Neas and his allies to satisfy the diverse strands of the civil-rights lobby, with constituency groups ranging from minorities to feminists to labor unions, all focusing on different objectives which Neas had to put into a single, saleable package. Once introduced, the bill failed to generate much enthusiasm. Until the inexplicable decision by Senator Jack Danforth (R., Mo.) on May 17 to join the bill, sponsors included only liberals and the usual maverick Republicans. Southern Democrats were lying low, perhaps haunted by the quota specter, which could bleed away white votes. By mid June, the bill had fewer than fifty Senate sponsors, a very low number for a civil-rights bill.

## *Re-Enter the President*

ENTER the President again. On May 14, he announced through his spokesman, Marlin Fitzwater, that he wanted to sign a civil-rights bill, and that his differences with Kennedy–Hawkins were minor. He scheduled three days of meetings with civil-rights leaders, along with a sprinkling of dissenters. The *Washington Post* reported that he was ready to sign the bill, sending conservatives and the business community into despair.




COATTAILS

Both sides were invited to the Rose Garden ceremony on Thursday of that week; but when the rhetorical smoke had cleared, it was the bill's supporters who were devastated. Instead of endorsing the bill, Bush reiterated his opposition to quotas and implied that he would veto the bill if his core principles were not satisfied.

Of course, the President could do another pirouette and sign the bill. His Rose Garden reversal, apparently the result of a last-minute blitz by Attorney General Richard Thornburgh and other top advisors, may prove little more than a negotiating ploy. He clearly still wants to sign a bill and subsequently has negotiated with Kennedy, leading most commentators to suggest he'll sign the bill with merely cosmetic alterations. But I don't think so.

If George Bush caves in on quotas, he will risk losing support among white voters and creating additional constituencies for the likes of David Duke. So Bush needs to appear firm. But if he vetoes the bill, won't he write off any chance of increasing his share of the black vote? Here's where the pundits have it wrong.

Ben Hooks and his allies have declared the civil-rights bill a "litmus test" for Bush, and threaten he'll get no black votes if he vetoes it. Ronald Reagan capitulated to such threats on several occasions (such as housing and voting rights), and he still didn't end up with many black votes. Richard Nixon tried a different approach—outliberaling the liberals on minority set-asides and the like—and he didn't get many black votes either. Maybe President Bush has learned something from this.

The answer may lie in the second half of his Rose Garden speech—the half the media didn't report. Bush called for a new vision on civil rights based on individual "empowerment," consisting of efforts to help poor people help themselves. He spoke specifically about education vouchers, tenant management and ownership of public housing, and day care.

It was just a sketch, but it could turn into a real strategy, and one that could finally break the sixty-year Democratic lock on the black vote. If this seems a bold prediction, consider the objective: we're not talking about competing for a *majority* of black votes, at least not initially, but rather for a mere doubling of the 9 per cent of the black vote that Bush received in 1988. That's only about one out of every ten blacks who didn't vote for him the first time. Assuming Bush can hold onto most of his white voter base (and a quota-bill veto would help), this modest increase in black support is all he'd need virtually to ensure his re-election by a wide margin; if Republi-

cans generally could duplicate the feat, it could lead to control of the Senate.

## *A Nod to Hooks*

THIS WOULD represent a major shift in approach. Bush would continue to give occasional nods to Ben Hooks, avoiding the remoteness, hostility even, of the Reagan era. But Bush—or at least his advisors—seems to realize that Hooks needs him more than vice versa. The civil-rights establishment responds to every problem with a new bill, and if it can't get one passed, it has nothing to offer its constituents.

Likewise, if Bush merely meets Hooks's present demands, he's got nothing over the Democrats, who will always be able to offer more in the way of government regulations and handouts. Hence, Bush should take his case directly to black voters, offering them policies that will really make a difference to their lives.

As with many political shifts, this one started with the academics. Scholars such as Thomas Sowell, Walter Williams, and Charles Murray all condemned the welfare state and race-conscious affirmative action as doing nothing to help blacks make economic advances. Their indictment of race-conscious measures was echoed by converts—James Coleman, Nathan Glazer, Morris Abram, Glenn Loury—and later by others, including William Julius Wilson and Harvard law professor Randall Kennedy, who remain unabashedly liberal.

In particular, Wilson's *The Truly Disadvantaged* (1987) demonstrated that race preferences helped mainly those who didn't need the help, while leaving unaddressed problems of economic mobility and development of human capital. Wilson's book made it acceptable for thoughtful liberals to question race-conscious strategies as a solution to problems of minorities.

Kennedy–Hawkins has run head on into this burgeoning skepticism. Commentators across the political spectrum are recognizing the bill as a turning point, presenting a clear choice between continuing down the road of quotas or embarking on a new direction for civil rights. William Raspberry, Charles Krauthammer, Edwin Yoder, Stuart Taylor of *Legal Times*, the *Christian Science Monitor*, and *The New Republic*, all of them sympathetic to civil-rights aims, have each editorialized against the bill or its underlying logic. Likewise, the moderate Democratic Leadership Council, meeting this spring in New Orleans, explicitly endorsed the goal of equal opportunity as opposed to equality of outcomes, thus rejecting the premise that lies at the heart of Kennedy–Hawkins.

Meanwhile, this skepticism is manifesting itself at the grassroots. The NAACP's membership rolls are hemorrhaging—it lost a hundred thousand over the past ten years. Were it not for ever-increasing corporate contributions, the venerable organization would have to close up shop.

Self-help groups, on the other hand, are flourishing. Though typically non-ideological, they are passionately committed to individual autonomy and are therefore potentially ripe for Republican courtship. Exemplified by Robert Woodson's National Center for Neighborhood Enterprise, these groups reject welfare and quotas in favor of individual and community initiative. A new civil-rights bill means absolutely nothing to these people, but such initiatives as enterprise zones, tenant management, and education vouchers can mean a great deal.

My own organization, the Landmark Center for Civil Rights, is a legal arm of the empowerment movement, challenging regulatory barriers to entrepreneurial opportunities and defending empowerment efforts where they are attacked by entrenched interests. After two years in this business, I am struck by the potential for at least modest political realignment.

Bertha Gilkey, a tenant-management activist in St. Louis, used to be a Black Panther. Now she sees liberals as her principal adversaries and Republicans as allies. In Wisconsin, black state Representative Polly Williams recently pushed through the nation's first-ever education-voucher program, which (if it survives legal challenge) will provide one thousand poor Milwaukee children the chance to attend high-quality nonsectarian private schools. Mrs. Williams, Jesse Jackson's Wisconsin campaign coordinator, joined forces with conservative Republican Governor Tommy Thompson to overcome efforts by white liberals to defeat the voucher proposal. She leaves little doubt whom she'll support in the upcoming gubernatorial campaign.

Some in the Bush Administration (such as Housing and Urban Development Secretary Jack Kemp, Equal Employment Opportunity Commission Chairman Evan Kemp, and EEOC Vice Chairman Rosalie Silberman) and their supporters in Congress (Representatives Steve Bartlett and Newt Gingrich) have taken note of the political potential of empowerment. My bets with Arch Parsons are based on the premise that Bush has noticed it too.

Though any civil-rights bill has important symbolic value among blacks and therefore carries significant veto risks, this bill, because of its complexity, simply won't set the grassroots on fire. If Bush ends up going toe to toe with Ben Hooks in the inner city, for once it will be the Republicans who offer the tangibles (vouchers, tenant management, etc.) while the civil-rights establishment argues about abstractions (burdens of proof, statistical inferences, and so on).

Thus far, many civil-rights groups are ambivalent about empowerment initiatives. The head of the Milwaukee NAACP chapter, for instance, has joined the teachers' unions in taking Polly Williams's education-choice program to court—a lawsuit my group is actively resisting on behalf of black parents and their children. This leaves the road clear for Bush to emerge as the "empowerment" President.

## *No-Lose Issue*

REPUBLICANS in recent years have run away from this issue, which is odd since it is a no-lose issue. For once, Republican principles and interests are coinciding, and that offers the prospect for a considerable change in the political landscape.

My own objective is to promote a new agenda; my principal venue is the courtroom, not the legislature. The political ramifications are secondary to me. But if George Bush decides to carry the empowerment banner, it might just advance the cause by twenty years or so—and quite possibly bring America closer to making good on its commitment of opportunity for all Americans.

That's fine with me—and besides, I'll be two bucks richer. □

News from Senator

# BOB DOLE

(R - Kansas) SH 141 Hart Building, Washington, D.C. 20510

FOR IMMEDIATE RELEASE
JULY 16, 1990

CONTACT: WALT RIKER
(202) 224-5358

## CIVIL RIGHTS

TOMORROW THE SENATE WILL DECIDE WHETHER TO INVOKE CLOTURE ON THE SO-CALLED CIVIL RIGHTS ACT OF 1990.

PRESIDENT BUSH HAS CONSISTENTLY SAID THAT HE WANTS TO SIGN A CIVIL RIGHTS BILL THIS YEAR. HE HAS SAID THAT HE WANTS A BILL THAT IS SOUND, THAT IS REASONABLE, AND ONE THAT PROMOTES RACIAL JUSTICE, NOT QUOTA JUSTICE.

AND I, FOR ONE, AS REPUBLICAN LEADER OF THE SENATE, WANT TO HELP PUT THAT THE BILL ON THE PRESIDENT'S DESK.

THE PRESIDENT HAS DIRECTED HIS TOP ADVISORS, INCLUDING CHIEF OF STAFF JOHN SUNUNU, WHITE HOUSE COUNSEL BOYDEN GRAY AND ATTORNEY GENERAL DICK THORNBURGH, TO NEGOTIATE IN GOOD FAITH WITH SENATOR KENNEDY AND WITH THE OTHER PROPONENTS OF THE CIVL RIGHTS ACT. THESE NEGOTIATIONS BEGAN IN ERNEST MORE THAN THREE WEEKS AGO. THERE WERE MANY LENGTHY NEGOTIATIONS LAST WEEK.

AND NEGOTIATIONS ARE CONTINUING TODAY.

### COMMON GROUND

WE ALL AGREE THAT SECTION 1981 SHOULD BE EXPANDED TO COVER RACIAL HARASSMENT ON THE JOB.

WE ALL AGREE THAT WORKERS SHOULD BE PERMITTED TO CHALLENGE DISCRIMINATORY SENIORITY PLANS EVEN AFTER THESE PLANS HAVE BEEN ADOPTED.

WE ALL AGREE THAT THERE MUST BE ADEQUATE REMEDIES IN THE LAW TO DETER SEXUAL HARASSMENT ON THE JOB.

AND WE ALL AGREE THAT ANY MAJOR REVISION TO THE FEDERAL CIVIL RIGHTS LAWS MUST PROMOTE CONCILIATION, NOT LITIGATION.

SO, THERE ARE MANY AREAS OF COMMON GROUND BETWEEN THE ADMINISTRATION AND THE BILL'S PROPONENTS HERE IN CONGRESS. BUT THIS COMMON GROUND IS SHAKY GROUND, AND IT WILL COLLAPSE IF THE BILL'S PROPONENTS DO NOT SHOW SOME WILLINGNESS TO ADDRESS -- IN MEANINGFUL WAYS -- THE VERY LEGITIMATE CONCERNS RAISED BY THE PRESIDENT AND HIS ADVISORS.

THE LANGUAGE IN THE KENNEDY-JEFFORDS SUBSTITUTE DEFINING THE TERM "BUSINESS NECESSITY" IS UNACCEPTABLE. IN MY OPINION, AND IN THE OPINION OF THE PRESIDENT, THIS LANGUAGE IS SO EXTREME, SO FAR REMOVED FROM THE JUDICIAL HISTORY OF TITLE VII, THAT IT WILL HAVE ONE INEVITABLE RESULT -- DE FACTO RACIAL AND ETHNIC QUOTAS IN THE WORKPLACE.

IF WE REALLY WANT TO CODIFY THE GRIGGS DECISION, AS THE BILL'S PROPONENTS URGE US TO DO, THEN LET'S DO IT. WE OUGHT TO DEFINE "BUSINESS NECESSITY" IN THE VERY SAME WAY THAT THE GRIGGS COURT DEFINES IT. AND WE SHOULD NOT DISTORT THE GRIGGS DECISION BY DEFINING "BUSINESS NECESSITY" WITH NEW WORDS THAT HAVE NEW AND UNCLEAR LEGAL MEANINGS.

THE SECTION IN THE KENNEDY-JEFFORDS SUBSTITUTE OVERTURNING THE MARTIN VERSUS WILKS DECISION IS ALSO EXTREME.

WHEN I WAS IN LAW SCHOOL, I LEARNED THAT EVERYONE WAS ENTITLED TO HIS OR HER DAY IN COURT. BUT THE SUBSTITUTE WOULD THROW THIS TIME-TESTED AND CHERISHED PRINCIPLE OUT THE WINDOW BY PRECLUDING THOSE WHO HAVE BEEN HARMED -- IN SUBSTANTIAL AND DEFINABLE WAYS -- FROM SEEKING REDRESS THROUGH THE COURT SYSTEM.

FINALLY, THE REMEDIES SECTION IN THE KENNEDY-JEFFORDS SUBSTITUTE SEEMS TO HAVE BEEN CRAFTED BY THE TRIAL LAWYERS ASSOCIATION.

I AGREE THAT A DAMAGES REMEDY UNDER TITLE VII -- IN ADDITION TO BACK-PAY -- MAKES A LOT A SENSE. WITHOUT QUESTION, THE WOMEN OF THIS COUNTRY NEED A STRONGER REMEDY TO DETER, AND COMPENSATE FOR, SEXUAL HARASSMENT IN THE WORKPLACE.

BUT THE COMBINATION OF UNLIMITED COMPENSATORY DAMAGES, UNLIMITED PUNITIVE DAMAGES, AND UNLIMITED JURY TRIALS IS AN UNNECESSARY BURDEN ON OUR NATION'S EMPLOYERS AND A BONANZA FOR THE PLAINTIFF'S BAR.

### KEEP DIALOGUE ALIVE

MY DISTINGUISHED COLLEAGUE, THE MAJORITY LEADER, HAS OUTLINED A VERY AMBITIOUS SCHEDULE LEADING UP TO THE AUGUST RECESS. THE SENATE IS SCHEDULED

AMBITIOUS SCHEDULE LEADING UP TO THE AUGUST RECESS. THE SENATE IS
TO CONSIDER THE FARM BILL, THE DEBT LIMIT, CAMPAIGN FINANCE REFORM, THE
DEPARTMENT OF DEFENSE REAUTHORIZATION BILL, AND ANY APPROPRIATIONS BILL THAT
MAY BE AVAILABLE.

IF THE SENATE IS TO COMPLETE ACTION ON THESE BILLS, AS WELL AS COMPLETE
ACTION ON A CIVIL RIGHTS BILL THAT THE PRESIDENT CAN SIGN, THEN THE PROPONENTS
OF THE SO-CALLED CIVIL RIGHTS ACT OF 1990 MUST BE WILLING TO SHOW SOME
FLEXIBILITY. AND THEY MUST BE WILLING TO TAKE THE NEGOTIATING PROCESS
SERIOUSLY.

THE CLOTURE VOTE TOMORROW DOES NOT PROMOTE THE NEGOTIATING PROCESS. IT
DOES NOT PROMOTE COMPROMISE. AND IT DOES NOT PROMOTE THE CAUSE OF RACIAL
JUSTICE IN THIS COUNTRY.

A VOTE AGAINST CLOTURE IS A VOTE FOR RACIAL JUSTICE, NOT QUOTA JUSTICE.
AND IT'S A VOTE TO KEEP THE DIALOGUE ALIVE.

###

DRAFT/SUBJECT TO REVIEW AND REVISION

DRAFT
7/9/90 5:00 pm

Dear Ted:

I very much appreciate your letter of June 29 on civil rights. I too am grateful for the time you have spent with me and with others in trying to develop an effective and fair civil rights bill that would receive bipartisan support.

What has been frustrating to me in the process is the realization that there may be common ground achievable on the principles of what the bill should address, and how it should address them. Converting what may be general agreement to mutually agreeable language has been very elusive.

During the process, I have had the feeling that at least part of the problem was that the negotiations may have gotten into a duel over whose language to use. Pride of authorship shouldn't be allowed to stand in the way of agreement, and I thought I would take one last crack at cutting through these difficulties.

The Administration's basic concern is that the bill as crafted now, will, even if unintentionally, compel businesses to adopt quota policies in hiring and promotion as the only or best defense against the likelihood of legal action.

The key to a solution, I believe, is to use language directly from Griggs, language that has become the basis of what we agree was a functioning process at eliminating discrimination. The Griggs decision and those Supreme Court decisions based on the Griggs holdings have become an effective framework that we, together, have agreed is well worth preserving.

Thus, I propose the following language to address the concerns we have raised and the issues you have identified in our discussions.

On the definition of business necessity, I think we can accommodate your desires by including language from Griggs. Rather than "substantially and demonstrably related to effective job performance," which is not a formulation that Griggs actually uses, how about "has a manifest relationship to the employment in question"? (This is on page 432 of the case.)

On "job performance plus" and related issues, consistent with preserving to Griggs and its framework, we must take account of the very recent case (Watson in 1988) that for the first time

expanded disparate impact theory to cover subjective hiring practices. The definition of business necessity must therefore accommodate the special characteristics of such practices. It should also permit employers to pursue business goals besides those related to job performance per se. (This would address issues such as the non-smoking criterion you have commented on.)

I think this could be accomplished with language that the Court used back in 1979. In New York Transit Authority v. Beazer, just eight years after Griggs, in an opinion written by Justice Stevens (author of the principal Wards Cove dissent), joined by Chief Justice Burger (author of Griggs) and by Justice Blackmun (who wrote the other dissent in Wards Cove), the Court upheld the practice of excluding methadone users even from non-safety-sensitive jobs with the Transit Authority, explaining that the "legitimate employment goals of safety and efficiency ... are significantly served by -- even if they do not require -- [the employer's] rule." 440 U.S., page 587.

