Originally Processed With FOIA(s):
1998-0004-F[1]; 1999-0285-F

FOIA Number:
S

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the George Bush Presidential Library Staff.

Record Group/Collection:	George H.W. Bush Presidential Records
Collection/Office of Origin:	Chief of Staff, White House Office of
Series:	Sununu, John, Files
Subseries:	Issues Files

OA/ID Number:	29144
Folder ID Number:	29144-009

Folder Title:
Civil Rights 1990 (1 of 2) [3]

Stack:	Row:	Section:	Shelf:	Position:
G	15	24	7	3

THE WHITE HOUSE

WASHINGTON

file

July 23, 1990

MEMORANDUM FOR JOHN H. SUNUNU
C. BOYDEN GRAY
ROGER PORTER

FROM: FREDERICK D. MCCLURE FM

SUBJECT: House GOP Civil Rights Language

Attached for your information and review is new language on Wards Cove and remedies drafted by the House GOP Leadership Task Force headed by Henry Hyde (R-IL). The Task Force plans to finalize this language today, then commence discussions with Judiciary Committee Chairman Jack Brooks (D-TX) and others. We expect Judiciary Committee markup of the Civil Rights bill (H.R. 4000) to begin Wednesday, with floor action likely to be postponed until after the August recess.

In short, the language

1. eliminates the definition of "business necessity" and requires a respondent (employer) in disparate impact cases "to demonstrate that such practice is substantially related to a legitimate business interest";

2. provides for restitution in willful harassment cases (not to exceed $30,000), if the court finds that such additional equitable remedies are required to deter future violations by the respondent;

3. allows temporary or preliminary injunctive relief for harassment suits; and

4. provides that all actions under Title VII be heard by a judge, an attempt to eliminate jury trials.

With regard to remedies, in response to our questions we have been told that the Task Force plans to add language to strike the remedies section of H.R. 4000 and substitute new Section 8 (pages 2-3 below).

Please provide me with any comments by COB today.

AMENDMENT TO H.R. 4000

On page 3, beginning on line 4, strike all of section 4 and insert the following in lieu thereof:

"SEC. 4. PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.

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

"(k) An unlawful employment practice is established under this section when a complaining party demonstrates that a specific employment practice causes a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is substantially related to a legitimate business interest.".

CONFORMING AMENDMENT:

On page 2, strike lines 19-22. (Deletes definition of "required by business necessity".)

AMENDMENT TO H.R. 4000

"SEC. 8. EQUITABLE RELIEF.

Section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) is amended by adding at the end the following:

"(m)(1) If the court finds that the respondent has willfully engaged in, or is willfully engaging in, an unlawful employment practice based on harassment charged in the complaint, then the respondent shall be liable to pay restitution to the complaining party in an amount not to exceed $30,000.00, provided that the court finds:

(i) that an additional equitable remedy beyond those otherwise available is needed to deter the respondent from future violations of this section; and

(ii) that such an award is otherwise justified by the equities, in addition to any other relief granted under this title.

"(2)(A) Notwithstanding any other provision of this section, if a person is aggrieved by an unlawful employment practice based on harassment, then such person may commence a civil action in an appropriate district court of the United States for temporary or preliminary injunctive relief, without regard to any waiting period that would otherwise prevent the commencement of a civil action under this title.

"(B) In a civil action commenced under subparagraph (A) -

"(i) harassment shall be deemed to cause irreparable harm; and "(ii) the court shall assign such action for hearing at the earliest practicable date and shall cause such action to be expedited in every way.

"(3) For purposes of this subsection, the term 'harassment' means conduct that is sufficiently severe or pervasive so as to alter the terms, conditions, or privileges of employment in a way that creates an abusive working environment.".

"(4) All issues in cases arising under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e to 2000e-17) shall be heard and determined by a judge, as specified in section 706(f) of that Title (42 U.S.C. 2000e-5f).

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From C. Boyden Gray to POTUS Re: Civil Rights (2 pp.)	5/4/90	~~P5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (1 of 2) [3]

Open on Expiration of PRA
(Document Follows)
By SF (NLGB) on 4/21/08

Date Closed:	12/17/2004	**OA/ID Number:**	29144-009
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

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

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

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

PRM. Removed as a personal record misfile.

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

(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

Sloppy = Re issues

John S / CBG —

We need to prepare — everyone

THE WHITE HOUSE

WASHINGTON

THE PRESIDENT HAS SEEN

If I will have to veto —

THE CHIEF of STAFF has seen

May 4, 1990

A highly sensitive matter. We can un-do a lot of good will by mis-handling; yet we cannot accept excessive provisions — GB 5-4-90

MEMORANDUM FOR THE PRESIDENT

FROM: C. BOYDEN GRAY

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:

- 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.

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

- 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:

- 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.

- 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).

- 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.

- Several other technical difficulties also remain.

J/12

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

but not limited to

The term required by business necessity means:

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

(2) in the case of ~~other~~ employment practices not covered by (1) ~~that are not primarily intended to measure job performance~~, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

(such as a plant closing or bankruptcy) or that rules involve relating to drug, [illegible], alcohol or tobacco use,

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

LEGISLATIVE HISTORY

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

and to override the treatment of business necessity as a defence in Wards Cove.

MIGHT TRY TO BE OPEN AND INVENTIVE

pain and suffering

O'MELVENY & MYERS

MEMORANDUM

DATE: September 19, 1990

TO: Honorable John H. Sununu

FROM: William T. Coleman, Jr.

SUBJECT: Letter to the President

Enclosed herewith is the original of the letter which I asked you to give to the President. I am doing it this way rather than sending it to him directly as since I wrote it we did have a conversation and you said you would see me sometime on Friday. In view of the fact that I have to leave the country on Saturday at 5:00 p.m., I wanted to get on the President's schedule if at all possible and therefore my request to him cannot wait until after our meeting on Friday.

Bill

Enclosures

O'MELVENY & MYERS

400 SOUTH HOPE STREET
LOS ANGELES, CALIFORNIA 90071-2899
TELEPHONE (213) 669-6000
TELEX 674122 • FACSIMILE (213) 669-6407

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

610 NEWPORT CENTER DRIVE
NEWPORT BEACH, CALIFORNIA 92660-6429
TELEPHONE (714) 760-9600 • (213) 669-6900
TELEX 4722088 • FACSIMILE (714) 669-6994

CITICORP CENTER
153 EAST 53RD STREET
NEW YORK, NEW YORK 10022-4611
TELEPHONE (212) 326-2000
TELEX 129165 • FACSIMILE (212) 326-2061

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

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

TELEPHONE (202) 383-5300

TELEX 89622 • FACSIMILE (202) 383-5414

EMBARCADERO CENTER WEST
275 BATTERY STREET
SAN FRANCISCO, CALIFORNIA 94111-3305
TELEPHONE (415) 984-8700
FACSIMILE (415) 984-8701

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

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

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

OUR FILE NUMBER

September
19th
1 9 9 0

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

Dear Mr. President:

When you called from Kennebunkport on August 17 you said that I could meet with you about the Civil Rights Act of 1990 if I could not work out the provisions with Governor Sununu. This point has been reached. I know that the Middle East, the unification of Germany, the budget and other issues are pressing, but there soon has to be a decision on the Administration's position with respect to the Civil Rights Act of 1990 as I am advised that the Conference Report will probably be filed by Monday, September 24, 1990.

I and those who voted for the bill in Congress are convinced that the bill, as presently drafted, is not a quota bill. First, it specifically says that it does not call for quotas. Second, as the bill worked its way through Congress six changes were made to assure that it was not a quota bill. Third, as shown by the attached two memoranda, even the Jewish groups, who are most vociferous against quotas, state that this is not a quota bill. Thus, in fairness, any new and subsequent public debate should be on other grounds, which grounds I do not think exist. For, as of today, the bill does not call for quotas, and like Griggs, will not result in the adoption of quotas.

Not so per Byrd

Morris Abram

The points on which you have to exercise final judgment are as follows:

1. Most people, including most people in your Administration, agree that Wards Cove must be overruled. Wards Cove contains two errors: (1) erroneously placing the

burden of proving the lack of business necessity on the plaintiff and (2) lowering the standards of business necessity in selection cases, e.g. hiring, promotion, etc. Appropriate language has been put in the bill which overrules Wards Cove with respect to the burden of proof. This has been accepted by the Administration. The continuing struggle, however, is over how one defines "business necessity" as used in Griggs. Section 3 of the bill defines it as follows:

> "The term 'required by business necessity' means --
>
> "(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or
>
> "(B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer."

Some in the Administration object. At a meeting with Senator Kennedy held on July 12, 1990, Governor Sununu indicated a willingness to accept the following language:

> "The term required by business necessity means:
>
> (1) in the case of employment practices primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to successful performance of the job.
>
> (2) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to a significant business objective of the employer."

You should note that the standards to measure 1 and 2 respectively, are word for word what is in the bill, so there is no dispute over the two standards. The difficulty with other language in the July 12th proposal, however, in addition to the erroneous use of the word "intended" in a statute not based upon intent, is that many in the civil rights movement and other employment lawyers feel that subparagraph (2) will be used to swallow up subparagraph (1). In other words, the courts will not know in which situations to apply subparagraph (1) and in which situations to apply subparagraph (2). And since the standard in (2) is less stringent (or at least different) than the standard that is in (1), there is the fear that (2) would be applied to selection and promotion cases.

In my meetings with Governor Sununu he readily acknowledges that his (1) is to deal with job selection issues and his (2) is to deal with issues of plant closings, bankruptcies, alcohol or smoking restrictions. Regrettably Boyden Gray and I have not been able to settle on mutually acceptable language to codify my understanding with Governor Sununu. To avoid any possible argument that (A) in the bill will swallow up (B) to the disadvantage of the employer, I propose that we handle the issue by adding a new subsection to the present bill as follows:

> "(C) Where the employer proves that its employment decision -- whether or not involving selection -- was based primarily on rules relating to the use of illegal drugs, excessive drinking on the job, attempting to create a smoke free environment or plant termination or bankruptcy such employment decision is to be measured by (B) above and not (A) above."

It seems a public tragedy that we have a situation where the political officers of the Administration agree with the House and Senate but for some reason the lawyers cannot put that agreement into language. I hope that after consultation you would accept the language presently in the bill as is, or with the addition I propose or suggest other language which will accomplish the result Governor Sununu, Senator Kennedy and Coleman all agree upon.

2. The other major issue is damages. Under the Act of 1866 if there is intentional discrimination against blacks in connection with job selection, racial harassment, etc., a black is entitled to back pay and restoration to his job[1], other compensatory damages including pain and suffering, and, in malicious intent cases, to punitive damages. A black is entitled to a jury trial on the compensatory damages and punitive damage issues as the Constitution so requires. Thus, a black always brings suit under the Civil Rights Act of 1964 as well as the Act of 1866. The problem faced here comes about because women are included in the Civil Rights Act of 1964 but not in the Act of 1866. Thus under present law a

---

[1]The two items of relief are also conferred by the Civil Rights Act of 1964, as amended.

woman who proved intentional sexual discrimination, including harassment, would receive only back pay, if any, and a restitution to the job, each of which is considered to be an equitable remedy and thus the Constitution does not require a jury trial. Women rightfully have said that in cases of intentional sexual discrimination they ought to be able to get compensatory damages including pain and suffering and in the egregious cases punitive damages. The House bill caps for businesses with less than 100 employees the punitive damages at the greater of $150,000 or the compensatory damages. The Senate sponsors and the Majority Leader agreed to accept an amendment with the same cap but it applies to all businesses regardless of the number of employees. Thus the issues in the conference on the damage issue are: (a) Does the cap apply to all businesses or only those with less than 100 employees? and (2) perhaps should the cap, as some in the Administration suggest, cover something more than punitive damages?