Merging the two sets of language together would produce the following:

> "The term 'justified by business necessity' means that the challenged practice or group of practices has a manifest relationship to the employment in question or that the respondent's legitimate employment goals are significantly served by -- even if they do not require -- the challenged practice or group of practices."

This formulation codifies Griggs and its progeny, just as you have urged. In order for the formulation to be acceptable however, we also would need to agree explicitly, and with a record, that there would be no legislative history changing or clouding its meaning. Instead, the legislative history should be confined to the following:

> "The definition of 'business necessity' is drawn from Chief Justice Burger's opinion in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) and Justice Stevens' opinion in New York Transit Authority v. Beazer, 440 U.S. 568, 587 (1979). The definition is intended to have the same meaning that the term 'business necessity' has been given by the United States Supreme Court in Griggs and its progeny."

Finally, I am still troubled by the proposed language on the "group of employment practices" issue. I agree with you that if a test is shown to produce a disparate impact, the employer should have to justify the test; but that doesn't mean the employer should have all of its practices subjected to judicial scrutiny as a matter of course.

I have noted that you are concerned about a question that arose in a case called Sledge v. J.P. Stevens, where the defendant's hiring process was basically a "black box" to the plaintiff because the defendant had no articulable hiring standards. I'm somewhat puzzled by the conclusions drawn from the case, since as I understand it, even after Wards Cove, the plaintiff won that case under the rule reaffirmed in Wards Cove.

Basically, I continue to fear language that causes more problems than it solves, or language with unintended consequences that would stimulate a quota-based defensive position. The language in your letter creates an exception that will swallow up the basic rule and thus permit challenges to employers' hiring based on their having the "wrong" demographic distribution. Still, consistent with our willingness to work out the differences, I suggest legislative history specifically endorsing the result in the Sledge case, along with our rewrite of your "group of practices" section to reduce that risk while permitting appropriate challenges to groups of practices that produce a disparate impact. I attach both. These suggestions, along with the new proposal on business necessity, would substantially alleviate our concerns about quotas in this part of the bill.

This is really as far as we can go on these points. Can't we agree on this effort to base the language directly on Griggs and Beazer as a way out of strugging with intended or unintended impacts of new words.

If we can deal quickly with these issues so directly related to our concerns on the quota implications and the potential for quota practices that could result from your proposed bill, then I am sure we can develop a way to handle the remaining issues.

Sincerely,

John H. Sununu

The Honorable Edward Kennedy
United States Senate
Washington, D.C. 20510

THE WHITE HOUSE
WASHINGTON

Date 6/8/98

TO: Ted Rogers

FROM: JEFF VOGT
Assistant Director/Business Liaison
Office of Public Liaison
Room 129 OEOB, Ext. 7983

talk for business w/ Porter

The attached is for:

- [x] Information
- [ ] Review & Comment
- [ ] Direct Response
- [ ] Appropriate Action
- [ ] Draft Reply
- [ ] Signature
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# FULFILLING AMERICA'S PROMISE: A CIVIL RIGHTS STRATEGY FOR THE 1990S

## INTRODUCTION

The U.S. Congress currently is considering legislation that its proponents claim will help to create equal opportunities for blacks and other minorities and reduce the racism that persists in America. Far from that, however, the proposed Civil Rights Act of 1990 will preserve and expand America's apartheid-like system of racial hiring quotas and do nothing to promote the economic opportunities for what is becoming a permanent under class of minority Americans. Ironically, the plight of these poor is used to justify the new civil rights law, yet the remedies proposed do not address their condition. Instead, the racial quotas encouraged by the Act at best may benefit only educated and upper income minorities.

Despite the civil rights gains of the last 25 years, one-third of the nation's black population remains in poverty and one-fourth of all Hispanic Americans live in poverty. What is needed is a civil rights bill that advances the opportunities of these and other poor Americans.

**Outdated Thinking.** The Civil Rights Act of 1990 represents an outdated view of how minority Americans can gain equality of opportunity. Sponsored by Senator Edward Kennedy of Massachusetts and Representative Augustus Hawkins of California, both Democrats, the bill offers 1960s-type solutions to a problem that requires a progressive new strategy for the 1990s. To be sure, many of the civil rights strategies employed in the 1950s and 1960s made crucial strides toward equal opportunity for minority Americans. That civil rights movement and the landmark statutes it achieved broke down barriers and won widespread support among Americans. But many of the veterans of those early battles still are locked into the thinking of that era. They focus on racial quotas, preferences, and statistical-base racial balancing mechanisms as

a weapon for advancing minorities, rather than on crafting strategies to give minorities the basic tools needed to take advantage of the opportunities hard won by Martin Luther King and other leaders of the original civil rights movement.

Fortunately, however, a new generation of minority Americans is beginning to question the relevance today of those old remedies. These Americans are proposing new solutions to propel civil rights beyond the old formula and into a new era of expanded opportunity and true equality of opportunity. The debate in Congress challenges conservatives and liberals alike to fashion a civil rights agenda that goes far beyond the outmoded approach of Kennedy/Hawkins.

**Ending a Paternalistic View.** What is needed are not racial quotas and set-asides, but an empowerment strategy that will unleash the capacity of individuals who have been excluded from the mainstream. This will require lawmakers to view differently those whom they wish to help. For too long government in practice has treated low-income Americans as people who do not have the capacity to make choices to better themselves. This paternalistic view has had a devastating effect on minority communities because it has encouraged entire racial groups to believe that they cannot succeed without discrimination in their favor and continuous aid from government. That has spawned a generation dependent on government, with low self-esteem and little hope for effecting change in their lives. With it has come broken families, soaring crime and school dropout rates, and shattered community institutions that once played a vital role in holding minority communities together.

The liberal civil rights agenda now being advanced in Congress perpetuates the myth that the poor and all minorities are somehow handicapped and must be given special preferences and handouts to succeed. This approach necessarily embraces racial quotas and the massive social welfare programs that have failed to create opportunities for the economically disadvantaged.

**Unfilled Capacity.** The conservative vision of progress, however, rests on a very different premise: that low-income and minority Americans actually have enormous unfilled capacity for achievement. By removing regulatory barriers to economic opportunity and creating an environment in which these individuals are empowered to take charge of their lives, conservatives believe that capacity for achievement will be realized.

This conservative view of progress suggests a two-pronged civil rights strategy. The first prong is vigorous enforcement of civil rights laws. Discrimination remains an all-too familiar fact of life for many Americans. Government must prosecute cases of discrimination against individuals to the full extent of the law. Title VII of the 1964 Civil Rights Act, moreover, should be strengthened to include a remedy of damages against those who willfully discriminate. Building on this enforcement strategy, the conservative civil rights strategy would call for aggressive court and legislative action to challenge modern-day Jim Crow laws that stifle minority business development. Examples include the 1931 Davis Bacon Act, which freezes out minority firms from government construction contracts, and onerous occupational licensing laws for profes-

sions ranging from cosmetology to child care. These barriers to economic opportunity, seemingly neutral in their impact on the races, actually disproportionately harm minority entrepreneurs trying to use the opportunities promised by the civil rights statutes. These remaining legal barriers, moreover, pose the greatest hurdles to the poor – the very people who have been left behind by today's civil rights movement.

**Attacking Quotas.** This enforcement strategy also would attack racial quotas that act as a ceiling to housing and educational opportunities for minorities. Strict adherence to racial and ethnic composition ratios in public schools, for example, has capped the number of minority students who can attend magnet schools, even when those schools are operating far below capacity. These and similar racial quotas that limit the number of Asian Americans admitted to universities should be challenged by all who genuinely believe in civil rights.

The second prong of the conservative civil rights agenda is individual empowerment to control one's own life. In many respects this is the essence of civil rights and the key to true independence. As Robert Kennedy stated in 1966, "reliance on government is dependence – and what the people of our ghettos need is not greater dependence, but full independence."[1] Conservatives thus want to fulfill the promise of the civil rights movement by pursuing a legislative strategy designed to remove government-imposed barriers that stifle economic opportunities for the poor. Such barriers prevent the poor from making such fundamental decisions as where they will live and who will educate and care for their children.

The conservative empowerment strategy calls for enterprise zones in low-income minority communities to reduce tax and regulatory impediments now frustrating the entrepreneurial spirit of those communities. It calls for a rejection of the public education double standard that condemns poor, primarily minority students to second-rate schools, by injecting competition into the American education system. Parental choice and education vouchers for low-income families are needed to empower parents as consumers with the ability to make choices in a market that now is open only to those who are not poor. This strategy also means vesting community groups with the power and responsibility to deliver services currently managed by bureaucrats. Public housing tenants, for example, should be allowed to manage and eventually to own their own housing units, building on the successes of such efforts in Boston, St. Louis, and Washington D.C. Empowerment also means that government must make good on its fundamental responsibility of protecting its law-abiding citizens from crime, creating an environment in which they can prosper. Thus innovative ideas like a police ROTC for students from low-income communities can be an important element of the conservative civil rights strategy.

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1 Quoted from "Empowerment: A Vision for the 1990s," Task Force on Empowerment, House Republican Research Committee, U.S. House of Representatives.

George Bush has a tremendous opportunity to forge a new civil rights agenda that fulfills the equal opportunities promised by the original civil rights movement. He should start by vetoing the Kennedy/Hawkins bill and the destructive racial quotas that it promotes. The President already has made a solid step in this direction, promising in a May 17, 1990, speech to veto any civil rights bill "whose unintended consequences are quotas." Next, he should propose new policy initiatives that express his vision of civil rights, rooted in empowerment and a firm commitment to prosecute actual discrimination. In what may prove to be a historic speech on civil rights, Bush on May 17 first articulated the critical connection between civil rights and empowerment, proclaiming that any changes in civil rights law must embrace "a broader agenda of empowerment." As John F. Kennedy did in 1961, Bush should issue an executive order that puts forth his vision of an empowerment civil rights agenda. This executive order should instruct the federal government to implement Bush's civil rights strategy of removing racial and economic barriers to individual independence.

## THE STATE OF CIVIL RIGHTS

Since its origins in the American revolutionary era, the quest for civil rights always has meant securing for individuals the power to control their own destinies. The past quarter-century has witnessed both major triumphs and serious setbacks in this quest. The civil rights laws of the 1960s opened the doors of opportunity to millions of previously excluded Americans in such crucial areas as employment, education, voting, and public accommodations.

Indeed, *Washington Post* columnist Courtland Milloy, who is black, has written that "black Americans are probably America's greatest success story. Enslaved a little more than a hundred years ago, there are now 2 million of them living affluently."[2] Milloy notes that between 1967 and 1987 the number of black households earning $50,000 or more grew from 212,000 to 764,000, an

2 Michael Novak, "The Invisible Man," American Enterprise Institute, *On the Issue*, from *Forbes*, February 19, 1990.

increase of 360 percent. The total income of America's 28 million blacks is larger than the gross domestic product of all but ten nations.[3] Since the mid-1960s, moreover, the number of African-American elected officials has quadrupled. And black politicians now govern four of America's six largest cities.

In recent years, however, the focus of many civil rights policies has shifted from securing equal opportunity to securing equal outcomes among racial and ethnic groups, through quotas, set-asides, busing, and welfare. Though advocated as temporary measures necessary to undo rapidly the lingering effects of past discrimination, these devices have grown increasingly entrenched.[4] Indeed, many "establishment" civil rights leaders[5] demand adherence to this agenda as a civil rights litmus test.[6]

**Little Help for Disadvantaged.** This agenda is destructive for many reasons, but the most damning indictment – delivered by critics spanning the philosophical spectrum from Charles Murray to William Julius Wilson – is that it hasn't worked.[7] Sociologist Wilson, of the University of Chicago, notes that while many blacks have enjoyed economic progress in recent years, for millions of others "the past three decades have been a time of regression, not progress." As Wilson explains, "[R]ace-specific policies... , although beneficial to more advantaged blacks... , do little for those who are truly disadvantaged."[8] Adds Robert Woodson, President of the Washington, D.C.-based National Center for Neighborhood Enterprise, a grass roots organization that promotes self-help solutions to local community problems, "Affirmative action does not help the black dishwasher or the untrained black youth."[9] A

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3 *Ibid.*

4 See, e.g., Clint Bolick, *Changing Course: Civil Rights at the Crossroads* (New Brunswick, N.J.: Transaction Books, 1988), P. 53-78.

5 See, e.g. Clint Bolick, *In Whose Name? The Civil Rights Establishment Today* (Washington, D.C.: Capital Research Center, 1988).

6 National Urban League President John E. Jacob, for instance, asserts that "[t]he goal of parity is the one constant that must be shared by anyone who presumes to hold a leadership position in the black community." John E. Jacob, "Black Leadership in a Reactionary Era," *The Urban League Review* (Summer 1985), p. 42-43.

7 See Bolick, *Changing Course*, pp. 84-91. As economists James P. Smith and Finis R. Welch recently concluded, "[A]ffirmative action apparently has [had] no significant long-range effect" on the wage gap between blacks and whites. *Closing the Gap: Forty Years of Economic Progress for Blacks* (Santa Monica, California: The Rand Corporation, 1986), p. 95. Rather, the principal effect of race-conscious strategies, according to William Julius Wilson, is a "growing economic schism between lower-income and higher-income black families." William Julius Wilson, *The Truly Disadvantaged* (Chicago: University of Chicago Press, 1987), p. 110.

8 *Ibid.*, pp. 110 and 42. Wilson's dismal economic prognosis was largely confirmed by the recent report of the Committee on the Status of Black Americans. Gerald David Jaynes and Robin M. Williams, eds., *A Common Destiny* (Washington, D.C.: National Academy Press, 1989).

9 Robert L. Woodson, "Race and Economic Opportunity," *NPI Policy Review Series*, National Center for Neighborhood Enterprise, 1989, p. 3.

civil rights agenda that promotes racial set-asides for the middle-class, writes *Washington Post* columnist William Raspberry, "is like demanding that the society supply aspirin for your uncle because your nephew has a headache. Isn't it time to abandon this bait-and-switch game in favor of truth in labeling?"[10]

### *The Victims of Racial Politics*

The failure of race-specific assistance programs to arrest the growing cleavage between disadvantaged and more successful blacks is borne out by census data. There has been, as Harvard political economist Glenn Loury has shown, "significant improvement in the earnings of employed black workers over the period 1940-1980."[11] But, says Loury, the average gains in black workers' earnings have not been "enjoyed equally by all black workers." In fact, earnings inequality within the black population has increased during the last 25 years, and remains greater than income differentials among white workers.

**Fact:** In 1959, the bottom 40 percent of black men earned 8 percent of the total earnings of all black men. By 1984 that bottom 40 percent earned only 4 percent of total earnings. Conversely, the top 20 percent of black men in 1959 earned 50 percent of total black male earnings. By 1984 this same 20 percent earned 60 percent of the total.[12]

**Fact:** From 1970-1986, the proportion of black families with incomes over $35,000 grew from 15.7 percent to 21.2 percent, and the proportion with incomes over $50,000 nearly doubled, from 4.7 percent to 8.8 percent. Yet during the same period, the proportion of black families with incomes of less than $10,000 also grew, from 26.8 percent to 30.2 percent.

What is the cause of such disparities? If racism were the answer, it would present a barrier for all blacks. And as Loury concludes, "[E]mployment discrimination is not a major factor." Rather, he points out, such practical factors as education contribute significantly to income differentials among blacks as well as between blacks and whites. Annual earnings of college-educated black males, for example, rose by 6 percent relative to whites between 1969 and 1984. The disintegration of the traditional family among poor blacks, however, accounts for much of this disparity: The poverty rate for black families headed by a single mother is 50 percent – more than four times the rate for intact, two-parent black families. The median income of two-parent black families now is 88 percent that of comparable white families, and the disparity is closing at a rate of 5 points a year.[13]

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10 "Playing on White Guilt," *Washington Post*, May 14, 1990.

11 Testimony of Professor Glenn C. Loury, before the Committee on Labor and Human Resources of the U.S. Senate, concerning S. 2104, the Civil Rights Act of 1990, February 23, 1990.

12 *Ibid.*

13 "Restoring the Black Family," *Family* (The Family Research Council), September/October 1989. Woodson, *op. cit.*, p. 11.

**Fact:** Between 1960 and 1988 the percentage of black women aged 15-44 married with a spouse present in the household declined from 51.4 percent to 29.1 percent. For whites, the decline was 69.1 percent to 54.5 percent. Between 1960 and 1988 the percent of black children living with a black married couple fell from 67 percent to 38.6 percent, while the number of black children living with a never-married person rose by more than 1400 percent, from 2.1 percent to 29.3 percent. By 1988, 61.2 percent of black children were born to an unmarried woman.[14]

Liberal solutions of quotas, forced integration, and other race-based approaches to civil rights clearly do not empower most blacks. Black men, particularly, are even more alienated from the economic mainstream. The last 25 years, for example, have witnessed a pronounced downward trend in the number of black men participating in the labor force. Fact: In 1962, almost 60 percent of young black males were employed, but by 1985 only 44 percent were employed.[15] The reason for this dramatic decline was not that jobs disappeared – in fact, it was a period of remarkable job creation. Nor is racism the culprit. The principal destructive influence was a burgeoning welfare system that subsidized family breakups and nonemployment.