Obviously these are provisions on which the White House and Congress should reach agreement. In any event, it would be a tragedy of the worst order to veto a bill which black and other minority communities overwhelmingly want and need when the dispute, minuscule by any standards, is how you express agreed upon principles in statutory language.

I stand ready to meet with you at your convenience, but I do have to leave the country at 5:00 p.m. on Saturday, September 23 for Stuttgart, Germany. I will be back in the United States at 9:00 a.m. on Wednesday, September 26, but that might be too late if the House-Senate Conference has acted.

Respectfully,

Bill

William T. Coleman, Jr.

I called Bill Fri 9-21
reported to JS " "
Called Boyden Sat 9-22
Talked Sullivan " " - he suggests Chas Alan Wright

Copy given to Boyden

O'MELVENY & MYERS

MEMORANDUM

DATE: September 21, 1990

TO: Honorable John H. Sununu

FROM: William T. Coleman, Jr.

SUBJECT: Civil Rights Act of 1990

I am aware of the document which Senator Kennedy gave you on September 20, 1990, and, even though I think the proposal I made on September 19 in the letter to the President is the way to go, if the Senator's proposal is the way to bring about closure of the negotiations and get the President's active support before the conference, I would be able to support such resolution.

As I told you, I will be in my office today and tomorrow until 4:30 p.m. (telephone 383-5325). On Sunday after 11:00 a.m. German time I can be reached at the Hotel Graf Zeppelin in Stuttgart at (49) (711) 29-98-81. On Monday and Tuesday I can be reached through the I.B.M. offices that have been set up at the Hotel Graf Zeppelin in Stuttgart at (49) (711) 22-62-893. I intend to leave Stuttgart, Germany at 7:15 a.m. Wednesday morning and will take the Concorde out of Paris landing at JFK at 8:45 a.m. Wednesday morning. From there I will helicopter to Philadelphia and can be reached at CIGNA after 11:00 a.m. through the Secretary's office at 215: 523-5731. I expect to be back in my office by 4:00 p.m. Wednesday.

O'MELVENY & MYERS

400 SOUTH HOPE STREET
LOS ANGELES, CALIFORNIA 90071-2899
TELEPHONE (213) 669-6000
TELEX 674122 • FACSIMILE (213) 669-6407

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

610 NEWPORT CENTER DRIVE
NEWPORT BEACH, CALIFORNIA 92660-6429
TELEPHONE (714) 760-9600 • (213) 669-6900
TELEX 4722088 • FACSIMILE (714) 669-6994

555 13TH STREET, N. W.
WASHINGTON, D. C. 20004-1109
TELEPHONE (202) 383-5300
TELEX 89622 • FACSIMILE (202) 383-5414

CITICORP CENTER
153 EAST 53RD STREET
NEW YORK, NEW YORK 10022-4611
TELEPHONE (212) 326-2000
TELEX 129165 • FACSIMILE (212) 326-2061

EMBARCADERO CENTER WEST
275 BATTERY STREET
SAN FRANCISCO, CALIFORNIA 94111-3305
TELEPHONE (415) 984-8700
FACSIMILE (415) 984-8701

10 FINSBURY SQUARE
LONDON EC2A 1LA
TELEPHONE 01-256 8451
TELEX 918859 • FACSIMILE 01-638 8205

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

WRITER'S DIRECT DIAL NUMBER

OUR FILE NUMBER

FACSIMILE TRANSMISSION

DATE: 9-21-90

 # PAGES TO FOLLOW: 1

TELECOPIER NUMBER: 456-2397

TO: Gov. Sununu

COMPANY:

FROM: Bill Coleman

PHONE: 383-5325

MEMORANDUM:

Our Telecopy Equipment:

PANAFAX UF-520 AUTOMATIC TELECOPIER - Compatible with other Panafax telecopiers and Group II or III standard machine systems.

202-383-5414

PANAFAX UF-600AT AUTOMATIC TELECOPIER - Compatible with other Panafax telecopiers and Group II or III standard machine systems.

202-383-5415

If you do not receive all of the pages, please call (202) 383-5222 as soon as possible.

Rev. 2/1/90

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02a. Memo	From James Cicconi to John Sununu Re: Telephone Calls on Civil Rights Legislation (1 pp.)	6/4/90	~~P5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (1 of 2) [3]

Open on Expiration of PRA
(Document Follows)
By JP (NLGB) on 10/28/05

Date Closed:	12/17/2004	**OA/ID Number:**	29144-009
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

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

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

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

PRM. Removed as a personal record misfile.

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

(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE

WASHINGTON

June 4, 1990

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: JAMES W. CICCONI Jim

SUBJECT: Telephone Calls on Civil Rights Legislation

After discussion with Roger Porter and Fred McClure, we suggest you place calls to the following Members of Congress to seek their views on the civil rights legislation. This is also an opportunity to offer our perspective on the potential for resolving the issue.

Talking points are attached at Tab A, and a copy of a memo explaining our concerns on the various issues is at Tab B.

Calls for Chief of Staff:

Senator Robert Dole
Senator Orrin Hatch
Senator Warren Rudman
Senator Thad Cochran
Senator Slade Gorton (re remedies)

Representative Bob Michel
Representative Henry Hyde
Representative Bill McCollum

In addition to the above, the following Republicans will be contacted early this week:

Porter: Senators Kassebaum, Simpson, Chafee and Boschwitz
Representatives Goodling and Sensenbrenner

McClure: Senators Lott, Kasten, Stevens, McCain, McConnell and Thurmand
Representative Bartlett

Legislative staff calls will also be made to Representatives Gunderson and Fawell

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02b. Memo	Suggested Talking Points for Telephone Calls on Civil Rights Legislation (2 pp.)	6/4/90	~~P-5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (1 of 2) [3]

Open on Expiration of PRA
(Document Follows)
By JJ (NLGB) on 10/28/05

Date Closed: 12/17/2004	**OA/ID Number:** 29144-009
FOIA/SYS Case #: 1998-0004-F[1]	**Appeal Case #:**
Re-review Case #: 2005-0426-S	**Appeal Disposition:**
P-2/P-5 Review Case #:	**Disposition Date:**
AR Case #:	**MR Case #:**
AR Disposition:	**MR Disposition:**
AR Disposition Date:	**MR Disposition Date:**

RESTRICTION CODES

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

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

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

PRM. Removed as a personal record misfile.

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

(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

TALKING POINTS FOR CIVIL RIGHTS
PHONE CALLS

-- The purpose of my call is to hear your thoughts on where the bill stands.

  o Does it still have momentum, or is that decreasing?

  o What level of support is there for the President's position among Republicans?

  o If there are no changes in the bill, what level of support could the President expect on the floor? On an override vote?

-- As you know, the President has said that he wants a bill he can sign, but he cannot sign a "quota bill." This bill, unless changed, is a "quota bill."

-- If, however, the bill's proponents are willing to consider language changes, it is still possible the quota problem can be solved.

  o Lawyers at Justice and the White House have looked at the language closely, and feel that the key areas that need to be changed are those relating to:

    1. broadening the definition of "business necessity" (going beyond the change secured by Danforth); and

    2. requiring a causal link be shown between a specific business practice and a discriminatory effect before shifting the burden to an employer to show business necessity.

  o If the above problems are addressed in full, our lawyers feel the burden of proof question is much less of a problem. More importantly, we feel it would solve the potential quota problem.

  o There are, of course, other problems with the bill that will also need to be solved, including consent decrees; remedies; and discriminatory motives which had no affect on a business decision.

- o We are particularly interested in your views on remedies. Do you think a fix can be limited to on-the-job harassment? (Chafee, Kassebaum, Simpson only)

-- As the President has said, we have hopes that our concerns can be worked out, and that the civil rights groups (if not the Democrats) would see the benefit in doing that. If we were able to secure the types of changes that could ensure against quotas and cure the other major problems with the bill, is that something you and your colleagues could support?

White House Offers a Compromise on Rights Bill

By STEVEN A. HOLMES
Special to The New York Times

WASHINGTON, July 10 — As the Senate began debate today on comprehensive civil rights legislation, the White House has offered what it terms a compromise to avert a threatened veto by President Bush.

The compromise was offered in a letter sent Monday from John H. Sununu, White House chief of staff, to Senator Edward M. Kennedy, the Massachusetts Democrat who is the bill's chief sponsor in the Senate.

Mr. Sununu's proposal deals with the critical issue of who bears the burden of proof in cases where it is alleged that a company's seemingly benign employment practices result in minority members being passed over for jobs or promotions.

Kennedy Rejects the Compromise

Mr. Kennedy said that the proposals in the Sununu letter "have not been satisfactory" but vowed to continue negotiating with the White House.

Last year in a ruling called Wards Cove v. Atonio, the Supreme Court overturned an 18-year-old decision by the Court that allowed plaintiffs to charge discrimination by saying that a business' work force did not reflect the demographics of the local labor pool.

The court had ruled in a 1971 case, Griggs v. Duke Power, that once such a statistical disparity was shown, it was up to the company to demonstrate that the employment practices that produced the disparity were required by business necessity.

In its 5-to-4 Wards Cove decision, the Court said plaintiffs had to show that the practices resulting in the disparity did not serve the company's legitimate employment goals.

In his letter, Mr. Sununu suggested adopting some language from the original Griggs decision that defined what the standard of proof should be. But he also borrowed language from Wards Cove that would allow companies to defend themselves by asserting that a given practice serves "legitimate employment goals."

As it now stands, the bill would place the burden on companies to justify policies that discriminate against minority groups, women or religious sects. But since its introduction in February, debate has centered on who should shoulder the burden of proof and what standards of proof would be required.

While the Administration has expressed concern about other provisions in the bill, most notably the one bolstering the amount in monetary damages juries may award victims of intentional discrimination, the letter only deals with the issue of quotas.

"If we can get the quota problem resolved, it will smooth the way for good faith negotiations on the other issues," said a White House official, who insisted on to be identified.

But spokesmen for civil rights groups said the White House offer does not go far enough to break the deadlock.

"Last year's decisions by the Supreme Court have seriously jeopardized the right of millions of women and minorities to equal job opportunity," Mr. Kennedy said. "Congress should restore the full strength of the anti-discrimination laws, not restore them only part way."

President Bush has said he would like to sign the measure, known as the Civil Rights Act of 1990, although he has vowed to veto any bill that would lead to quotas.

White House Gases

Reduce greenhouse gases? The Bush Administration has again made clear, at the economic summit meeting in Houston, that it wants no part of an international timetable to limit emissions of carbon dioxide, which many fear will lead to a catastrophic warming of the earth's climate.

There are valid arguments against rushing into speculative, costly fixes. But Mr. Bush and his chief of staff, John Sununu, aren't making them. They cloak their inaction in gaseous language and dubious science. That's an insult to the allies and a political embarrassment for Mr. Bush.

The computer models that predict global warming are full of uncertainties — good reason to resist a draconian program to reduce emissions. But these same models, and many scientists, suggest that some warming is likely. And that's reason enough to take sensible precautions.