**Victim Identity.** Liberal civil rights policies also have had a more insidious effect on the economic advancement of blacks. Shelby Steele, Associate Professor of English at San Jose University, has written that the prevalence of racial quotas and preferences has ingrained in blacks an identity of themselves as victims. This identity as victim, argues Steele, who is black, perpetuates a sense of low-self esteem among blacks and a feeling of powerlessness, which stifles individual initiative and responsibility. Writes Steele:

> Social victims may be collectively entitled, but they are all too often individually demoralized. Since the social victim has been oppressed by society, he comes to feel that his individual life will be improved more by changes in society than by his own initiative. Without realizing it, he makes society rather than himself the agent of change. The power he finds in victimization may lead him to collective action against society, but it also encourages passivity within his own life.[16]

Steele notes that after the death of Martin Luther King, the civil rights movement's message of equal opportunity was supplanted by a focus of blacks as victims entitled to special reparations from white society. "The 1964 civil rights bill," writes Steele, "was passed on the understanding that equal

14 Loury. *op. cit.*

15 Novak, *op. cit.*

16 Shelby Steele, "I'm Black, You're White, Who's Innocent," *Harpers*, June, 1989.

opportunity would not mean racial preference. But in the late 1960s and early 1970s, affirmative action underwent a remarkable escalation of its mission from simple anti-discrimination enforcement to social engineering by means of quotas, goals, timetables, set-asides and other forms of preferential treatment."[17] These policies remain the agenda of the liberal civil rights establishment.

Recent Supreme Court rulings, however, may signal a turning point for the future direction of civil rights policy. In a series of decisions last year,[18] the Court called squarely into question the use of racial quotas as well as the assumptions on which race-conscious measures are based.[19] Yet old guard civil rights leaders and their congressional allies reacted to these rulings swiftly and predictably, condemning them and urging "corrective" legislation. Senator Kennedy and Representative Hawkins introduced legislation to overturn most of the rulings and further expand the scope of the civil rights laws.

## WHY THE KENNEDY/HAWKINS BILL FAILS MINORITY AMERICANS

Undergirding the Kennedy/Hawkins legislation is the assumption that every significant difference in statistical outcomes among racial or ethnic groups is attributable to discrimination and curable by quotas.[20] This assumption is flawed. While discrimination remains a serious obstacle for minorities, it is not the primary barrier to opportunity afflicting the economically disadvantaged. Observes the National Center for Neighborhood Enterprise's Woodson, "Vague cries for 'peace, jobs, and freedom' are meaningless when a permanent (and growing) underclass of more than one-third of all black Americans, unskilled and undereducated, remains untouched by civil rights gains, the war on poverty, increased black political power, and a mammoth social welfare industry."[21] Civil rights policies that fail to recognize this fact and to confront real obstacles to progress are doomed to repeat the failures of the past.

At the heart of the Kennedy/Hawkins bill are provisions that will make it all but impossible for employers to defend themselves against a claim of discriminatory hiring practices. Under the proposed law, a business that fails to

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17 Shelby Steele, "A Negative Vote on Affirmative Action," *New York Times Magazine*, May 13, 1990.

18 *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)(striking down Richmond's minority contract set-aside program); *Wards Cove Packing Co. v. Antonio*, 109 S.Ct. 2115 (1989)(making it less difficult for employers to defend employee selection practices against discrimination charges that are based solely on statistics without evidence of discrimination); *Martin v. Wilks*, 109 S.Ct. 2180 (1989)(allowing challenges to racial quotas contained in consent decrees by those who are affected); and *Patterson v. McLean Credit Union*, 109 S.Ct. 2362 (1989)(holding that the Civil Rights Act of 1866, which prohibits discrimination in the making of contracts, does not cover instances of racial harassment).

19 See Clint Bolick, "The Supreme Court and Civil Rights: A Challenge for George Bush," Heritage Foundation *Backgrounder* No. 728, September 28, 1989.

20 See Bolick, *Changing Course*, pp. 56-60.

21 Woodson, *op. cit.*, p. 3.

meet certain racial and ethnic percentages in the composition of its work force must prove that such disparities are not due to discrimination. This is a reversal of normal legal standards. Usually, a claimant must prove that a defendant has violated some legal standard in order to prevail. Under the proposed legislation, however, the claimant need only show that racial hiring percentages have not been met, and the burden then shifts to the employer to prove the absence of discrimination. Thus the employer is presumed guilty unless innocence is proved.

**Insurmountable Standard.** In addition to this shifting of the burdens, the legislation proposes another hurdle that will make it impossible for an employer actually to prove that he or she does not discriminate. Under the Kennedy/Hawkins bill, if the work force of a business fails to meet the prescribed racial composition, the only way that an employer can rebut the presumption of discrimination is by proving that his or her hiring criteria bears "a substantial and demonstrable relationship to effective job performance." This is an insurmountable legal standard, and a reversal of the Supreme Court's 1989 ruling in *Wards Cove Packing Co. v. Antonio* that a business need only show that a challenged hiring practice "serves, in a significant way, the legitimate goals of the employer." Under the elevated hurdle proposed by the Kennedy/Hawkins bill, such reasonable and non-racial hiring criteria as requiring a high school or college diploma could fail to meet the "substantial and demonstrable" test necessary to rebut a claim of discrimination. A company that merely shows that it applies the same standards to everyone, regardless of race, will be found guilty of discrimination.

Faced with such hurdles, rational employers will turn to racial quotas as the only reasonable means to protect themselves from lawsuits. To avoid litigation, employers will have no recourse but to hire a certain percentage of their employees based not on merit or qualifications, but solely on the basis of race. Indeed, writing in the weekly lawyers' newspaper *Legal Times*, liberal columnist Stuart Taylor, Jr. notes that the bill would "pressure employers surreptitiously to use quotas to improve their statistics." This is not a positive direction for civil rights. As George Bush said in his May 17 Rose Garden speech on civil rights, "The focus of employers in this country must be on providing equal opportunity for all workers, not on developing strategies to avoid litigation."

**Presumption of Discrimination.** Another adverse impact of the Kennedy/Hawkins bill would be to establish "quota ceilings" on the number of minorities employed in low-skilled jobs. One of the issues in the *Wards Cove* case was a disparity in the company's work force between the number of minorities employed in low-skilled factory jobs and upper-level management positions. Under the proposed Kennedy/Hawkins bill, such a disparity would create the presumption of employer discrimination. The result: rather than hiring more minorities for management level positions, many employers simply would reduce the number of minorities employed in low-skilled positions so as to avoid the unequal percentages that would result in liability.

By its narrow focus on statistical disparities and racial quotas, the Kennedy/Hawkins bill would codify the racial divisions that continue to fuel racial tensions between whites and minorities. Rather than equal opportunity for all, the bill would offer racial entitlements for a select few. What is needed instead is a positive civil rights strategy geared toward empowering all individuals with the independence they need to make the choices necessary to succeed. The two key elements of this new civil rights agenda are vigorous enforcement of anti-discrimination laws and progressing from the old agenda of affirmative action to a new strategy of affirmative empowerment.

## CONSERVATIVES AND THE CIVIL RIGHTS LAWS

The conservative civil rights agenda must be more than opposition to racial quotas. Conservatives must assert a strong affirmative commitment to enforcing civil rights laws and prosecuting discrimination. Civil rights law enforcement officials should take their lead from U.S. Appeals Court Judge Clarence Thomas, who served as chairman of the U.S. Equal Employment Opportunity Commission (EEOC) from 1982 to 1990. Thomas demonstrated that vigorous civil rights law enforcement need not mean quotas. He reorganized and streamlined a previously ineffective agency; he established a policy of full relief for victims of discrimination (the EEOC previously settled for quotas, which employers were happy to accept); and he shifted the agency's focus away from cases involving statistics to those involving individual victims – the very people who could not find help elsewhere. As a consequence, Thomas was able to secure more relief for more victims of discrimination than ever before had been obtained.

The new civil rights strategy should reject quotas as an unfair and racially divisive remedy, and instead seek tough penalties against discriminators and full relief for victims of actual discrimination. This would require amending the employment provisions of the 1964 Civil Rights Act to strengthen damage remedies,[22] an approach supported by Clarence Thomas, former Attorney General Edwin Meese, and former Assistant Attorney General William Bradford Reynolds. In the desegregation context, conservatives should push for monetary damages instead of busing. Rather than merely reassigning students to achieve racial balance, damages in the form of education vouchers should be a remedy available to successful plaintiffs. Currently, the preferred judicial remedy in desegregation cases are such "equitable remedies" as busing and racial quotas. These forms of relief advance "group" rather than "individual" remedies. Yet as Clarence Thomas demonstrated during his tenure at the EEOC, remedies that focus on individual relief are possible and far more effective. A remedy of education vouchers would secure better the goal of equal opportunity by enabling parents to choose the best education opportunities available for their children.

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22 See Bolick, "The Supreme Court and Civil Rights," p. 8.

**Economic Barriers.** Aggressive enforcement of civil rights laws also means pursuing litigation and legislation to remove regulatory barriers to economic opportunity. In the courts and legislatures, conservative civil rights advocates should join with members of minority groups to challenge on civil rights grounds such economic barriers as the 1931 Davis-Bacon Act, which prevents minority firms from securing government construction contracts. This law requires that inflated "prevailing wages" be paid on all government construction contracts. In practice, this has meant that only firms willing and able to pay union scale wages can secure government construction contracts. Such firms typically are large, established, white-owned businesses that can afford to pay inflated wages. Smaller, more competitive minority firms that cannot absorb such costs thus are prevented from securing the contracts, even though they can perform the work at lower cost. The law also discourages the hiring of low-skilled workers by establishing high entry-level wages. The predictable combined impact of these restrictions is the disproportionate exclusion of minority entrepreneurs and laborers, which was an explicit goal of the bill.[23]

**Limiting Competition.** Occupational licensing laws and regulations that restrict the formation of new businesses also should be confronted for their disparate impact on minorities. Many of these restrictions are unrelated to public health or safety objectives, and in fact often are promoted by the professions themselves to limit competition. Like the Jim Crow laws of an earlier era, these laws often impede minority participation in professions and businesses. Taxicab regulations, for example, strictly limit the number of entrepreneurs in a business that otherwise would be easily accessible to minorities. Licensing laws also exclude from professions those who are demonstrably qualified, but who cannot satisfy arbitrary and formalistic requirements. These licensing restrictions commonly are prevalent in such entry-level trades and professions as cosmetology, barbering, photography, stenography, interior decorating, and pool cleaning.

More rigorous enforcement of civil rights laws also requires confronting quota "ceilings" in education and housing. To achieve racial balance in public schools and housing, government authorities set rigid quotas that operate to exclude minorities. Example: In California universities, Asian American students are excluded from admission because they are "overrepresented" among eligible candidates for admission.[24] Example: In Kansas City magnet schools, black youngsters are denied admission so the school district can hold seats empty for white students.[25] These experiences illustrate how race-based

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23 See *Congressional Record-House*, February 28, 1931, pps. 6504-6521.

24 See Dan C. Heldman, "Ending College Admission Quotas Against Asian-Americans," Heritage Foundation *Executive Memorandum* No. 240, June 30, 1989; Representative Dana Rohrabacher, "College Admission Quotas Against Asian-Americans: Why Is the Civil Rights Community Silent?" *Heritage Lectures* No. 236.

25 See "Blacks sue over KC desegregation plan," *The Washington Times*, July 17, 1989.

policies, however well-intentioned, can ultimately harm the very individuals they are purported to benefit.

*Affirmative Action*

If one term exists in the American lexicon that conservatives need to recapture, it is "affirmative action." Conservatives generally have been perceived to be "opposed" to affirmative action. If affirmative action means quotas, such opposition is warranted. But "affirmative action" need not be synonymous with quotas; conservatives, therefore, should not be considered adversaries of affirmative action as it was originally intended.

Affirmative action as practiced in the mid-1960s recognized that many individuals were ill equipped, for reasons of past discrimination, to take advantage of the equal opportunities secured to them for the first time by the newly enacted civil rights laws. Affirmative action thus meant providing tools to enable those who had been held back by discrimination to compete effectively in the market. It did not mean racial hiring quotas.

**Origin of a Term.** The term first was used by John F. Kennedy in his Executive Order No. 10925, issued in 1961. As Hoover Institution economist Thomas Sowell has noted, Kennedy's order specifically provided that affirmative action was not intended as a system of racial quotas or hiring preferences. Instead, it was an effort to disseminate information about federal jobs to encourage previously excluded groups to apply, and to insure fairness in hiring and promotion regardless of race. Thus, Kennedy ordered federal contractors to "take affirmative action to ensure that the applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."[26]

Senator Hubert Humphrey, the Minnesota Democrat and architect of the Civil Rights Act of 1964, also took pains to distinguish affirmative action from racial quotas. During Senate debate on the civil rights bill, Humphrey instructed his colleagues that the bill "does not require an employer to achieve any kind of racial balance in his work force by giving preferential treatment to any individual or group."[27] But Thomas Sowell recounts that "the original meaning of 'affirmative action,' as a general attempt to inform and recruit applicants from groups long excluded from employment and other opportunities, quickly gave way to its current meaning – choosing among applicants on the basis of numerical group results."[28]

The firm opposition to racial quotas expressed by most liberals in the 1960s was well founded. Quotas (sometimes called "goals and timetables") could

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26 Thomas Sowell, *Civil Rights: Rhetoric or Reality?* (New York: William Morrow & Company, Inc., 1984) p. 39.
27 *Ibid.*
28 Thomas Sowell, "*Weber* and *Bakke*, and the Presuppositions of 'Affirmative Action,'" in W.E. Block and M.A. Walker, eds., *Discrimination, Affirmative Action, and Equal Opportunity* (Vancouver: The Fraser Institute, 1982), p. 61.

not accomplish the original – and still salient – objectives of affirmative action. All quotas do is to redistribute opportunities as part of a zero-sum game: every person's gain means another's loss. Quotas, moreover, do not help the economically disadvantaged gain the skills necessary to compete effectively. Thus affirmative action comprised solely of quotas has aided better-qualified minority candidates while not addressing the real-world needs of people outside the economic mainstream. As William Julius Wilson argues, future affirmative action must consist of efforts "targeted to truly disadvantaged individuals regardless of their race or ethnicity."[29]

## CONSERVATIVES AND EMPOWERMENT

The second element of a new civil rights agenda is individual empowerment. This empowerment means giving individuals the opportunity to realize their potential and achieve economic independence by giving them the power to choose the conditions under which they live – such as how their family will be educated and where they will live. Liberal social welfare programs do not empower the poor. Rather they empower government and an industry of social service providers that prospers by managing the lives of the poor. The conservative idea of empowerment, by contrast, derives from the movement's roots in market economics and classical liberalism – power not as control over others but as the freedom to control one's own affairs, the essential ingredient of liberty.

A civil rights strategy based on empowerment focuses on enabling individuals to choose how they will improve their condition. The aim is to help low-income Americans by expanding opportunities rather than by merely redistributing them. The impetus for such efforts is not the coercive power of government, but consumer choice in the market. To achieve empowerment, the new civil rights strategy must confront remaining systemic obstacles that prevent individuals from controlling their own destinies. At least four such obstacles exist: stifling regulation of entrepreneurial opportunities, poor public schools, the welfare system, and crime. All of these barriers disproportionately burden people outside the economic mainstream, who disproportionately are minorities.

An empowerment strategy to unlock the pent-up capacity of lower-income minority Americans requires many actions on several fronts. Among them:

1) **Remove obstacles to entrepreneurs.** Economic liberty is a fundamental civil right. Yet this liberty to pursue a livelihood free from excessive or arbitrary interference is the forgotten civil right. This right was destroyed by the 1873 *Slaughter-House* cases[30] in which the Supreme Court ruled erroneously that economic liberty was not included among privileges or immunities of citi-

29 Wilson, *op. cit.*, p. 117.
30 83 U.S. 36 (1873).

zenship protected by the Fourteenth Amendment. As a consequence, entrepreneurial opportunities are burdened by a pervasive array of regulations at every level of government, from the 1931 Davis-Bacon Act and federal minimum wage laws to local occupational licensing laws and government-conferred business monopolies. These laws, most of which were enacted not to promote public health or safety but to limit competition, stifle the tradition of bootstraps capitalism that is America's beacon to the enterprising poor. In essence, these restrictions cut off the bottom rungs of the economic ladder, so vital to the poor and those who have suffered discrimination, thereby destroying traditional methods for upward mobility.[31]

Conservatives should champion an Economic Liberty Act, which would require governmental entities to limit regulations restricting entry into trades or businesses to demonstrable public health, safety, or welfare objectives. Conservatives also should challenge as civil rights violations the most arbitrary and oppressive economic regulations.[32] In this way, conservatives not only would help complete the legal work of the original civil rights movement, but would open the most important door to economic independence: self-employment and business creation.

2) **Introduce parental choice into education.** Education is the key to progress. It is the great equalizer of the races, the most powerful tool for eliminating racism. But interposed between precious educational opportunities and those who need them the most stand America's often substandard public schools. And the greatest number of victims of that system are those who have no other choice – the inner city schoolchildren whose opportunities for advancement are crushed at schools that seem answerable to no one. Minorities disproportionately are the victims of America's dismal public school performance. Dropout rates for black and Hispanic students exceed those for whites, especially in urban areas. In the Chicago public schools, for example, the 1988-1989 school year dropout rate for whites was 13.9 percent, compared with a 23.3 percent rate for Hispanics and a 60.9 percent rate for blacks.[33] These young dropouts may in one sense be making a rational

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31 See Bolick, *Changing Course*, p. 94-104.

32 Landmark Legal Foundation's Center for Civil Rights last year successfully challenged a District of Columbia ordinance prohibiting street corner shoe shine stands, and is currently challenging Houston's "anti-jitney law" and a National Park Service regulation that has destroyed the native Virgin Islander charter boat industry.

33 Chicago Public Schools, Board of Education. Chicago defines a dropout as any student, sixteen or older, who has been removed from the enrollment roster for any reason other than death, extended illness, graduation, or completion of an equivalency program. Also included are transferring students whose records have not been requested by another public or private school.

choice: why stay in a substandard public school? But the tragedy is that unlike individuals of moderate and upper incomes, these low income students and their families have no opportunity to transfer to better schools.

America needs to empower low-income minorities and others as consumers with a choice of schools, by providing to parents a portion of the dollars spent on schooling in the form of a tax credit or voucher to purchase the education that best suits their children's needs. Studies show that choice and competition in education work, particularly for those who have lacked the most basic educational opportunities.[34] Moreover, polling shows that vouchers are especially popular among inner city minority parents.[35] Returning to parents choice of, control over, and responsibility for the education of their children is the first step in expanding educational opportunities.