Chancellor Helmut Kohl says that Germany is prepared to reduce its carbon dioxide emissions by 25 percent in 15 years and urges the allies to follow suit. Some economists think that's an affordable goal. Mr. Sununu thinks it's a recipe for national suicide that would force the U.S. to abandon fossil fuels and drive it into a depression.

Mr. Sununu, whose impatience with environmentalists stops just short of contempt, adumbrates his dark vision with half-truths. Most carbon dioxide emissions, he says, come from decaying vegetation. That's true; but what threatens to shatter the global balance isn't nature but a century of man-made emissions from automobiles, electrical utilities and industry.

Except for the U.S., every industrial nation represented at the summit meeting has pledged to stabilize greenhouse gases. Mr. Bush's negative response might be understandable if he would offer an alternative. But he's been so busy saying no that he hasn't even opened for public discussion any number of sensible ideas to reduce carbon dioxide that are worth pursuing on their own merits.

Compared with other countries, for example, the U.S. uses energy recklessly. Improved automobile mileage standards would improve energy efficiency. So would an energy tax, which, quite apart from its value as insurance against global warming, would ease the deficit. A sensible plan would also include incentives for using forms of energy that don't produce carbon dioxide, like solar and a new generation of safe nuclear plants. There would also be incentives for third world countries to stop the burning of tropical forests, an act of ecological vandalism that releases huge amounts of carbon dioxide.

Mr. Bush takes pride in his innovative clean air bill and his decision to join an international agreement to abolish ozone-threatening chemicals. Those are fine achievements, but they do not unhook him from a campaign promise he made on Aug. 31, 1988.

"Those who think we are powerless to do anything about the 'greenhouse effect' are forgetting about the 'White House effect,'" he said. "As President, I intend to do something about it." Do what?

draft

Statement of Administration Policy

S. 2104 - The Civil Rights Act of 1990

If S. 2104 were presented to the President in its current form, or without substantial modifications that address the problems outlined below, the President's senior advisors would recommend that the bill be vetoed.

In its current form, S. 2104 is inconsistent with our civil rights tradition and basic principles of our legal system. It would lead to invidious distinctions among classes of our citizens and would encourage employers to adopt quota systems for hiring and promotion. The bill would also violate fundamental principles of fairness by closing the courts to certain victims of civil rights violations. Among other objectionable provisions, the bill as drafted would also give unfair advantages to lawyers, impede the settlement of lawsuits, and disrupt the proper operation of the courts.

Section 4 of S. 2104 as drafted would inevitably lead employers overtly or informally to adopt hiring and promotion quotas because, unless an employer's bottom-line numbers are "correct," lawsuits will be certain to be brought and virtually impossible to defend. This will result from the bill's radical and complicated alteration of longstanding rules of civil litigation as they apply to "disparate impact" cases under Title VII of the Civil Rights Act of 1964.

Under Section 4, defendant employers would be required to bear the burden of proof, under a very difficult legal standard, in defending any number of employment practices -- none of which has to have been shown to produce or even contribute to a disparate impact. The Supreme Court has never permitted plaintiffs in disparate impact cases to proceed without identifying the employment practices they are challenging and showing that each of the identified employment practices produces a disparate impact. The Administration believes that requirements along these lines are necessary to avoid encouraging quotas.

The bill would then compel defendants to prove that each employment practice within a challenged group bears a substantial and demonstrable relationship to effective job performance. This requirement, which departs very significantly from longstanding Supreme Court precedent, would make it extremely difficult for employers to defend practices that are both legitimate and reasonable. The Administration believes that employers must be given a fair chance to defend all employment practices that are based on legitimate and nondiscriminatory business goals. This view is supported by Supreme Court precedent, including Griggs and its progeny.

Section 6 of S. 2104 would encourage certain litigants in discrimination cases to settle their cases at the expense of people not party to the suits, and would insulate consent decrees that impose quotas from appropriate judicial review. The provision would close the courts to some individuals whose civil rights are violated by settlements and consent decrees about which the victims received no notice and which the victims had no adequate opportunity to challenge. Section 13 of the bill would also shield "affirmative action," "court-ordered remedies," and "conciliation agreements" from the neutral application of the bill's other provisions. The Administration opposes Sections 6 and 13 as written.

Section 8 of S. 2104 would provide for jury trials and for the award of compensatory and punitive damages in Title VII cases. Thus, the bill would radically transform the statute by undermining Title VII's elaborate system of mediation and conciliation. The Administration favors the goal of devising adequate legal deterrents against harassment in the workplace based on race, sex, religion, or disability, but the Administration opposes the overly broad provisions in Section 8 of this bill.

Other provisions of S. 2104 are also objectionable. Several sections would create anomalous rules regarding attorneys fees in civil rights cases. These include provisions that would inappropriately make it more difficult for parties to settle cases without the defendant's first having to pay the plaintiff's lawyer at full scale, and provisions overturning the legal rule that a plaintiff who rejects an offer of settlement more favorable than the judgment eventually awarded may not recover attorneys fees for services performed after the settlement offer was made. The Administration opposes these provisions as written.

The bill would also alter yet another decision of the Supreme Court (written by Justice Brennan in favor of the plaintiff) by creating liability even where an employer can prove that bias, although it was one "motivating factor," did not affect the actual outcome of an employment decision. The bill also contains provisions unconstitutionally reversing the judgments in specific cases already decided by the courts; unnecessarily creating open-ended and excessive "limitations periods"; and establishing an ill-advised rule of construction encouraging courts to interpret laws beyond the terms actually enacted. The Administration opposes these provisions as written.

S. 2104 also fails to extend the coverage of the civil rights laws to Congressional employees. The Administration believes that the Congress should live by the same requirements it prescribes for others.

* * * * *

July 3, 1990

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: Bob Teeter

Following are the preliminary trend results from the survey we took over the weekend. Additional analysis will follow.

If you have any questions, please feel free to call me at 517-238-2286.

cc: Ed Rogers

RNC National Surveys

BUSH APPROVAL

	Approve	Disapprove	DK/Ref
Republicans			
6/29/90	79	15	6
6/14/90	87	6	5
5/90	84	10	6
3/90	94	4	2
10/89	94	5	1
4/89	90	3	6
Ticket-Splitters			
6/29/90	68	23	9
6/14/90	76	18	6
5/90	70	21	9
3/90	79	17	4
10/89	79	15	6
4/89	75	14	11
Democrats			
6/29/90	44	48	8
6/14/90	56	34	10
5/90	52	38	10
3/90	58	35	3
10/89	56	36	8
4/89	50	37	13

U.S. National Survey #7
QUESTION RESULTS
June 29, 1990

Q1. Do you feel things in this country are generally going in the right direction, or do you feel things have pretty seriously gotten off on the wrong track?

	June 29, 1990	June 14, 1990	May 1990	Mar 1990	Oct. 1989	Apr. 1989	Jan. 1989
Right direction	38%	41%	39%	39%	40%	46%	53%
Wrong Track	54	49	54	54	51	41	37
Don't know	7	8	6	6	8	12	9
Refused/NA	1	1	1	1	1	1	1

Q2. If the elections for the U.S. House of Representative were being held today, would you be voting for the (ROTATE: Republican candidate or the Democratic candidate) from your district? (IF DON'T KNOW OR REFUSED:) Which way do you lean as of today -- toward the (ROTATE: Republican candidate or the Democratic candidate)?

	June 29, 1990	March 1990	Oct. 1989	April 1989
Republican candidate	38%	40%	43%	38%
Democratic candidate	40	41	47	46
Don't know	19	16	8	15
Refused/NA	2	2	2	1

Thinking about George Bush...

Q3. Do you approve or disapprove of the way George Bush is handling his job as President? (IF APPROVE/DISAPPROVE, ASK:) Would that be strongly (approve/disapprove) or just somewhat (approve/disapprove)?

	June 29, 1990	June 14, 1990	May 1990	Mar 1990	Oct. 1989	Apr. 1989
Strongly approve	23%	23%	23%	33%	29%	27%
Somewhat approve	40	49	46	44	45	43
Somewhat disapprove	15	13	12	11	10	11
Strongly disapprove	13	8	10	6	8	8
Don't know	8	7	7	5	7	11
Refused/NA	1	1	2	1	1	1
Collasped						
Approve	63%	71%	69%	77%	75%	70%
Disapprove	28	21	22	17	18	19

Q4A. Why do you approve? (PROBE FOR AT LEAST TWO RESPONSES)

Q4B. Why do you disapprove? (PROBE FOR AT LEAST TWO RESPONSES)

Q5. Do you approve or disapprove of the way George Bush is handling the economy?

	June 29, 1990	June 14, 1990
Approve	48%	46%
Disapprove	35	43
Don't know	15	10
Refused/NA	2	1

For each of the following two descriptions, please tell me which ONE you think is closer to describing George Bush. (WAIT FOR RESPONSE AND ASK:) Would you say that describes him very well or just somewhat well?

(RANDOMIZE Q6-Q8)

Q6. STRONG OR WEAK

	June 29, 1990	Jan. 1989
STRONG, very well	30%	31%
STRONG, somewhat well	37	37
Neither/Depends (VOLUNTEERED)	6	6
WEAK, somewhat well	17	16
WEAK, very well	7	6
Don't know	3	5
Refused/NA	*	*

Q7. TRUSTWORTHY OR UNTRUSTWORTHY

	June 29, 1990	Jan. 1989
TRUSTWORTHY, very well	40%	35
TRUSTWORTHY, somewhat well	34	38
Neither/Depends (VOLUNTEERED)	3	5
UNTRUSTWORTHY, somewhat well	10	11
UNTRUSTWORTHY, very well	9	7
Don't know	4	5
Refused/NA	1	*

Q8. COMPETENT OR INCOMPETENT

	June 29, 1990	Jan. 1989
COMPETENT, very well	47%	42%
COMPETENT, somewhat well	37	39
Neither/Depends (VOLUNTEERED)	3	3
INCOMPETENT, somewhat well	7	8
INCOMPETENT, very well	4	4
Don't know	3	4
Refused/NA	1	*

Now, I'd like to turn to some issues in the country. First...

Q9. What do you think are the most important problems facing the country at the present time? (ASK AS AN OPEN END, MULTIPLE MENTIONS ALLOWED, PROBE FOR AT LEAST TWO RESPONSES)

	June 29, 1990
Drugs	36%
Deficit/National debt	33
Homeless/street people	25
Environment/pollution/toxic waste/hazardous waste	16
Taxes/high taxes	14
Crime	11
Education	11
All other	44
Don't know	6
Refused/NA	*

Q10. Do you have more confidence in the policies and programs of (ROTATE: the Republican Party or the Democratic Party) to solve the problems facing the country?

	June 29, 1990	March 1990	Oct. 1989	Apr. 1989	Jan. 1989
Republican Party	37%	41%	38%	43%	47%
Democratic Party	32	29	30	33	33
Both equal (VOL)	9	12	10	8	6
Neither (VOL)	11	10	12	11	10
Don't know	10	8	10	6	4
Refused/NA	1	1	1	1	*

Thinking about the country's two political parties...

Here are some issues and problems. For each one, please tell me whether you think (ROTATE: the Republican Party or the Democratic Party) would do a better job of handling it?