The successes of educational choice initiatives in such states as Minnesota and in low income communities, like East Harlem, New York, should continue to be highlighted and serve as a model for expanded efforts. Conservatives, too, should craft educational empowerment strategies that support and build on such educational voucher plans as that achieved in Milwaukee, Wisconsin, owing to the efforts of State Representative Annette "Polly" Williams, a black Democrat who represents low-income inner city constituents.

3) **Make welfare a ladder, not a permanent crutch.** The welfare system has fueled a self-perpetuating cycle of dependency, which has influenced minorities disproportionately. Intended as a temporary helping hand in the case of the able-bodied, the welfare system not only has encouraged millions to remain on its rolls, but also in most instances has rewarded destructive behavior and penalized those who sought to become independent. Example: if a father walks out on his family, they become eligible for welfare. If instead of leaving, he takes a low-paying job to try to fulfill his responsibility, the family often is financially worse off.

The welfare system is particularly damaging to minorities because many of these families are at the margin, where welfare is an attractive option. Moreover, the "official" leadership of the black and Hispanic communities has added to the problem by urging government to increase benefits for those on

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34 See Clint Bolick, "A Primer on Choice in Education: Part I – How Choice Works," Heritage Foundation *Backgrounder* No. 760, March 21, 1990.

35 Alec M. Gallup, "The 18th Annual Gallup Poll of the Public's Attitudes Toward the Public Schools," *Phi Delta Kappan*, September 1986, pp. 58,59. A 1989 Gallup/Phi Delta Kappan poll found that 67 percent of non-whites favor educational choice.

the rolls, while doing little to support proposals to reward those who strive to become independent.

The federal government should encourage economic emancipation by reducing dependency on welfare and rewarding those who work. This strategy requires a major reform of the welfare system and anti-poverty programs to encourage independence and reward those who take their responsibilities seriously. Among the key reforms needed:[36]

♦ ♦ Expand the Earned Income Tax Credit, which supplements the earnings of very low-paid workers through the tax code.[37] This would reward work, encourage many on welfare to climb the ladder of employment, and ensure that families would move out of poverty if they joined the work force.

♦ ♦ Make some form of work mandatory for all welfare programs serving the able-bodied.

♦ ♦ Attach a portion of the earnings of all absent fathers, married or unmarried, if their family is on welfare. If the father claims to be unemployed, require him to enroll full time in a government work program.

♦ ♦ Encourage home ownership among the poor through "urban homesteading" programs, and an acceleration of tenant management of public housing.[38]

♦ ♦ Enact "enterprise zone" legislation, which would reduce tax and regulatory barriers to job creation in the inner city.

4) **Crack down on Crime.** The new civil rights agenda should emphasize the most fundamental of civil rights: freedom from crime. Personal security is the primary justification for government. Government, however, is failing to protect its law-abiding minority citizens against crime.

Crime falls disproportionately on minorities, creating an additional barrier to those striving for economic independence and social responsibility. Black households in 1988, for example, were 60 percent more likely to be burglarized and three times more likely to be robbed than white households. Black households suffer more than twice the number of motor vehicle thefts and al-

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36 See also, Stuart M. Butler, "Razing the Liberal Plantation: A Conservative War in Poverty," in *National Review*, November 10, 1989, p. 27; Stuart M. Butler, "Welfare," in Charles L. Heatherly and Burton Yale Pines, eds., *Mandate For Leadership III: Policy Strategies for the 1990s* (Washington, D.C.: The Heritage Foundation, 1989) p. 253; Stuart M. Butler and Anna Kondratas, *Out of the Poverty Trap* (New York: The Free Press, 1987).

37 See Stuart M. Butler, "The Peace Dividend: It Belongs to the People, Not Congress," Heritage Foundation *Backgrounder* No. 752, February 9, 1990.

38 See John Scanlon, "People Power in the Projects: How Tenant Management Can Save Public Housing," Heritage Foundation *Backgrounder* No. 758, March 8, 1990.

most 65 percent more incidents of aggravated assault than whites.[39] The probability of being murdered is six times greater for blacks than for whites.[40] Hispanics, too, are far more likely than whites to be victims of crime. From 1979-1986, for example, Hispanic Americans were victims of violent crime at a rate twice that of non-Hispanics.[41]

If conservatives and the inner-city poor can make common cause on any issue, it should be crime. Strong anti-crime measures directed toward urban centers, along with meaningful protection of victims' rights, form the foundation of an effort to better secure vulnerable individuals in their persons and their property. Creating a crime-free environment in poor communities will require several changes in the law to favor the victim over the victimizer. Among them: "victim's rights" laws that compel criminals to make restitution to their victims, and require prosecutors to take the victim's interests into account in sentencing and probation. Government also should reprioritize its law enforcement strategy in poor communities. Law enforcement should focus on preventing and prosecuting crimes against persons and property in the ghettos, and increasing penalties for such crimes.

Ridding America's minority communities of the source of crime also will require empowerment strategies to involve communities in the fight. One idea that merits study is a proposal currently before Congress to create a police ROTC program for poor communities.[42]

Under the plan, students would receive college tuition in exchange for serving on the police force of their community after graduation. Such additions to urban police forces would free more officers to perform such vital functions as foot patrol on the streets of poor communities.

## WHAT GEORGE BUSH SHOULD DO

Obviously, George Bush can do a great deal to advance a conservative strategy on civil rights – one that will do far more to advance civil rights than the Kennedy/Hawkins legislation. He enjoys enormous popularity among both white and minority Americans. The time is ripe for a Bush-led civil rights strategy that would build on the foundation laid in the 1960s. The President thus should draw on his popularity and credibility by restoring momentum to a quest for civil rights that has strayed off course for the past generation. Already, Bush has taken an important step in this direction with his May 17 Rose Garden speech on civil rights. In that ground-breaking speech, he vowed to veto any civil rights bill that would promote racial quotas, and he re-

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39 See Joseph Perkins, ed., *A Conservative Agenda For Black Americans* (Washington, D.C.: The Heritage Foundation, 1987, 1990) pps. 31-32.

40 Bolick, *Changing Course*, pp. 116-118.

41 "Hispanic Victimization," Bureau of Justice Statistics, January 1990.

42 S. 1299, "The Police Corps Act of 1989." Sponsors include Republican Senators Specter, Heinz, Rudman, Coats, and Lott. Democrats include Senators Sasser, Bradley, Lieberman, and Dodd.

defined civil rights to include empowerment strategies for the poor. Next, the President should:

**1) Veto the Kennedy/Hawkins bill.** To sign into law a civil rights bill that promotes racial quotas would be to surrender to racism. And to sign a civil rights bill that fails to include empowerment initiatives for the poor would ignore the civil rights of those who are struggling the most. The Kennedy/Hawkins bill champions a failed policy agenda and does little to solve the most pressing civil rights problems. If the bill passes Congress, Bush should veto it and immediately shift the terms of the debate from quotas to empowerment.

**2) Issue an Executive Order on Empowerment.** In 1961 President John F. Kennedy issued Executive Order 10925 that mandated affirmative action throughout the federal government. Now, nearly three decades later, George Bush should issue a new executive order building on Kennedy's vision and propelling government into a new era of civil rights action.

This executive order should require all federal agencies, departments, and offices to review existing policies and regulations and eliminate those that stifle the economic empowerment of minorities. Like Kennedy's executive order, Bush should require the federal government to take affirmative action to recruit minorities and also to break down barriers to their economic liberty. Bush should order the federal government to restructure affirmative action to encourage empowerment efforts aimed at increasing human capital and removing obstacles to the economically disadvantaged.

The Bush executive order also should require that every new government regulation be accompanied by an "Empowerment Impact Statement" that addresses how the regulation would help to empower low-income Americans to manage their own affairs and attain economic liberty.

**3) Establish a Commission on Economic Mobility.** In his 1961 Executive Order, Kennedy established the President's Committee on Equal Employment Opportunity to "scrutinize and study employment practices of the Government of the United States, and to consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination...." Bush likewise should appoint a presidential commission to examine contemporary obstacles to minority opportunities, and to recommend within a specified time period legislation designed to eradicate those obstacles. This effort should be similar to that which preceded the development of the Age Discrimination in Employment Act of 1967. By establishing this Economic Mobility Commission Bush would lay the groundwork for opening far more opportunities for economically disadvantaged minorities than would the Kennedy/Hawkins bill.

**4) Strengthen Damage Provisions of the Civil Rights Act.** Under the Civil Rights Act of 1964, an employer found guilty of discrimination need only provide a job and back pay to the aggrieved party. This penalty is not sufficient to deter future discrimination. To remedy this, Bush should propose to Congress

amendments to the law to allow recovery of treble punitive damages against employers who willfully or persistently violate the law.

**5) Propose a Comprehensive Welfare Reform.** Congress in 1988 enacted the Family Support Act. Touted as a major reform of the welfare system that would reduce welfare dependency, the legislation in fact is little more than an expansion of existing programs. Moreover, a Congressional Budget Office analysis of the statute predicts that it will actually add people to the welfare rolls.

Bush should explain to Americans that there will be no progress in the war against poverty until there is a change in the strategy used to fight the war. He should assemble a cabinet-level task force, led by Housing and Urban Development Secretary Jack Kemp, to develop a comprehensive series of welfare reforms to promote the empowerment of poor Americans.

**6) Coordinate Empowerment Efforts.** The beginning of an empowerment infrastructure already exists. In addition to public policy organizations dedicated to self-help, Secretary of Housing and Urban Development Jack Kemp and Education Secretary Lauro Cavazos are pushing empowerment strategies in their agencies. In Congress, Representative Steve Bartlett, the Texas Republican, has formed an empowerment caucus comprised of conservative and moderate Republicans. And the moderate Democratic Leadership Council last month endorsed a policy plank calling for equal opportunity rather than equal results. These developments reflect a growing determination among conservatives to confront civil rights issues, and a growing receptivity to what conservatives have to say.

Outside of Congress, organizations and individuals are showing what can be accomplished by poor Americans if they are given the opportunity to use the capacities they have. The public housing tenant management movement, for example, has brought dignity and hope to dozens of once crime-ridden and blighted projects. An education reform movement has spawned more than 300 new black independent schools, most of them created by parents and community groups in poor neighborhoods. Robert Woodson's National Center for Neighborhood Enterprise has helped to highlight the successes of numerous additional empowerment efforts nationwide, and provided technical assistance to self-help groups in minority communities. And the National Association of the Southern Poor, headed by Donald Anderson, has carried the self-help message to rural Southern communities, sparking a rejuvenation of formerly crime-ridden and depressed communities.

George Bush needs to draw greater attention to the movement for minority empowerment. He needs to give this movement at least equal standing in the debate over civil rights, and to instruct agency officials to do likewise. As long as the perception exists that only minority leaders espousing the tired liberal agenda are legitimate spokesmen for black and Hispanic Americans, the economic emancipation of these groups will be painfully slow.

**7) Repeal the Davis Bacon Act.** The 1931 Davis Bacon Act is the federal equivalent of local Jim Crow laws that prevent minorities from competing for

economic opportunities. The law's requirements that federal construction contracts pay the "local prevailing wage" inflates wage rates. The result: many small minority firms that cannot afford to pay such inflated rates are excluded from government construction contracts. The law also discriminates against minority tradesmen who are willing to work for less than union wages. In fact discriminating against black workers seems to have been one of the reasons for passing the 1931 law. Said Alabama Congressman Miles Allgood during the February 28, 1931, floor debate on the bill, "That contractor has cheap colored labor...and it is labor of that sort that is in competition with white labor . . .. This bill has merit ... it is very important that we enact this measure."[43]

Despite its devastating impact on black firms and tradesmen, and its effect of increasing federal construction costs by $1.5 billion annually, the 60-year-old Davis Bacon Act remains law. The reason: Congress refuses to abolish it out of fear of offending organized labor. George Bush should launch a campaign to convince Congress to repeal the Act. As part of this effort, he should instruct Labor Secretary Elizabeth Dole and other appropriate executive branch agencies to conduct a thorough examination of the Act's impact on minorities. Bush should make repeal of the Davis Bacon Act the centerpiece of his civil rights strategy to eliminate the remaining vestiges of America's Jim Crow laws.

**8) Require that Congress be Subject to Civil Rights Laws.** Congress routinely exempts itself from the laws it passes, including the nation's major civil rights statutes. Although the executive branch is subject to the provisions of the 1964 Civil Rights Act, Congress is not. Thus the 37,000 employees of the legislative branch are without the civil rights protection guaranteed to all other Americans. This has led some observers to describe Congress as the "last plantation." Undeterred, however, Congress is attempting to exempt itself from new civil rights laws. The Kennedy/Hawkins bill, for example, fails to require that Congress comply with its provisions.

George Bush, in his May 17 Rose Garden speech, called on Congress to apply to itself all existing and proposed civil rights laws. This is sound policy. Bush should hold Congress to that standard, and refuse to sign any civil rights bill that fails to subject Congress to its provisions.

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43 *Congressional Record - House*, February 28, 1931, p. 6513.

## CONCLUSION

In his February testimony before the Senate Labor and Human Resources Committee, Harvard's Glenn Loury summed up the current civil rights challenge:

> Today the nation faces a challenge different in character though perhaps no less severe in degree than that which occasioned the civil rights revolution. It is important, though, to be clear about just what that challenge is, and what it is not. The bottom stratum of the black community has compelling problems which can no longer be blamed solely on white racism, which will not yield to protest marches or court orders, and which force us to confront disquieting aspects of lower class black urban society. The profound alienation of the ghetto poor from mainstream American life has continued to grow worse in the years since the triumphs of the civil rights movement, even as the successes of that movement has provided the basis for an impressive expansion of economic and political power of the black middle class. Finding ways to effectively address the problems of the inner-city poor, of all races, is the challenge which confronts us today.[44]

The abandonment of employment and educational objectivity and the reflexive use of quotas exacerbate racism and fail to address the serious problems faced by America's truly underclass. What is needed are efforts to confront remaining obstacles so that minorities can take advantage of the opportunities secured by the civil rights laws. The economic barriers separating minorities from the American mainstream are the type of barriers that affirmative action originally was intended to overcome: practical obstacles, some the result of discrimination and some not, that prevented individuals from securing the opportunities promised by civil rights laws. By pursuing an affirmative action strategy of redressing problems of economic mobility and human capital development, the unfinished business of the civil rights movement can be completed.

Conservatives since the 1960s have consigned themselves to a marginal role in the civil rights debate, acting as opponents to civil rights or passive bystanders while liberals dictated the terms of the debate. Many civil rights policies of the past quarter century have failed to aid the most disadvantaged individuals in our society. These policies also have perpetuated racial divisions

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44 Loury, *op. cit.*

among Americans. This dismal status quo can change only if conservatives reclaim the moral high ground and assume a positive leadership role in civil rights issues in the coming decade. This leadership can be achieved by pursuing a strategy of vigorous law enforcement and individual empowerment.

Prepared for The Heritage Foundation by
Clint Bolick
Director, Landmark Legal Foundation Center for Civil Rights
and
Mark B. Liedl
Director of Special Projects
The Heritage Foundation

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THE WHITE HOUSE

WASHINGTON

May 30, 1990

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: ROGER B. PORTER RBP

SUBJECT: Civil Rights Developments

Yesterday afternoon I convened another meeting to discuss recent developments with regard to civil rights legislation. Given all the players in the executive branch, the Congress, and in outside organizations, it is important that we compare notes frequently and make certain our efforts are coordinated. This is an issue on which we do not want to be sending mixed signals.

The meeting included Boyden Gray, Jim Cicconi, Marianne McGettigan, Tony Schall from Justice (John Dunne was out of town), David Fortney (Labor), and Lee Liberman and Fred Nelson from the Counsel's Office.

Our discussion focused on the following:

1. Marianne McGettigan was informed by a reliable source that the Senate Committee Report (which you told Senator Kennedy was a precondition to further discussions) may be ready for our review as early as tomorrow, May 31.

2. Tony Schall reported that John Dunne has not yet held meetings with the Arthur Fletcher group and will not do so until we have reviewed a copy of the Senate Committee Report and have had time to review it.

3. Marianne McGettigan and Fred Nelson reported on a meeting they held earlier in the day at the request of several business groups including the Chamber of Commerce, the Business Roundtable, the Labor Policy Association, and the National Association of Manufacturers. The business group representatives indicated they were most concerned about the remedies portion of the bill and the potential for an explosion in litigation as a result of extending broadly compensatory and punitive damage awards. They also indicated they are starting to motivate their members. We have heard this before on other issues. We will wait and see.

4. We agreed that the approach we have developed on Wards Cove is a sound one, but that we may be on a slippery slope with respect to remedies.

5. Our discussion of remedies concluded that:

a. Given the President's statement in the Rose Garden that he supports remedies adequate to deter on-the-job harassment based on sex, religion, or national origin, etc. there is an expectation that he will support a change in current law regarding remedies for on-the-job harassment; and

b. That this will undoubtedly be used by proponents of Kennedy-Hawkins to open the remedies door much further.