		REPUB	DEMO	BOTH NEITHER	DK/ REF	PDI[a]
Q15.	HOLDING DOWN TAXES					
	June 29, 1990	44%	32	16	9	+12
	March, 1990	47%	33	11	8	+14
	October, 1989	55%	27	8	10	+28
Q14.	COMBATTING THE DRUG PROBLEM					
	June 29, 1990	37%	25	27	11	+12
	March, 1990	42%	26	22	10	+16
	October, 1989	41%	28	20	11	+13
	April, 1989	43%	31	20	6	+12
	January, 1989	38%	32	11	12	+ 6
Q11.	REDUCING THE FEDERAL BUDGET DEFICIT					
	June 29, 1990	40%	34	15	10	+ 6
	March, 1990	47%	32	13	8	+15
	October, 1989	44%	32	14	10	+12
	April, 1989	50%	31	14	6	+19
	January, 1989	45%	34	15	6	+11
Q13.	IMPROVING PUBLIC EDUCATION					
	June 29, 1990	32%	45	14	10	−13
	March, 1990	37%	40	15	8	− 3
	October, 1989	34%	42	15	10	− 8
	April, 1989	38%	44	13	6	− 6
	January, 1989	33%	48	13	7	−15
Q12.	PROTECTING THE ENVIRONMENT					
	June 29, 1990	28%	46	14	12	−18
	March, 1990	26%	49	14	10	−23
	October, 1989	26%	47	15	11	−21
	April, 1989	31%	50	13	7	−19

[a] Republican % minus Democrat %

Here are some questions concerning the federal budget deficit...

Q16. Do you think it will or will not be necessary to have a tax increase in order to reduce the deficit?

	June 29, 1990	June 14, 1990	May 1990	Mar 1990	Oct. 1989	Apr. 1989	Jan. 1989
Will be necessary	58%	54%	50%	52%	53%	60%	56%
Will NOT be necessary	35	41	44	43	41	35	40
Don't know	6	4	5	5	6	4	4
Refused/NA	1	*	*	*	*	*	*

Q17. Would you support or oppose a tax increase as ONE part of an overall plan to reduce the federal budget deficit?

	June 29, 1990	June 14, 1990	May 1990	Mar 1990	Oct. 1989	Apr. 1989
Support	46%	45%	36%	41%	50%	41%
Oppose	47	51	60	55	42	55
Don't know	6	4	4	4	7	4
Refused/NA	1	*	*	1	1	*

Q18. Do you think the federal budget deficit should be considered a national crises that needs a solution very quickly, or do you think it is not quite that serious and just needs to be reduced over the next several years?

	June 29, 1990	May 1990	Oct. 1990
National crisis	46%	43%	33%
Not quite that serious	51	56	62
Don't know	3	2	4
Refused/NA	*	--	*

Q19. Have you read or heard about a "budget summit" meeting going on between President Bush and leaders of Congress?

	June 29, 1990	June 14, 1990	May 1990
Yes	49%	46%	54%
No	50	54	45
Don't know	1	1	1
Refused/NA	--	*	--

Q20. President Bush and Congressional leaders are now meeting to reach an agreement on a plan to reduce the budget deficit. How likely do think it is that they will agree on a plan that will significantly reduce the budget deficit – very likely, somewhat likely, or not very likely?

	June 29, 1990	June 14, 1990	May 1990
Very likely	11%	6%	8%
Somewhat likely	41	28	38
Not very likely	45	64	53
Don't know	3	2	1
Refused/NA	*	--	*

Q21. Do you recall any promises or commitments President Bush made in his 1988 Presidential campaign?

Yes	74%
No	26
Don't know	*
Refused/NA	*

Q22. (IF YES TO Q21) What were they? (ASK AS AN OPEN END).

Promised not to raise taxes/read my lips	68%
Other	5
Don't know	1
Refused/NA	--

Q23. Have you read or heard about any statement President Bush has made recently with regard to the budget deficit and taxes?

Yes	57%
No	41
Don't know	2
Refused/NA	--

Q24. (IF YES TO Q24) What did he say? (ASK AS AN OPEN END).

Taxes will have to be increased	49%
All other	4
Don't know	5
Refused/NA	*

Q25. President Bush said earlier this week that he and the leaders of Congress agreed that a solution to the budget deficit problem would have to include tax revenue increases, major cuts in domestic spending, reduction in the growth of entitlements, cuts in defense spending, and budget process reform. Do you approve or disapprove of the statement President Bush made?

Approve	58%
Disapprove	31
Don't know	10
Refused/NA	1

Q26. By making this statement, do you believe the President did or did not break his campaign promise not to raise taxes?

Did	74%
Did not	20
Don't know	5
Refused/NA	2

Q27. Has this statement made your opinion of President Bush more favorable, less favorable, or not made a difference?

More favorable	11%
No difference	61
Less favorable	27
Don't know	1
Refused/NA	*

Now, I'd like to ask you a few questions for statistical purposes...

(PARTYID) Generally speaking, do you think of yourself as a Republican, a Democrat, an independent or what?

(INTENSE) Would you call yourself a strong (Rep/Dem) or a not very strong (Rep/Dem)?

(LEAN) Do you think of yourself as closer to the Republican or the Democratic Party?

Strong Republican	14%
Weak Republican	19
Independent Republican	16
Independent	6
Independent Democrat	14
Weak Democrat	16
Strong Democrat	15
Not Ascertained	--

(VOTETYPE) In the last general election in which you voted, which answer best describes how you voted for state and local offices such as governor and senator? (READ CHOICES 1 THRU 7/ALTERNATE TOP TO BOTTOM/BOTTOM TO TOP)

Straight Democratic	11%
Mostly Democratic	16
A few more Democrats than Republicans	10
About equally for both parties	20
A few more Republicans than Democrats	10
Mostly Republican	16
Straight Republican	8
Other	1
Never voted	5
Don't know	2
Refused	*

(BIRTH) In what year were you born?