6. In an effort to limit the expansion of remedies we agreed that:

a. We need better intelligence from both the House and the Senate as to where several key Members of Congress stand and how they would vote if this were the only unresolved issue in the bill.

b. Our office, working with the Counsel's Office, Justice, and Labor would develop a set of options and arguments for limiting the expansion of remedies to on-the-job harassment and precluding the use of jury trials.

c. There is a need to provide a standard to which members of Congress could repair, particularly if this is the last remaining issue. This will need to be positive given what we are picking up with respect to the intransigence of some women's groups to accepting anything less than full Section 1981 remedies.

cc: C. Boyden Gray
James W. Cicconi
Marianne McGettigan

Document No. 140899SS

# WHITE HOUSE STAFFING MEMORANDUM

DATE: 5/16/90 ACTION/CONCURRENCE/COMMENT DUE BY: ---

SUBJECT: PRESIDENTIAL REMARKS: CIVIL RIGHTS COMMISSION

| | ACTION | FYI | | ACTION | FYI |
|---|---|---|---|---|---|
| VICE PRESIDENT | ☐ | ☑ | MCCLURE | ☐ | ☑ |
| SUNUNU | ☐ | ☐ | NEWMAN | ☐ | ☐ |
| SCOWCROFT | ☐ | ☑ | PORTER | ☐ | ☑ |
| DARMAN | ☐ | ☑ | ROGICH | ☐ | ☑ |
| BATES | ☐ | ☑ | UNTERMEYER | ☐ | ☐ |
| CARD | ☐ | ☑ | ROGERS | ☐ | ☑ |
| CICCONI | ☐ | ☑ | WINSTON | ☐ | ☑ |
| DEMAREST | ☐ | ☑ | PINKERTON | ☐ | ☑ |
| FITZWATER | ☐ | ☑ | _____ | ☐ | ☐ |
| GRAY | ☐ | ☑ | _____ | ☐ | ☐ |
| HAGIN | ☐ | ☐ | _____ | ☐ | ☐ |

REMARKS:

The attached has been forwarded to the President.

RESPONSE:

James W. Cicconi
Assistant to the President
and Deputy to the Chief of Staff
Ext. 2702

THE WHITE HOUSE

WASHINGTON

1990 MAY 16 AM 9:11

May 16, 1990

INFORMATION

MEMORANDUM TO THE PRESIDENT

THROUGH: CHRISS WINSTON

FROM: MARK LANGE

SUBJECT: REMARKS FOR THE CIVIL RIGHTS COMMISSION

I. SUMMARY

On Thursday, May 17, at 10:00 a.m. you will make remarks at the gathering of the leaders of the U.S. civil rights movement. The event will take place in the Rose Garden and your remarks are twelve minutes in length and will be on speechcards.

II. DISCUSSION

The attached remarks cite the advance of democracy around the world as an added impetus for civil rights vigilance here at home -- and outline three principles that should guide any new legislation. The remarks also suggest that Congress should be held to the same civil rights standards as the private section.

In particular, you emphasize a common understanding that new legislation should avoid the unintended consequence of racial quotas. Instead, you call for a broader agenda of empowerment for all minorities.

(Lange/Cawley)
May 16, 1990
3:30 p.m.
[AFFIRM.DOC]

1990 MAY 16 PM 3:53

PRESIDENTIAL REMARKS: NATIONAL COMMISSION ON CIVIL RIGHTS
THE ROSE GARDEN
THURSDAY, MAY 17, 1990
10:00 A.M.

Thank you all. Attorney General Thornburgh. Chairman Fletcher, Commissioners Buckley, Ramirez, and Redenbaugh [RED-in-bao]; Wilfredo Gonzalez, Regional Directors and State Advisory Committee Chairpersons:

It's an honor to have you here today. We meet at a very hopeful moment worldwide. A time when the thundering cry for freedom is being heard and answered from Panama to Johannesburg to Warsaw. Around the world, peoples warring against tyranny, citizens struggling against state control, economies weary of bureaucratic central planning, all are looking to America as reason for hope -- the bright star by which to chart their course to freedom.

So it's all the more crucial now that we look carefully to the kind of country we are -- to the state of democracy here in the land of liberty. **We are called upon to ensure that <u>this</u> democracy <u>means</u> opportunity, for all who call it home.** \\

Few have worked harder to deliver the promise of democracy, to make an enduring dream a living reality, than the men and women assembled here today -- and particularly, these men and women behind me.

From its earliest origins, the Commission on Civil Rights has been an independent, bipartisan voice for justice. The

Commissioners, the Directors, the Advisory Committees, all share a cultural diversity, and an intellectual and moral conviction, that are truly America's best. **These men and women have earned our admiration. Today, they deserve our thanks.**

Joining a new Chairman, and my friend of many years, Art Fletcher, are two outstanding additions: Carl Anderson and Russell Redenbaugh [RED-in-bao]. I know Bob Dole shares my admiration for Russell -- a man of impressive credentials -- who knows, as all Americans should know, that physical disability will not be a barrier to service in this Administration. That's why **I remain firmly committed to the landmark "Americans with Disabilities Act" to help ensure equal rights and opportunities for these Americans.** Today I'd like to announce a new member of the Civil Rights Commission: Mr. Charles Pei Wang [PAY WAING] -- President of the China Institute in America, and an outstanding new addition.

Over the last few days I've met to discuss pending civil rights legislation with leaders representing America's rich tapestry of cultural, religious, and ethnic diversity. I got, as I knew I would, a great deal of sound advice. These leaders, this Commission, the Congress, and this Administration, all share a common conviction for equal opportunity. It's a responsibility I have always taken very seriously -- especially now, when our most vital export to the world is democracy.

We must make sure that we as a nation lead by example. We must see that true affirmative action is not reduced to an empty

slogan -- and that this principle has real, living meaning, for all Americans. **We will leave nothing to chance, and no stone unturned, as we work to advance America's civil rights agenda.**

This nation's progress against prejudice -- from the 1964 Civil Rights Act, to the Voting Rights Act, to the Fair Housing and Age Discrimination in Employment Acts -- it has all hinged on the principle that no one in this country should be excluded from opportunity. So, we're committed to enacting new measures -- like the Hate Crimes Statistics Act, the HOPE initiative, and revitalized enforcement of restrictions against employment bias.

This Administration seeks equal opportunity and equal protection under the law for all Americans -- goals that I know are shared by Senator Kennedy and Representative Hawkins. So we've supported efforts to ensure an individual's ability to challenge discriminatory seniority systems. We've also moved to stiffen the penalties for racial discrimination in setting or applying the terms and conditions of employment.

**Today, as we work to ensure that America represents democracy's highest expression, I want to begin by offering three principles that must guide any amendments to our civil rights laws.**

These principles are firmly rooted in the spirit of our current laws -- and after the extensive discussions we've had this week, I think they're principles on which all of us -- including the leadership on the Hill -- can agree. So **I will enthusiastically support legislation that meets these principles.**

First, civil rights legislation must operate to obliterate consideration of race, color, religion, sex, nation of origin, age, or disability from employment decisions. **We seek civil rights legislation that is more effective, not less.** The focus of employers in this country must be on providing equal opportunity for all workers -- not on developing strategies to avoid litigation. No one here today would want me to sign a bill whose unintended consequences are quotas -- because quotas violate the most basic principles of our civil rights tradition, and the promise of democracy.

The surest, most insidious symptom of the perpetuation of injustice was well understood by Dr. Martin Luther King, Jr. Nearly 30 years ago he knew, as Americans of all walks of life know today, that quotas are wrong. He wrote, in fact, that "tokenism can now be seen not only as a useless goal, but as a genuine menace. It is a palliative which relieves emotional distress, but leaves the disease and its ravages unaffected."

**We want to eradicate the disease.** And America's minority communities deserve more than symptomatic relief. They deserve systematic solutions -- strategies that transcend statistics.

We should empower and ennoble our minority communities. We should seek systematic change that allows every American to excel. During my meetings this week, I invited the civil rights leadership to work with me to craft a bill, in the spirit of our record of civil rights legislation, that moves us toward this

goal. I am confident that this can be done. **I want to sign a civil rights bill; I cannot sign a quota bill.**

Second, civil rights legislation must reflect fundamental principles of fairness that apply throughout our legal system: individuals who believe their rights have been violated are entitled to their day in court, and an accuser must shoulder the burden of proof. In every case involving a civil rights dispute, constitutional protections of due process must be preserved.

And third, Federal law should provide an adequate deterrent to sexual or religious harassment, or harassment on the basis of disability in the workplace, and should ensure a speedy end to such discriminatory practices. In improving the remedies, however, our civil rights laws should not be turned into a bonanza for lawyers, encouraging litigation at the expense of conciliation, mediation, or settlement.

Let me add that Congress should subject itself to the same requirements it prescribes for others. In 1972, the Civil Rights Act of 1964 was justly applied to executive agencies and state and local governments. Congress, however, is not yet covered. This inconsistency must be remedied, to give Congressional employees and applicants the full protection of the law. The Congress should join the Executive Branch in setting an example for private employers.

We seek strategies that work -- putting power where it belongs: in the hands of people. And that means new ideas, like giving poor parents the power of an alternative, and choice in

where to send their kids to school -- so that all can have access to the best. It means more tenant control and ownership of public housing. Tax credits for child care, to give parents more flexibility and choice. And policies that underwrite prosperity, by encouraging capital flow to businesses in poor neighborhoods.

The door is open wider now than it has ever been -- and together we can open it still wider. Today, an expanding economy is working in the service of civil rights. Let's not set back the clock. Let us look past the differences that divide us, to the shared principles and better natures we have within us.

To the Civil Rights leadership assembled here today: I have offered you my hand, and my word, that together we will make America "open and equal to all." This administration is committed to action that is truly affirmative -- positive action, in every sense -- to strike down all barriers to advancement, of every kind, for all people. We will tolerate no barriers, no bias, no inside tracks, no two-tiered systems, no glass ceilings, and no rungless ladders. \\

Now is the time to extend a hand to all that struggle on the other side -- and to devote our energies to a broader agenda of empowerment, that all might join in this new age of freedom.

Thank you, and God bless you all.

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CR for JHS

THE WHITE HOUSE

WASHINGTON

CIVIL RIGHTS LEGISLATION
MEETING WITH HISPANIC LEADERS
MAY 16, 1990
11:15 A.M.

1. Mr. Fred Alvarez, Former Assistant Secretary
   Department of Labor for Employment Standards
   Partner, Pillsbury, Madison, & Sutro / San Francisco,CA

2. Emilio Bermiss, Chairman
   National Puerto Rican Forum

3. Ms. Esther Buckley, Commissioner
   Civil Rights Commission

4. Mr. Mario Diaz, Chairman
   G.I. Forum of the United States

5. Ms. Patricia Diaz Dennis, Partner
   Jones, Day, Reavis, & Poague

6. Mr. Ruben Franco, President
   Puerto Rican Legal Defense & Education Fund

7. Mr. Tony Gallegos, Commissioner
   Equal Employment Opportunity Commission

8. Mr. Willie Gonzalez, Executive Director
   Civil Rights Commission

9. Ms. Regina Montoya, Partner
   Akin, Gump, Strauss, Hauer, & Feld / Dallas, TX.

10. Mario Moreno, Washington, D.C. Counsel
    Mexican & American Legal Defense & Education Fund

11. Harry Pacheon, President
    National Association of Latino Elected Officials

12. Jess Quintero, Vice President / Eastern Region
    League of United Latin American Citizens

13. Mr. Joe Ramirez, Vice President, & Deputy General Counsel
    Labor and Employment Relations, AT&T

14. Mr. Jaime Ramon, General Counsel
    Office of Personnel Management

15. Raul Yzaguirre, President
    National Council of La Raza

ER for JHS.

THE WHITE HOUSE

WASHINGTON

CIVIL RIGHTS LEGISLATION
MEETING WITH VARIOUS CONSTITUENCIES
MAY 16, 1990
1:15 P.M.

1. Clint Bolick
   Director of Center for Civil Rights
   Landmark Legal Center for Civil Rights

2. Susan Bracken
   Executive Director
   Eagle Forum

3. Anne Bryant
   Executive Director
   American Association of University Women

4. Alan Cheung
   Director of Public Affairs
   Organization of Chinese Americans

5. Justin Dart
   Chairman
   President's Committee on Employment of People with Disabilities

6. Linda Dorian
   Executive Director
   The National Federation of Business and Professional Women's Clubs, Inc.

7. Meyer Eisenberg
   Chairman, National Legal Affairs Committee
   Anti-Defamation League of B'nai B'rith

8. Judy Golub
   Associate Washington Representative
   American Jewish Committee

9. Pat Harrison
   President
   National Women's Economic Alliance

10. Michael Hill
    Assistant Director, Office of Government Liaison
    U.S. Catholic Conference

11. Paul Igasaki
    Executive Director
    Japanese American Citizens League

12. Evan Kemp
Chairman
Equal Employment Opportunity Commission

13. Judy Lichtman
President
Women's Legal Defense Fund

14. Mark Liedel
Director of Special Projects
Heritage Foundation

15. Jordan Lorence
Litigation Director
Concerned Women for America

16. Ralph Neas
Executive Director
Leadership Conference on Civil Rights

17. Ricky Silberman
Vice Chairman
Equal Employment Opportunity Commission

18. Carey Stacy
President
National Association of Women Business Owners

19. David Zwiebel
Director of Government Affairs and General Counsel
Agudath Israel

THE WHITE HOUSE

WASHINGTON

MAY 13, 1990

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: JEFF VOGT ASSISTANT DIRECTOR, PUBLIC LIAISON

SUBJECT: MONDAY, 11:30 A.M. CIVIL RIGHTS LEGISLATION MEETING WITH ATTORNEYS, BUSINESS, ASSOCIATION AND FOUNDATION LEADERS

Sir, attached is the list of attendees and talking points for the Civil Rights legislation meeting on Monday at 11:30 a.m. in the Roosevelt Room.

Also attached for your information is the President's briefing memorandum for his meeting with black leaders at 1:30 p.m.

Thank you.

cc: Bobbie Kilberg

THE WHITE HOUSE

WASHINGTON

**CIVIL RIGHTS LEGISLATION MEETING**
**CORPORATE PERSONNEL MANAGERS, ATTORNEYS, ASSOCIATION AND FOUNDATION LEADERS**
**MONDAY, 11:30 A.M., THE ROOSEVELT ROOM**

Michael Baroody, Senior Vice President
National Association of Manufacturers

Marshall Phelps, Vice President, Human Resources
IBM Corporation

Ken Cribb, President
Inter Collegiate Studies Institute

Fred Krebs, Department Affairs Manager, Business-Government Policy
U.S. Chamber of Commerce

John Galles, Executive Vice President
National Small Business United

Lillian Gorman, Senior Vice President, Human Resources
First Interstate Bank

Katherine Hagen, Attorney and Human Resource Specialist; Leader of Business Roundtable Human Resources Task Force
AT&T Corporation

Eugene L. Hartwig, Senior Vice President, General Counsel & Secretary; Past Chairman of ABA Labor & Employment Law Section
Kelly Services, Inc.

William J. Kilberg, Partner
Gibson, Dunn & Crutcher; Former Solicitor, U.S. Department of Labor

Sharon Lambly, Vice President, Human Resources
Hershey Foods Corporation

Lloyd Loomis, Senior Corporate Counsel, Employee Relations
ARCO

Susan Meisinger, Vice President, Government Affairs
Society for Human Resource Management

Donald Miller, Vice President, Human Resources
Dow Jones

Thomas B. Moorhead, Vice President, Human Resources
Carter-Wallace Pharmaceutical Corp., Incorporated

John Stirk, Vice President, Government Affairs
General Dynamics

John Motley, Vice President, Government Relations
National Federation of Independent Business

Lois Rice, Senior Vice President, Government Affairs
Control Data Corporation

John Satagaj, President
Small Business Legislative Council

Joshua Smith, Chairman
Maxima Corporation; Chairman, President's Minority Business Development Commission

Mary Tavenner, Vice President
National Assocation of Wholesaler-Distributors

Calvin E. Tyler, Senior Vice President, Personnel
United Parcel Service

Paul Weyrich, President
Free Congress Research and Education Foundation

THE WHITE HOUSE

WASHINGTON

TALKING POINTS
CIVIL RIGHTS LEGISLATION MEETING WITH CORPORATE PERSONNEL MANAGERS, ATTORNEYS, ASSOCIATION AND FOUNDATION LEADERS
MONDAY, MAY 14, 11:30 A.M.
THE ROOSEVELT ROOM

-- Thank you for coming today. I know some of you have come a long distance to be here, and we are grateful to you.

-- We want to get your views on the potential effects of the Kennedy/Hawkins bill and your views on the Bush legislation. As you know, the Kennedy/Hawkins bill, in its present form, would in effect institute a quota system in hiring and promotion. This Administration is opposed to quotas and does not believe they are consistent with the equal employment vision that we all share.

-- Because most of you are corporate human resource managers, and thus will be on the front lines having to deal with this legislation, should it become law, we have called this meeting to get your input. I would like to discuss the major points of both the Bush and Kennedy-Hawkins bill as they affect you. In particular, I'd like you to address the issues surrounding statistical imbalances, the issues of quotas, remedies and challenges to consent decrees. I am also open to discussing any other aspects of the bills with you.

-- As you know, this President is committed to civil rights and equal employment opportunity. The first 17 months of this Administration has seen good progress:
a) The Civil Rights Commission has been reauthorized and under the able leadership of Art Fletcher it has been revitalized.
b) The President strongly supports the intent of the Americans with Disabilities Act -- which is well on its way to enactment -- to fulfill his pledge to help bring more disabled into the workplace and into the mainstream. We want to achieve this objective without adversely affecting the business community's productivity.
c) And, finally, the President recently signed into law the Hate Crime Statistics Act.

-- President Bush has a solid record against discrimination and harassment in employment.

THE WHITE HOUSE

WASHINGTON

MEETING ON CIVIL RIGHTS LEGISLATION WITH BLACK LEADERS

DATE: MAY 14, 1990
TIME: 1:30 P.M.
LOCATION: ROOSEVELT ROOM

THROUGH: DAVID DEMAREST CWH for DD
ASSISTANT TO THE PRESIDENT FOR
COMMUNICATIONS

FROM: BOBBIE KILBERG BK
DEPUTY ASSISTANT TO THE PRESIDENT FOR
PUBLIC LIAISON

I. PURPOSE

To listen to the views of Black leaders about the Bush and Kennedy-Hawkins civil rights bills presently pending in Congress.

II. BACKGROUND

You will have three listening sessions with relevant constituency groups on the pending civil rights legislation. This session will be with leaders from the Black community and it will be followed on March 16 with two additional sessions: a meeting of Hispanic leaders and a meeting that will include representatives from the Jewish, Catholic and Asian communities, women's organizations, the disabled community, and conservative think-tanks.

This session with Black leaders will include individuals who are supporters of Kennedy-Hawkins as well as individuals who oppose Kennedy-Hawkins and are supportive of the Bush legislation. Proponents of Kennedy-Hawkins will be in the clear majority around the table. We have made a concerted effort to invite a number of Black leaders who disagree with the Kennedy-Hawkins bill so that you would be presented with full arguments from both perspectives.

We have asked the attendees to address the specific provisions of the bills and expect that they will concentrate on the issues surrounding statistical imbalances, the issues of quotas, remedies and challenges to consent decrees. The participants understand that this is a listening session and it is thus appropriate for you not to give specific substantive responses to their arguments.

Art Fletcher, Civil Rights Commission Chairman, will moderate the discussion.

III. PARTICIPANTS

The President
Attorney General Thornburgh
Governor Sununu
Boyden Gray
Roger Porter
Fred McClure

Please see attached list for outside participants.

IV. SEQUENCE OF EVENTS

--President enters Roosevelt Room and greets guests.
--President makes brief opening remarks.
--President turns to Art Fletcher to open discussion and moderate.
--President listens to participants.
--President departs

V. MEDIA COVERAGE

Press Pool.

Talking Points provided by Office of Public Liaison and Office of Policy Development.

THE WHITE HOUSE

WASHINGTON

CIVIL RIGHTS LEGISLATION
ATTENDEES TO MEETING WITH BLACK LEADERS

Julius Chambers
Director Counsel (President)
NAACP Legal Defense Fund

William Coleman
Chairman of the Board, NAACP Legal Defense Fund
Former Secretary of Transportation

Drew Days, III
Law Professor, Yale University
Former Assistant Attorney General for Civil Rights

Arthur Fletcher
Chairman, U.S. Civil Rights Commission
Former Assistant Secretary for Employment Standards,
Department of Labor

Thaddeus Garrett
President, Garrett & Co.
Former Assistant to Vice President Bush for Domestic Policy

Benjamin Hooks
Executive Director
NAACP

Dorothy Height
President
National Council of Negro Women

John Jacob
President and CEO, National Urban League
Chairman, Black Leadership Forum

Eddie Williams
President
Joint Center for Political Studies

Ramona Edelin
President
National Urban Coalition

Keith Butler
Detroit City Councilman

Leonard Coleman
Chairman, One to One Foundation (NJ.)
Vice President, Kidder, Peabody

Robert Woodson
President
National Center for Neighborhood Enterprise

Shelby Steele
Professor of English
San Jose State University

Buster Soaries
Assistant Pastor, Shiloh Baptist Church (Trenton, NJ)

Connie Newman
Director
Office of Personnel Management

THE WHITE HOUSE

WASHINGTON

MAY 11, 1990

MEMORANDUM FOR GOVERNOR SUNUNU
ANDY CARD
JIM CICCONI
BOYDEN GRAY
FRED MCCLURE
ROGER PORTER
JOE HAGIN
ED ROGERS
BILL KRISTOL
MARIANNE MCGETTIGAN
LEE LIEBERMAN
MICHAEL JACKSON

FROM: DAVID DEMAREST BK for DD
BOBBIE KILBERG BK

SUBJECT: MEETINGS WITH CONSTITUENCY GROUPS ON CIVIL RIGHTS LEGISLATION

The following are the meeting schedules for the President and Governor Sununu:

The President

Monday, May 14; 1:30 p.m., Roosevelt Room: Black Leaders

Wednesday, May 16; 11:15 a.m., Roosevelt Room: Hispanic Leaders

Wednesday, May 16; 1:15 p.m., Roosevelt Room: Other Constituencies

Governor Sununu

Monday, May 14; 11:30 a.m., Roosevelt Room: Corporate Personnel Managers, Attorneys, Association and Foundation Leaders

Tuesday, May 15; 5:00 p.m., Roosevelt Room: Union Leaders

Please let us know which meetings you plan to attend by calling Terri Woods at ext. 7900.

The Attorney General will attend all five meetings.

THE WHITE HOUSE
WASHINGTON

DATE: 5-9-90

TO: Ed Rogers

FROM: DAVID M. CARNEY
Special Assistant to the President
and Deputy Director,
Office of Political Affairs

FYI,
Bobbie Kilberg has
included her Husband
on the list of Corporate and
Union Types to meet
w/POTUS on Civil Rights -
#15 Page 2

Otherwise
all ok

THE WHITE HOUSE

WASHINGTON

CIVIL RIGHTS LEGISLATION MEETING: CORPORATE PERSONNEL MANAGERS, LAWYERS, ASSOCIATION REPRESENTATIVES AND UNIONS

1. Calvin E. Tyler, Jr., Senior Vice President, Personnel
   United Parcel Service

2. James R. Simpson, Vice President, Human Resources
   Times-Mirror, Inc.

3. Thomas Morehead, Vice President, Human Resources
   Carter-Wallace Pharmaceutical Co.,Inc.

4. Lloyd Loomis, Senior Corporate Counsel, Employee Relations
   ARCO

5. Lillian Gorman, Senior Vice President, Human Resources
   First Interstate Bank

6. James R. Gilland, Senior Vice President & General Counsel
   Prudential Insurance Co.

7. Donald Miller, Vice President, Human Resources
   Dow Jones

8. Frank P. Doyle, Senior Vice President, Corporate Relations
   General Electric

9. Donald Reed, Vice President, Human Resources
   Nynex

10. Arch H. Rambeau, Vice President, Human Resources
    General Dynamics Corp.

11. Eugene L. Hartwig, Senior Vice President, General Counsel & Secretary; Past Chairman of ABA Labor & Employment Law Section
    Kelly Services, Inc.

12. Richard McAloon, Vice President, Corporate Human Resources
    Aetna Life & Casualty Co.

13. Michael Baroody, Senior Vice President
    National Association of Manufacturers

14. Christine Russell, House Legislative Affairs Director
U.S. Chamber of Commerce

15. William J. Kilberg
Managing Partner, Gibson, Dunn & Crutcher
Former Solicitor, U.S. Department of Labor

16. Alan Kranowitz, Vice President
National Association of Wholesaler-Distributors

17. Larry Gold, General Counsel
AFL-CIO

18. ----------
International Teamsters Union

19. ----------
Marine Engineers Beneficial Association

20. Susan Meisinger, Vice President, Government Affairs
Society for Human Resource Management

THE WHITE HOUSE

WASHINGTON

CIVIL RIGHTS LEGISLATION
POSSIBLE ATTENDEES TO MEETING OF BLACK LEADERS

1. Julius Chambers
   Director Counsel (President)
   NAACP Legal Defense Fund

2. William Coleman
   Chairman of the Board, NAACP Legal Defense Fund
   Former Secretary of Transportation, Ford Administration

3. Drew Days, III
   Law Professor, Yale University
   Former Assistant Attorney General for Civil Rights, Carter Administration

4. Arthur Fletcher
   Chairman, U.S. Civil Rights Commission
   Former Assistant Secretary, Department of Labor, Nixon Administration

5. Thaddeus Garrett
   President, Garrett & Co.
   Former Senior Aide, Vice President Bush

6. Benjamin Hooks
   Executive Director
   NAACP

7. Dorothy Height
   President
   National Council of Negro Women

8. John Jacob
   President and CEO, National Urban League
   Chairman, Black Leadership Forum

9. Eddie Williams
   President
   Joint Center for Political Studies

10. Tom Sowell
Senior Fellow
Hoover Institution

11. Bob Woodson
President
National Center for Neighborhood Enterprise

12. Glen Loury
Professor
John F. Kennedy School of Government
Harvard University

13. Alan Keyes
President
Citizens Against Government Waste

14. Walter Williams
Economist
George Mason University

THE WHITE HOUSE

WASHINGTON

May 4, 1990

MEMORANDUM FOR THE PRESIDENT

FROM: C. BOYDEN GRAY (S)

SUBJECT: Civil Rights

The House Committee amendment made recently to the Kennedy-Hawkins bill will not significantly alleviate the pressure that the legislation would put on employers to adopt hiring quotas. Several other significant problems with the bill also remain.

Under the bill's original language, a business whose workforce does not mirror the racial, ethnic, sexual, or religious composition of the pool of available workers would have to demonstrate that its hiring practices are demanded by "business necessity" as "essential to effective job performance." The new version retains the "business necessity" language, but defines that test as requiring the employer to prove by "objective evidence" that its employment practices "bear a substantial and demonstrable relationship to effective job performance." That standard contrasts with present law requiring employers to produce evidence that a challenged hiring practice is job related.

The bill as revised thus imposes complicated new litigation risks on employers, shifting the burden of proof and requiring that a practice be not merely job related but "substantially" and "demonstrably" so. It also adds difficult new evidentiary requirements. Employers not wanting to run the risk of costly litigation inevitably would concentrate on hiring by race, sex and religion rather than by qualification.

Employment criteria helpful to job performance but not sufficiently "substantial"--or not "demonstrably" so through "objective" scientific evidence--would not meet the new standard. The bill would leave courts free to conclude that unless the employer ensures the requisite statistical balance:

- o A fast food restaurant interested in keeping kids in school could not refuse to hire drop-outs as hamburger grillers, because it could not prove that a school degree is "substantially" related to effective job performance.

- o A factory could not refuse to hire employees with admitted records of <u>past</u> illegal drug use (although the bill makes an exception allowing employers to refuse to hire <u>current</u> users or possessors of drugs.)

- o Police forces in many communities could not refuse to hire people with criminal records.

Why legitimate, job related criteria should be impermissible, especially in today's competitive world market, is not clear. Moreover, by shifting the burden of proof to employers whose "numbers are off" and by eliminating the requirement that plaintiffs identify the employment practice complained of, the bill would alter the nature of our civil rights laws to permit attacks based simply on "bottom line" statistics.

The bill has other problems:

- o It would unconstitutionally deny a day in court for workers who wish to challenge quota systems approved by courts in settlement of litigation to which the new victims were not party.

- o It would upset Title VII's current remedies system by providing for jury trials leading to compensatory and punitive damages for intentional violations (a matter of special concern to business groups, especially in light of the ADA).

- o It provides that all civil rights laws and remedial schemes are to be "broadly construed", rather than simply read according to their terms as enacted.

- o Several other technical difficulties also remain.

cc: Andrew H. Card, Jr.
Edward M. Rogers, Jr.

# Coalitions for America

115139

Paul M. Weyrich
National Chairman
Eric Licht
President
M. Kimberly Roberts
Director
Library Court
Social Issues
Stanton
Defense & Foreign Policy
Kingston
Budget & Economic Policy
721 Group
Judicial & Legal Policy
Carroll Group
Catholic Coalition
The Omega Alliance
Young Activist Coalition
Resistance Support Alliance
Freedom Fighter Policy
Jewish/Conservative Alliance

721 Second Street
Capitol Hill
Washington, D.C. 20002
(202) 546-3003

February 16, 1990

**MEMORANDUM**

TO: John Sununu

FROM: Paul Weyrich PW

RE: Administration Alternative to the Kennedy Civil Rights Bill.

**SITUATION:** My understanding is that the administration has been asked by House Republicans to prepare an alternative to the election - year Democratic Civil Rights Bill. My further understanding is that the administration is considering forwarding a proposal which would reverse two of the Supreme Court cases addressed by the Kennedy bill, but would contain none of the administration's own priorities.

**ANALYSIS:** An examination of the administration's alternatives on guns, Clean Air, minimum wage, etc., has led me to the following conclusions:

(1) The administration will get no credit in the press for embracing any portion of the Kennedy agenda short of 100%.

(2) The administration's alternative on the gun bill contained a greater percent of its own priorities than any of the other administration alternatives -- death penalty, habeas corpus, and exclusionary rule. It was subject to fewer attacks in the press than the other alternatives precisely because an attack on the administration bill was tantamount to an attack on the death penalty.

(3) By introducing a substitute consisting of little more than a portion of Kennedy's agenda, the administration would create impetus for the Kennedy bill, subject itself to additional unnecessary attacks in the press, and increase the political damage to Republicans which will result from this issue.

**RECOMMENDATION:** Republicans are not without their own civil rights agenda items. My recommendation is that the administration add some of these items to its alternative. For example:

- Senator Humphrey has introduced legislation to extend civil rights protection to baby girls facing abortions solely on the basis of sex.

- A variety of senators have sought to legislatively prohibit the ability of judges to impose state income and property taxes by judicial fiat.

- Because the Kennedy bill seeks to remove court jurisdiction to review civil rights settlements on constitutional issues (i.e., "court stripping"), bills to remove court jurisdiction to release dangerous criminals from overcrowded jails might be appropriate. Surely, it is an important civil right of minority citizens to be safe in their homes and neighborhoods.

- Absolute prohibitions on quotas -- including provisions to protect Asian - Americans who are currently facing discrimination by so - called "liberal" institutions -- might be considered.

Whether or not any of these particular amendments appeal to you, the point is that the administration substitute should contain the administration's objectives, in addition to Ted Kennedy's objectives.

I will be happy to work with House Republicans in order to arrange an extension of time to work on this.

ID# 115139

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: FEBRUARY 20, 1990

NAME OF CORRESPONDENT: MR. PAUL M. WEYRICH

SUBJECT: RECOMMENDS AN ADMINISTRATION ALTERNATIVE TO
THE KENNEDY CIVIL RIGHTS BILL

| ROUTE TO: OFFICE/AGENCY (STAFF NAME) | ACTION ACT CODE | ACTION DATE YY/MM/DD | DISPOSITION TYPE RESP | DISPOSITION C D | DISPOSITION COMPLETED YY/MM/DD |
|---|---|---|---|---|---|
| JOHN SUNUNU | ORG | 90/02/20 | | | |
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COMMENTS: _____

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

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

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

## OVERVIEW

Attached are a brief summary, legislative history, regulations, court battles, and political ramifications as they relate to Title X of the Public Health Service Act. Most important facts are:

1. Opposition to the reauthorization of Title X is the top priority of every pro-life/pro-family group in the nation;

2. Current Title X regulations are being challenged in the courts and will most likely result in a pro-life victory at the Supreme Court if Title X is not reauthorized;

3. Senator Kennedy's S. 110 is strictly a political scheme to create trouble for the President and GOP. Kennedy's bill puts the President in a no-win situation which will make both pro-life and "pro-choice" forces angry.

4. The White House must do everything in its power to keep S. 110 from reaching the Senate floor.

## TITLE X OF THE PUBLIC HEALTH SERVICE ACT

I. **PROBLEM: KENNEDY'S BILL - S. 110**
[see tab 3]

A. The bill would badly damage the Administration's case in court. The bill itself states that grantees should promote all "options", which in the context of the ongoing litigation means abortion counseling and referral. In addition Kennedy's committee report explicitly repudiates the the pro-life regulations. The following is from the Kennedy committee report (Com. Rep. No. 101-95, 101st Cong., 1st Sess. 15 [1989]):

> "The Committee reasserts its support of the mandate in the existing [1981 guidelines] Title X guidelines for nonreproductive counseling and referral upon request for all options concerning unintended pregnancy."

B. The bill opens the door for federal funding of reserch on new abortion inducing drugs, such as RU-486 - the French abortion pill. The Committee report does not define the following language in the bill: "...bringing to the marketplace, of new and improved contraceptive devices, drugs, and methods..."

C. The bill would also open the door for future funding of abortion counseling services at school-based clinics. The bill authorizes the Secretary to "...make grants to or enter into contracts with public and nonprofit private entities to establish community-based information and education programs to assist individuals in making responsible choices concerning human sexuality, pregnancy,..." This provision would erode the roles of state law, local values, and parental responsibility.

D. In addition, OMB and HHS have voiced opposition to the bill on fiscal and administrative grounds.

E. If this bill reaches the floor, it will probably pass without significant modification. Pro-abortion forces in the House are waiting to see what comes out of the Senate before releasing from the appropriate committee. Thus, the President would be faced with a non-win situation: if he signs, right to life forces will consider him as caving-in on abortion, pro-RU-486, and pro-school based clinics --- if he vetos, pro-abortion forces will consider him anti-contraception and anti-

family planning. The bottom line is, Democrats plan to use this as a major way of creating trouble for the President.

II. **SOLUTION: Keep this bill off the Floor.**

A. We think it is unlikely that Senator Mitchell would bring up this bill unless he knew that there were 60 firm votes to invoke cloture on a certain filibuster. We know that Senator Kennedy is trying to round up commitments from 60 Senators. Obviously, he will need the help of several Republicans. We know that he already has commitments from: Durenberger, Chafee, Cochran, Cohen, Heinz, Jeffords, Kassebaum, Simpson, Specter, Stevens, and Wilson. The White House should seek to pursuade some of these Senators to withdraw their commitment. Best prospects from this group are: Cochran, Simpson and Chafee--all members of the Republican leadership. Durenberger should be with us as he regularly votes pro-life.

In addition, we need to forestall a further defection among Republicans. The following are known to be prime targets of Kennedy: Roth, Warner, Boschwitz, and Hatch. Senator Hatch is a key player, if he firmly came out in opposition to Kennedy's bill, many would follow his example. Whatever can be done to bring Hatch along will help a great deal.

B. Senator Dole must make it clear at the next Republican Policy luncheon that the Kennedy bill is a political attack on the President. The Republican Leader should be asked to lobby the above-named senators as soon as possible. Further, he should be asked to use his relationship with Senator Mitchell to keep S.110 off the Floor. Possibly he could strike a deal involving other legislation.

C. If the bill reaches the floor, the Administration must issue a prompt and clear veto message: the bill promotes abortion, repudiates pro-life regulations, and is contrary to the Administrations block-grant proposal.

D. If this bill stays off the floor, the House probably will not do anything with Title X. It is essential to use the strong arm of the White House.

III. **LEGISLATIVE HISTORY**
[see tab 1]

A. Title X of the Public Health Service Act was enacted in 1970, before abortion was legal, by Pub. L. 91-572. Among other things, it authorized the Secretary of HHS to make grants to public and private nonprofit entities

to establish and operate family planning projects. Section 1008 of Title X, 42 U.S.C. 300a-6 contains the following prohibition which has not been altered since 1970:

> "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning."

B. Congressional intent clearly created a wall of separation between Title X programs and abortion as a method of family planning. The following is from Conf. Rep. No. 91-1667, 97th Cong., 2nd Sess. 8-9 (1970):

> "It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services, and other related medical, information and education activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion in order to make clear this intent."

In addition, Congressman Dingell, a chief sponsor of section 1008, made the following floor statement (116 Cong. Rec. 37375 [1970]):

> "With the 'prohibition of abortion' the committee member clearly intended that abortion is not to be encouraged or promoted in any way through this legislation."

## IV. THE 1981 GUIDELINES - THE EROSION OF CONGRESSIONAL INTENT

[see tab 1]

A. In 1981 HHS issued revised Title X program guidelines. Like previous editions of the guidelines, they did not incorporate prior HHS Office of General Counsel (OGC) opinions providing guidance on abortion counseling, referral and program separation. However, unlike prior guidelines, the new guidelines actually reversed Congressional intent and <u>required</u> Title X projects to engage in abortion-related activities under certain circumstances.

## V. THE REAGAN/BUSH REGULATIONS

[see tab 1]

A. On February 2, 1988, as printed in the Federal <u>Register</u>, regulations were issued establishing clearer standards for compliance with section 1008. The regulations focus the emphasis of the Title X program on its traditional mission and stated intent of Congress: the provision of

preventive family planning services, and the specific prohibition of abortion counseling.

## VI. COURT BATTLE

[see tab 2]

A. Once the pro-life regulations were issued in 1988, they were immediately challenged by the ACLU, Planned Parenthood and other pro-abortion groups in three separate lawsuits. The U.S. Court of Appeals for the Second Circuit has upheld the regulations; rulings are awaited from the First and Tenth Circuits. Most are optimistic that the Supreme Court will ultimately uphold the Reagan/Bush regulations.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Washington DC 20201

# FINAL RULES PROHIBITING USE OF TITLE X FUNDS IN PROGRAMS IN WHICH ABORTION IS A METHOD OF FAMILY PLANNING

## FACT SHEET

- Created in 1970 (P.L. 91-572), the Title X program is a categorical grant program which provides funding for a broad range of family planning services, including contraceptive services, natural family planning, infertility services and treatment for sexually transmitted diseases.

- Administered by the Office of Population Affairs in the Public Health Service, Title X supports approximately 4,000 family planning clinics through 89 grantees and serves an estimated 4.3 million individuals. Over 85 percent of Title X clients are low-income and approximately one-third are adolescents. The FY `88 budget for the program is approximately $140 million.

- Section 1008 of the Public Health Service Act states, "No funds appropriated under this Title shall be used in programs where abortion is a method of family planning."

- Because of continuing concern that the Department has provided inadequate guidance about the scope of this prohibition, the Department published a notice of its proposal to issue new regulations on September 1, 1987.

- The Department received approximately 75,000 comments during the 60-day public comment period from September 1 to November 2, 1987, with a majority supporting the proposed rules.

- The final regulations were printed in the Federal Register on February 2, 1988. They govern the use of federal Title X family planning funds expended to provide services in family planning clinics, including those in county health departments and hospitals as well as private non-profit organizations.

- The rules apply only to Title X projects. Programs not receiving Title X funds are not governed by these rules. The rules do not interfere with activities paid for with funds from another federal program or with non-federal funds.

- The regulations limit Title X funding to those programs which:

  -- do not include abortion as a method of family planning;

  -- do not provide counseling and referral for abortion;

  -- maintain physical and financial separation from prohibited abortion activities; and

  -- do not engage in any activities that encourage, promote, or advocate abortion as a method of family planning.

- In response to public comments, the Department made several modifications and clarifications in the final regulations to:

  -- address concerns about informed consent for family planning services by clarifying that the restrictions in the regulation in no way preclude providers from providing information on risks and benefits of a particular method of contraception (e.g., information accompanying oral contraceptives or IUDs contains information on mortality rates from use of different methods of family planning, including abortion);

  -- modify the requirements for physical and financial separation so that the determination of separation is made on a case-by-case basis according to specific review of criteria established by the Secretary;

  -- make it clear that when a Title X client is in need of emergency medical care (as in the case of an ectopic pregnancy), she should be referred immediately for emergency medical treatment.

- Separate lawsuits have been filed in the District Courts in Denver, Boston and New York challenging the statutory and constitutional bases of the regulations. The Department is currently enjoined from enforcing them with respect to certain grantees under two separate permanent injunctions entered in the Colorado

and Massachusetts cases. Those injunctions cover members of the National Family Planning and Reproductive Health Association, Inc. (NFPRHA), and the Commonwealth of Massachusetts, and most affiliates of Planned Parenthood Federation of America, Inc., among others. The Department has filed appeals in both of those cases.

- In the third case, on June 30, 1988, Judge Stanton in the United States District Court for the Southern District of New York issued an order dismissing the lawsuits filed by the American Civil Liberties Union (ACLU), the State of New York and others plaintiffs finding that the regulations are within the scope of Secretary's authority under Title X and are constitutional. The plaintiffs filed an appeal in this case.

- On May 8, 1989, the U.S. District Court of Appeals for the First Circuit in Boston affirmed the District Court's ruling and upheld the permanent injunction with respect to the enforcement of the regulations. The Department requested an en banc rehearing in the First Circuit and that request has been granted. This case will be reheard in December, 1989. As part of the agreement to rehear the case, the First Circuit vacated its earlier affirmation of the District Court's ruling.

- In the appeal of the New York case, the Second Circuit Court of Appeals on November 1, 1989, upheld the regulations on both statutory and constitutional grounds.

- Arguments have been heard in the appeal of the Colorado case but there has been no decision.

- On August 12, 1988, the Office of Population Affairs sent guidance to the regional offices stating that except where the Department was enjoined from enforcing the regulations, they were to proceed to implement the regulations at the time grant awards are made. All grant applicants are required to provide a certification that they are or are not covered by one of the court injunctions.

- The Department is proceeding to implement the regulations where practicable and where not enjoined, and is examining difficult implementation situations on a case-by-case basis.

- On May 31, 1989, Judge Skinner of the U.S. District Court for Massachusetts ruled that a state that is covered by an injunction but that wishes to comply voluntarily with the regulations is free to do so.

November 2, 1989

United States Senate

MEMORANDUM

John:

Per your request.

Gordon Humphrey

2/26

Pls. call when you're ready to discuss

The Planned Parenthood Federation gets $30 million a year from Title 10. Kennedy's bill would increase this.

# For women, abortion is a tough decision. For President Bush and Tom Tauke, it was a snap.

Twice this year, Congressman Tauke went out of his way to endanger the lives and privacy of women all across America.

In February, he joined President Bush in asking the U.S. Supreme Court to overturn *Roe v. Wade*, the case that made abortion safe and legal in all fifty states.

More recently, he voted against federal Medicaid help for victims of rape and incest too poor to afford their own health care. Even *before* President Bush went out of his own way to veto it.

Tom Tauke is not a doctor. So he probably doesn't know thousands of women were maimed and killed in bloody back-alleys before the Supreme Court upheld safe and legal abortion in 1973.

Nor is he a woman. And maybe that's why he finds it so easy to dismiss the deep concern and outrage most women feel when a few politicians decide to make headlines out of such intensely personal and private decisions.

Most others in Congress aren't doctors and women either.

But unlike Congressman Tauke and President Bush, they respect the American majority view that abortion must remain a private decision, free of government interference.

Tom Tauke went out of his way to urge the Court to make abortion dangerous and illegal again. For every woman. No matter what the circumstances. Then he turned his back on women who are poor and need medical help because of rape and incest.

It's time we let both of them know their irresponsible actions threaten the health and privacy of women.

And that's something we care about here in Iowa. Just like the rest of America.

Please mail the coupon.

President Bush:

Whatever your personal feelings about abortion, you have a responsibility to protect the private choice of others. Stop trying to overturn *Roe v. Wade*. Stop interfering in women's lives.

NAME

ADDRESS

Congressman Tauke:

Whatever your personal feelings about abortion, you were elected to represent the rest of us. We don't want *Roe v. Wade* overturned. We want to keep abortion legal and safe.

NAME

ADDRESS

Forward my messages to President Bush and Rep. Tauke. [ ] I also enclose a donation to support all Planned Parenthood does to reduce the need for abortion, through family planning services and education, while ensuring its safety: __ $15 __ $30 __ $45 __ other.

Planned Parenthood
of Mid-Iowa
P.O. Box 4557, Des Moines, IA 50306



Des Moines Register 12-10-89

**CONFIDENTIAL AND URGENT**

To: Governor John Sununu (c/o Jacki Kennedy)

From: Darla St. Martin, Assoc. Executive Director (626-8826)
Douglas Johnson, Legislative Director (626-8820)

Re: Senator Kennedy's Title 10 bill (S. 110)--
substantive and political problems

Date: February 8, 1990

We are concerned that an important opportunity may soon be lost to prevent the pro-abortion forces from advancing their agenda under the guise of "family planning." If the White House does not intervene now, we could face a messy and probably avoidable veto situation next summer.

The subject of our concern is Senator Kennedy's bill (S. 110) to revamp Title X ("Title 10"), the major federal birth-control program. As we discussed briefly during your Jan. 23 meeting with the assembled pro-life leaders, this bill is substantively one of the greatest threats to pro-life interests likely to be acted on this session. All major components of the pro-life coalition-- NRLC, the Family Research Council, the Southern Baptist Convention, the U.S. Catholic Conference, etc.-- consider stopping this bill a top pro-life priority.

Here's why: Title X was originally established in 1970 as a contraceptive-only program, but pro-abortion HHS administrators and many of the service providers later transformed it into an arm of the abortion industry. Although Title X funds cannot be used directly to pay for abortion procedures, by 1981 Title X guidelines actually required grantees to counsel and refer for abortions. The revised Reagan-Bush Title 10 regulations, issued in 1988, would prohibit promotion of abortion, and return the program to its original contraceptive-only mission.

These pro-life regulations have been challenged by the ACLU, Planned Parenthood and other pro-abortion groups in three separate lawsuits. The U.S. Court of Appeals for the Second Circuit has upheld the regulations; rulings are awaited from the First and Tenth Circuits. We are optimistic that the Supreme Court will ultimately uphold the regulations. That would remove $30 million a year from Planned Parenthood-- the nation's largest chain of abortion clinics, which is already running full-pages ads against Tom Tauke and others-- which would be given instead to organizations which agree to stick to contraception rather than abortion.

Kennedy's bill, however, would badly damage the Administration's case in court. The bill itself states that grantees should promote all "options," which in the context of the ongoing litigation means abortion counseling and referral. Kennedy's committee report explicitly repudiates the Administration's regulations in two places.

There are also very troublesome provisions which could open the door to future funding of abortion counseling services at school-based clinics and

federal funding of research on new abortion-inducing drugs, such as the French abortion pill. Moreover, the OMB has voiced opposition to the bill on fiscal and administrative grounds.

Nevertheless, if the bill reaches the Senate floor anytime soon, it will probably pass without significant modification, and probably rather quickly clear the House as well. Even if ameliorating amendments are adopted in the House, they could be dropped in a conference chaired by Kennedy and Henry Waxman. The final product of Kennedy and Waxman will be fully acceptable to the pro-abortion lobby.

The pro-abortion lobby, and the press, are already beginning to beat the drums that the President is "against family planning" if he does not support Kennedy's bill (see attached). If the bill reaches the White House, the far-reaching pro-abortion ramifications of the bill are likely to be downplayed or ignored in much of the press coverage. A veto could be sustained, but it would be messy.

Thus, a little White House energy at this point, to keep the bill off the Senate floor or delay its consideration, would be well invested.

Yesterday, Senator Kennedy was heard to privately ask Senator Mitchell, "When will you schedule the Title 10 bill?" To which Mitchell responded, "I will schedule it as soon as you get Dole to sign off on it." We respectfully urge, therefore, that you advise Senator Dole of the substantive and political reasons why this bill should be kept off the floor for as long as possible.

Secondly, Senator Hatch has been of two minds on the bill, which contains $1.8 million in funding for a special project in Utah. Senator Hatch, too, would benefit from your guidance regarding the reasons why this bill should not move forward.

Thank you for your consideration of these requests.

f - Family Planning

THE WHITE HOUSE
WASHINGTON

February 22, 1990

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: FRED McCLURE
ROGER B. PORTER

SUBJECT: Amendments to Family Planning Reauthorization

If our effort to prevent Senate consideration of the Title X reauthorization (S. 110) fails, many amendments may be offered. This memorandum summarizes those we may wish to support.

The following caveats should be noted:

1. Any reauthorization bill that the present Congress sends to the President will erode our position in the courts. We do not feel we can prevail on any amendment that would protect sufficiently the ban on abortion counseling now being contested in the courts. Thus Congressional inaction remains our best outcome.

2. As soon as the Senate turns to the bill, we can expect a cloture petition to be filed. If cloture is invoked, a very narrow germaneness rule then applies. To be germane, an amendment must (1) change a number, figure, or date, (2) strike a provision, or (3) limit authorities created by the legislation. Most of our amendments would fail the post-cloture test of germaneness. Non-germane amendments pending when cloture is invoked receive no further consideration. Also, debate is limited to thirty hours post cloture.

3. Any apparent success in the Senate is unlikely to last; House/Senate differences will be resolved in a conference with Rep. Henry Waxman and Sen. Edward Kennedy as the key actors.

The amendments are:

<u>Amendments in the nature of a substitute</u>

Two total substitutes for the Kennedy bill would resolve both the threat to the counseling regulation and our other concerns about S. 110.

- The Administration bill

  Secretary Sullivan sent the Administration bill to the Congress last June. Our bill would make Title X a program of grants solely to states, leaving policy decisions to the states while maintaining the abortion prohibition. It could be offered as an amendment in the nature of a substitute. Its germaneness in a post-cloture situation is not yet known.

- A simple, straightforward reauthorization

  This amendment would continue the program in its current structure for two or three years at the funding level in the President's budget and drop all other provisions of S. 110.

Fixes relating to the abortion counseling regulation

If any of these is offered and rejected, the legislative history thus created makes our chance of prevailing in the abortion counseling litigation near zero. Raising these amendments entails significant risks. The versions are ranked according to their ability to strengthen our position, most to least.

- Write the challenged abortion counseling regulation into the statute.

- Add statutory language to repudiate the report language on the abortion counseling rule: "Nothing in this act shall be construed to permit abortion counseling by Title X grantees."

- Strike the item in the "findings" section of S. 110 that says "sound medical practices require that all individuals be fully informed of their options." This language serves as the hook for report language squashing the abortion counseling rule.

- Try to raise the offensive report language to the statutory language: "Every grantee shall counsel that abortion is an option." This would provide an up or down vote on the unvarnished statement of our opponents' position.

Amendments beyond those on the counseling rule -- GERMANE

- Allow only those organizations which do not provide abortion services to be eligible for Title X funding.

- Prohibit Title X funds from being used to promote homosexuality. This is a concern of Senator Humphrey's based on the New Hampshire grantee who created the "Mutual Caring, Mutual Sharing" curriculum.

- Require parental consent before a minor can receive Title X services.

- Require that parents be notified when a minor obtains Title X services.

Amendments beyond those on the counseling rule -- NON-GERMANE

- Fold the Title X program into the Maternal and Child Health block grant.

- Make Title X services available solely on a means tested basis.

The list of non-germane and barely germane amendments can be made nearly endless.

In addition to the amendments we may wish to advocate or encourage Senators to propound, we must decide whether our opposition to the bill in its present form extends to threatening a veto.

A veto threat will cast a long shadow on the debate. Without a veto threat, those opposed to the Administration's position will see 50 votes rather than 67 as the number they must hold as a coalition. Gathering fifty votes can be done with little difficulty by S. 110's proponents. Without the veto threat they will see no reason to give on anything.

116014

Family Research Council
T.M.
Gary L. Bauer, President

February 19, 1990

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

Dear Governor Sununu:

The Family Research Council, a division of Focus on the Family, joins the Administration in opposing S.110, the Family Planning Amendments of 1989. We believe it is possible to hinder movement of S. 110 on the Senate floor through several approaches.

The Council's opposition to S.110 is multifold. We oppose the general increase of Title X funding, plus the new authorization of $10 million dollars specifically designated for "community-based information and education programs" and the separate authorization of $10 million dollars for the expansion and promotion of the development, marketing, and evaluation of new contraceptive devices, drugs, and methods.

In a time of concern over budget constraints coupled with alarm at the deterioration of the cohesive American family unit, we believe that an intensive study of Title X and its effectiveness in decreasing teenage pregnancies should be undertaken before additional funding occurs.

As stated in the November/December, 1989 issue of Family Policy, nearly twenty years have passed since Congress adopted legislation establishing Title X of the Public Health Service Act. Expenditures and clientele have grown dramatically. The American taxpayer has spent $2.1 billion over the past twenty years, providing services to an estimated 1.5 million teenagers annually. As a result, teenage pregnancy is not declining, but rather, it is escalating. This should raise questions to both lawmakers and the public as to the effectiveness of the Title X program, its future, and what alternatives can be offered to both parents and teenagers.

Our opposition to the $10 million authorization for community information centers is based on a concern that these will provide federal funding for school-based clinics. Opposition to the separate authorization for funding of contraceptive research opens the door, we believe, for research regarding abortifacients.

The involvement of parents in the Title X program is limited at best. The future of the program must be based on inclusion of parental authority and consent, whether on the state and/or federal levels. An example can be seen in the state of Minnesota, where a parental notice law for abortion went into effect in 1981. By 1985, data supplied by the Minnesota Department of Health indicated the number and rate of pregnancies, births, and abortions all dropped significantly for girls under age 18. This suggests that parental involvement is a significant deterrent to adolescent sexual activity.

The Council will view this vote as a pro-life vote.

It is our understanding that the chief sponsor of the bill, Senator Edward M. Kennedy (D-Massachusetts) plans to bring S. 110 to the Senate floor in March if he has the sixty votes necessary to invoke cloture. We would like to make the following recommendations.

1. We recommend that the cloture vote for S.110 be regarded as a party-line vote.

2. If cloture is not invoked, we ask for Administration support of amendments addressing the funding of school based health clinics, contraceptive research that includes abortifacients, and an amendment which allows for parental consent prior to services rendered with Title X funds.

Enclosed is a copy of Family Policy, a copy of the Administration's position as stated in a letter from Secretary Sullivan to Senator Kennedy, copies of newspaper articles and an additional copy of a memorandum sent to you on January 24, 1990 with an addendum.

Thank you for your consideration of this matter. I trust that we will be able to work together on this issue. If you or your staff have any questions, please do not hestitate to contact me or Elizabeth Kepley at 393-2100.

Sincerely,

Gary L. Bauer

Gary L. Bauer
President

GLB:eyk

Enclosures

Family Research Council
T.M.
Gary L. Bauer, President

DATE: JANUARY 24, 1990

MEMORANDUM TO: THE HONORABLE JOHN SUNUNU
CHIEF OF STAFF, THE WHITE HOUSE

FROM: ELIZABETH KEPLEY, DIRECTOR OF GOVERNMENT RELATIONS

RE: S.110, THE FAMILY PLANNING AMENDMENTS OF 1989

Senator Edward Kennedy's priority for the second session of the 101st Congress is to enact S.110 and S.120, two blockbuster pieces of legislation. S. 110, the Family Planning Amendments of 1989, throws open the door to federal funding of school-based clinics and contraceptive research. S.120, the Adolescent Pregnancy Prevention, Care and Research Grants Act of 1989, turns the only federal program advocating abstinence and family values into another Planned Parenthood funding mechanism.

Expected floor action at this time is February. Senator Kennedy has the necessary votes to pass S.110, but there are grave concerns that we have with the bill. Three areas of concern are 1) funding of school based health clinics, 2) funding of contraceptive research that includes abortifacients and 3) the lack of parental consent. Any of these areas, successfully addressed in amendment form, could derail the bill. Grassroots activity in the Senate will create the momentum necessary for House victories.

A multi-pronged strategy is necessary. The first prong is to generate grassroots against the Senators who may vote to invoke cloture. Senator Kennedy claims to have 60 commitments to invoke cloture. This is not accurate. There are "soft" spots in his cloture list. Several offices have indicated that they have not made a commitment to Senator Kennedy regarding a cloture vote.

The following four divisions are Senators who are on Kennedy's cloture list. Each Senator's name is on the list for the following reasons. 1) No commitment has been made. 2) A commitment has been made, but the Senator ie either a Republican, up for re-election, is pro-life and must view this as a pro-life vote, or must see this as a partyline vote (see category 4.)

1. Senators up for re-election in '90 and who are on list

Boren -- staff indicates that they've asked Senator Kennedy's office to take his name off the list

Cochran -- no commitment or decision has been made, although he is on the list

Hatfield -- has agreed to vote to invoke cloture, but is up for re-election

Simpson -- position yet to be determined regarding cloture

2. Senators that have had a pro-life voting record
Durenberger
DeConcini

3. Senators who need constituent activity regarding a vote against invoking cloture
Wilson
Hollings
Stevens

4. Republicans who have agreed to invoke cloture and who are pro-abortion
Chafee
Kassebaum
Packwood
Jeffords
Rudman
Specter

If you have any questions, please do not hesitate to call me at 393-2100.

Family Research Council
T.M.
Gary L. Bauer, President

DATE: FEBRUARY 19, 1990

ADDENDUM TO MEMORANDUM

DATE OF MEMORANDUM: JANUARY 24, 1990

TO: THE HONORABLE JOHN SUNUNU
CHIEF OF STAFF, THE WHITE HOUSE

FROM: ELIZABETH KEPLEY
DIRECTOR OF GOVERNMENT RELATIONS

RE: S.110, THE FAMILY PLANNING AMENDMENT OF 1989

Republican Senators who have not made a formal agreement to invoke cloture are as follows. Republicans not appearing on this list are mentioned under various categories in the memorandum.

Armstrong
Bond
Boschwitz
Burns
Coats
D'Amato
Danforth
Dole
Domenici
Garn
Gorton
Gramm
Grassley
Hatch
Helms
Humphrey
Kasten
Lott
Lugar
Mack
McCain
McClure
McConnell
Murkowski
Nickles
Pressler
Roth
Symms
Thurmond

Wallop
Warner

In addition, Senators John Heinz (R-PA) and William S. Cohen (R-ME) has indicated they will vote for cloture.

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

The Honorable Edward M. Kennedy
Chairman, Committee on
Labor and Human Resources
United States Senate
Washington, D.C. 20510

JUN 23 1989

Dear Mr. Chairman:

This is in response to your request for a report on S. 110, a bill "To revise and extend the programs of assistance under title X of the Public Health Service Act."

In summary, we oppose this legislation for several reasons. First, it is inconsistent with the Administration's 1990 proposal that the current title X categorical family planning program become a program of direct grants to States. In addition, we oppose the proposed increased authorization levels. Finally, we believe that two provisions which would expand current program authorities and provide separate authorizations for these activities are unnecessary.

The bill would revise and extend the title X family planning program for three years, authorizing $163 million in fiscal year 1990, $171 million in fiscal year 1991, and $179.5 million in fiscal year 1992. While continuing the Secretary's authority to make grants and contracts with public or private nonprofit entities to provide family planning services, the bill would repeal the current authority to make formula grants to States for family planning services. Technical assistance, clinical training, and training for educators and counselors would be included as specific areas for which the Secretary would be authorized to make grants and contracts. A separate authorization of $10 million for fiscal year 1990 would be provided for community-based information and education programs to provide information to parents and adolescents about the availability of a broad range of acceptable and effective family planning methods and services. Current authority for biomedical research would be continued and a separate $10 million authorization would be included to expand the ongoing work of the National Institutes of Health (NIH) to promote the development, marketing, and evaluation of new contraceptive devices, drugs, and methods. Finally, the Secretary would be given a new responsibility to collect specific family planning data on an annual basis.

S. 110 is inconsistent with the Administration's proposed 1990 budget, which proposes that the current title X categorical grant program become a program of direct grants to States for the provision of acceptable and effective family planning services, training, service delivery improvement research and information and education activities. Funding would be authorized for the proposed program of State administered grants at $138.3 million in fiscal year 1990 and would contain many of the characteristics of the block grant programs in order to increase State flexibility and thereby give States the ability to make the most effective use of the funds to serve their populations. Within this framework, several key provisions of the current program would be retained, such as the prohibition on abortion as a method of family planning, the requirement for priority in serving low-income families, the requirement that acceptance of services be voluntary, and the encouragement of family participation. We believe that a State administered program of family planing grants is the best approach to the delivery of family planning services to low-income persons in a manner that is flexible and best meets local needs and priorities.

In addition, the provisions of S. 110 which would expand the authority and provide separate authorizations for contraceptive research as well as information and education activities are inconsistent with Administration policy. The proposed expanded authorities are unnecessary since current authorities are sufficiently broad to allow for such activities and, indeed, the Department is already conducting such activities. Sections 301 and 448 of the Public Health Service Act already provide broad authority for contraceptive research, development and evaluation, as well as dissemination activities of the type proposed in S. 110. Further, under the Administration's proposed program, States also would have such broad and flexible authority. We oppose expanding the authorities and increasing authorizations for these specific activities.

We therefore recommend that the bill not be favorably considered.

We are advised by the Office of Management and Budget that enactment of S. 110 would not be in accord with the program of the President.

Sincerely,

/s/ Louis W. Sullivan, M.D.

Louis W. Sullivan, M.D.
Secretary

11 Wash. Times 11 Feb 14, 1990

# Mr. Bush gets sandbagged

Last summer as Metro buses tooled around town bearing Planned Parenthood posters that depicted a bedraggled little girl under a caption that blamed Sen. Jesse Helms for killing her mother, Sen. Edward Kennedy was pushing a bill through the Senate Labor and Human Services Committee that would ensure the continued flow of "Title X" subsidies to Planned Parenthood. If Mr. Kennedy can gather 60 votes to shut off a filibuster, the bill probably will pass Congress and land on the president's desk next October — just before the congressional elections.

Proponents of legalized abortion believe they have the president sandbagged. Mr. Kennedy's "Family Planning Amendments of 1990," as he calls them, aren't about "family planning," which the president claims to support, but about whether the federal government should funnel approximately $150 million a year into clinics that channel teenage girls to abortionists while preventing their parents from knowing about the ordeal.

Two years ago, the Reagan administration issued regulations that withheld family planning grants (Title X money) from agencies that referred women to abortionists. The law that created the grants program (which then-Rep. George Bush sponsored) explicitly states that "no funds appropriated under this Title shall be used in programs where abortion is a method of family planning." But that did not deter the Planned Parenthood Federation of America, other pro-abortion lobbies and the Massachusetts government of Michael Dukakis from seeking injunctions and filing suits claiming that abortion advocates have a First Amendment right to federal money. The U.S. Court of Appeals in New York has upheld the Reagan regulations in one suit; in two others, appeals are pending. Everyone agrees that if the issue goes to the Supreme Court, the administration wins and Planned Parenthood loses.

Mr. Kennedy does not want that to happen. If the president signs his bill, the regulations will be superceded, the court cases will be mooted and federal subsidies will continue flowing to Planned Parenthood and other organizations that help teenage girls gain abortions without their parents' knowledge or consent. This is where the sandbagging comes in: If President Bush vetoes the "Family Planning Amendments" on election eve, you can be sure that he will be accused of bedding down with the "anti-abortion" lobby while saying no to contraception too.

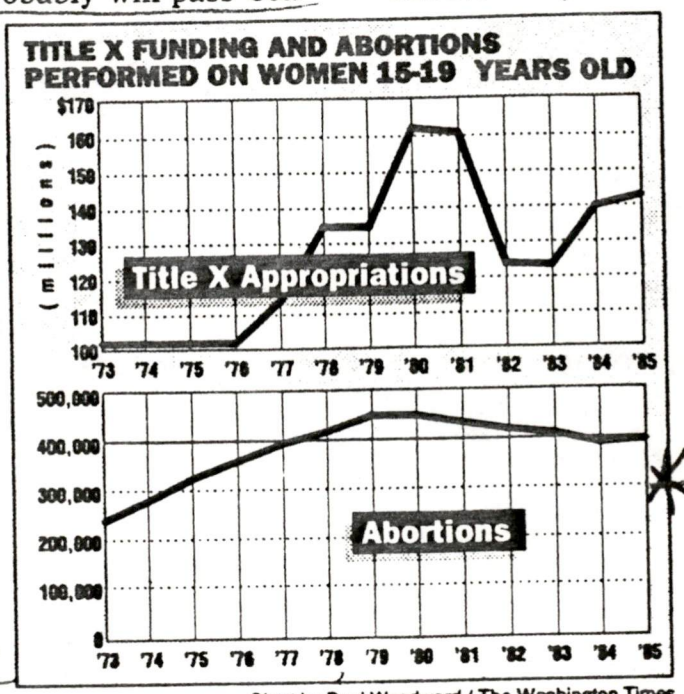


Chart by Paul Woodward / The Washington Times

The president can avoid that setup by demanding discipline among Republican senators. If he doesn't, he will have to veto the bill in October and face the political heat. Either way, he ought to point out that there is no evidence that federal "family planning" programs reduce teen-age abortions (see chart). Besides, the federal government has no business standing between children and parents in order to substitute the state's values and moral guidance for the family's.

THE WALL STREET JOURNAL, FRIDAY, FEBRUARY 2, 1990 p. A 16

# Bush Backs Away From Birth-Control Program As Congress Braces for a Tough Fight on Issue

By KENNETH H. BACON
*Staff Reporter of* THE WALL STREET JOURNAL

WASHINGTON—"No one has to feel timid about discussing birth control anymore," Rep. George Bush declared back in 1970.

Today, though, at least one person does feel timid about the issue: President George Bush, who for political and budgetary reasons is trying to distance himself from the very federal birth-control program he co-sponsored two decades ago.

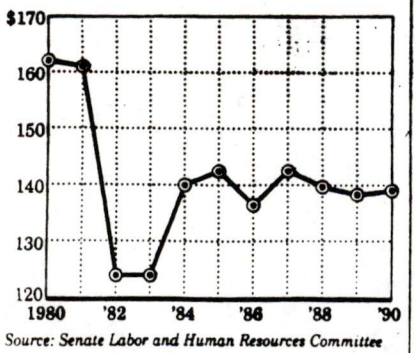
The program is the Family Planning Services and Population Research Act of 1970, which supports a nationwide network of birth-control clinics. The Reagan-Bush administration wasn't kind to the program: During a decade of concern about AIDS, teen-age pregnancy and abortion, it nonetheless was cut from a high of $162 million in 1980 to $139 million this fiscal year. The president proposes the same level of funding for next year.

Now, as Congress prepares formally to reauthorize the program for the first time since 1985, birth-control supporters are confident they have the votes to boost funding for the family-planning program to over $200 million. The administration, though, opposes the increase, leading some critics to suggest that it is kowtowing to anti-abortion activists. Many of these activists dislike the program because some of the same organizations that receive money under the bill also act as abortion-referral centers.

Family-planning forces say such charges miss the point. "A reasonable person would say if you're upset about the level of abortion in this country, you would put as much money as you can into prevention [of pregnancy]," says Jeannie Rosoff, president of the Alan Guttmacher Institute, a family-planning research organization.

**Funding for Family Planning Clinics**

**Federal funding for family planning clinics, in millions of dollars**




*Source: Senate Labor and Human Resources Committee*

Yet, charges Scott Swirling, executive director of the National Family Planning and Reproductive Health Association, President Bush "has totally ignored prevention of pregnancy and focused on abstinence and adoption as an alternative to abortion."

Rep. James Scheuer (D., N.Y.), who worked with Mr. Bush to pass the Family Planning Services Act, says, "It's bizarre that 20 years later he's acting the way he is." After loyally following Mr. Reagan's opposition to abortion and family-planning programs, political pressure from abortion-rights groups may force Mr. Bush to adopt a softer line, Mr. Scheuer predicts. "It's going to take some courage and a lot of pragmatism," Mr. Scheuer adds. But so far, Mr. Bush shows no signs of supporting an expansion of the program he helped pass.

By federal standards, the program is inexpensive and small. But the money helps finance some 4,500 public and private family-planning clinics, which see about 4.3 million women a year. The clinics provide birth-control services, basic reproductive-health care and counseling, as well as some testing for AIDS and other sexually transmitted diseases. Many of the women are low-income, and about one-third are teen-agers.

Birth-control advocates cite a University of California finding that every $1 spent on family-planning services saves the state $11.20 in later medical, welfare and other costs. They also say that improved family planning is the best way to reduce the one million pregnancies and 400,000 abortions unmarried teen-agers have each year.

Federal family-planning funds come from a variety of sources. Medicaid, which provides health care to the very poorest, will spend about $274 million on family planning this year, and far smaller amounts will come from the federal maternal and child health-care program. But the services these funds provide frequently come through clinics. "These health centers are often the first place that low-income women receive medical care, but less than one-half of those eligible for the program are currently being served," says Sen. Edward Kennedy (D., Mass.).

Dr. Daniel Federman of the Harvard Medical School says adolescent sexual activity in the U.S. isn't any greater than in other Western countries, "but our rates of pregnancy, abortion and childbearing are greater than for any other Western country" because of "the lack of broadly available, effective and regularly used family planning and contraception."

Last year, the Senate Labor and Human Resources Committee voted to reauthorize and bolster the family-planning program. Sen. Kennedy, the panel's chairman, says he has lined up 60 supporters for the bill, enough to head off expected filibuster attempts from opponents. In the House, the bill's chief sponsor, Rep. Henry Waxman (D., Calif.), believes that the bill will pass, in part because the changing politics of abortion have created a more favorable climate.

Abortion-rights groups mobilized after the Supreme Court ruled last year in Webster vs. Reproductive Health Services that states can limit the right to abortion. "In the post-Webster environment, a lot of members who are anti-abortion want to be for something positive for women," says lobbyist William Hamilton of the Planned Parenthood Federation of America.

Nevertheless, the Bush administration not only opposes the funding increase but wants to change the current program—which makes grants to 88 public and private agencies that run family-planning clinics—into a program that sends the funds directly to the states. Such "block grants" would encourage local control over the program, making it more efficient and flexible, the administration argues.

Conservatives believe that block grants would make it easier for them to change at the state level one of their primary objections to the federal family-planning program—the fact that it allows teen-agers to receive birth-control assistance without parental knowledge or consent. During his presidential campaign, Mr. Bush said: "I am against supplying birth-control aids to minors without parental consent." Some birth-control advocates worry that Mr. Bush might veto a bill that doesn't require parental consent for teen-agers.

The other major objection the administration and abortion opponents have to the family-planning act is that it allows federally funded clinics to discuss abortion with women and to refer them to abortion clinics. "Title X [as the family-planning law is called] is currently a major source of funds for certain organizations which treat abortion as simply one birth-control option among many," complains Richard Glasow, education director of the National Right to Life Committee.

The Reagan administration issued regulations barring clinics funded under the act from providing counseling or referrals for abortions, but courts have enjoined those rules from taking effect in most parts of the country while considering challenges.

Administration officials fault current family-planning programs for not doing more to encourage abstinence as the best defense against out-of-wedlock teen pregnancy and sexually transmitted diseases. Under the Reagan-era Adolescent Family Life Act, the government spends $9 million a year to support family and community-based efforts to promote sexual abstinence for unmarried adolescents. Among other things, the program has funded abstinence projects in which teen-agers have made posters saying: "Pet your dog, not your date" and "Don't be a louse, wait for your spouse."