18–24	15%
25–34	24
35–44	20
45–54	14
55–64	12
65+	16

(EDOFR) What is the last grade of school you completed?

Grade school or less (Grade 1–8)	4%
Some high school (Grade 9–11)	9
Graduated high school	35
Vocational school/Technical school	3
Some college–2 years or less	18
Some college–more than 2 years	8
Graduated college	17
Post–graduate work	8
Refused	*

(RELIGION) Is your religious background Protestant, Roman Catholic, Jewish or something else? (IF "SOMETHING ELSE" OR UNCLEAR IF CHRISTIAN, ASK:) Is that a Christian church?

Protestant (e.g. Baptist, Methodist, etc.)	52%
Roman Catholic	25
Jewish	2
Other Christian	12
Other non–Christian/Unspecified	3
Agnostic/Atheist	1
None	3
Don't know	1
Refused	1

(INCOME) Which of the following income groups includes your TOTAL FAMILY INCOME in 1989 before taxes? (Just stop me when I read the correct category)

Under $10,000	10%
$10,000–$15,000 (14,999)	7
$15,000–$20,000 (19,999)	10
$20,000–$25,000 (24,999)	12
$25,000–$30,000 (29,999)	10
$30,000–$40,000 (39,999)	13
$40,000–$50,000 (49,999)	10
$50,000–$75,000 (74,999)	11
$75,000 and over	7
Don't know	4
Refused	6

(RACE) Is your racial or ethnic heritage white, black, hispanic or what?

White	81%
Black	12
Hispanic/Spanish American/Chicano	4
Oriental	1
American Indian	1
Other	1
Not ascertained	1

Sex: (BY OBSERVATION)

Male	47%
Female	53

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Memo	From C. Boyden Gray to John Sununu Re: Senator Kennedy's 6/29 Letter (1 pp.)	7/3/90	~~P-5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (1 of 2) [3]

Open on Expiration of PRA
(Document Follows)
By JP (NLGB) on 1/19/09

Date Closed:	12/17/2004	**OA/ID Number:**	29144-009
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

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

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

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

PRM. Removed as a personal record misfile.

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

(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE

WASHINGTON

July 3, 1990

MEMORANDUM FOR GOVERNOR JOHN H. SUNUNU
CHIEF OF STAFF TO THE PRESIDENT

FROM: DICK THORNBURGH
ATTORNEY GENERAL

C. BOYDEN GRAY
COUNSEL TO THE PRESIDENT

SUBJECT: Senator Kennedy's June 29 Letter

We have reviewed Senator Kennedy's June 29 letter to you, and the new Wards Cove language that he attached. This language still leaves us with a quota bill. With the bill coming to the Senate floor next week, we must make it clear what the President can and cannot accept. Therefore, we recommend that you send a letter rejecting Kennedy's June 29 proposal and offering a serious, final counterproposal on this issue. We have attached a draft letter and proposal to this effect. We also attach an explanatory memorandum for you to review at your leisure. We apologize for the length, but the dramatic rewrite of the rules of litigation and 20 years of jurisprudence necessarily requires some explanation, however tedious.

cc: Roger Porter

THE WHITE HOUSE

WASHINGTON

July 3, 1990

Dear Ted:

RELATING TO THE WARDS COVE PROVISIONS OF YOUR BILL.

Thank you for your letter of June 29 in which you suggest A two -PART proposals ~~for addressing some of the difficulties with the Kennedy-Hawkins Wards Cove provisions~~. I join you in believing that there should be a way to work out these and other ~~problems with~~ ISSUES IN the bill.

I CONTINUE TO BELIEVE THAT THE BILL, AS CURRENTLY

As we ~~have~~ discussed, ~~in the past~~, getting the right formulations in the Wards Cove section of the bill is critical to producing ~~a piece of~~ ACCEPTABLE legislation ~~that I would feel comfortable advising the President to sign. As the President noted in his Rose Garden speech on May 17, no one would want him to sign a bill the unintended consequences of which would be quotas. Quotas violate the fundamental principles of our civil rights tradition and our democracy.~~ ~~They are simply wrong. As the Administration has previously noted, however, the bill as~~ drafted would produce enormous pressure for employers across the country to adopt quota schemes in hiring and promotion in order to avoid litigation.

Three interrelated provisions of the legislation combine to produce this effect: its elimination of the requirement ~~(heretofore unquestioned by either Congress or the Supreme Court)~~ that plaintiffs identify a particular practice that causes disparate impact; its shifting of the burden of proof to employers to prove that their practices are required by business necessity; and its narrow definition of business necessity. These provisions, ~~while admittedly rather technical,~~ in combination COULD ~~will~~ lead MANY employers to adopt quotas. ~~They allow~~ * a plaintiff ~~to~~ claim discrimination merely because of statistical disparities between the racial, ethnic, religious or sexual composition of its work force and the available labor pool. At that point, the employer must prove that all of its employment practices are "substantially and demonstrably related to effective job performance." ~~Rather than attempt to meet this onerous standard, many employers will simply avoid the problem in the first place by making sure that their numbers come out "right."~~ COULD IN FACT

I have previously expressed the Administration's desire to accommodate as much of your Wards Cove proposal as possible. ~~short of having it become a quota bill~~. We have each indicated a willingness to consider modifications of our original positions. In particular, in order to make sure that we are rooting out even well concealed discrimination, I have said that we would CONSIDER ~~think about whether we could accommodate~~ your desire to shift to employers the burden of proving the justification for employment practices even where no intent to discriminate has been shown. ~~If we were to give serious thought to this most unusual step, however, we would need to be sure~~ that plaintiffs could impose this obligation on employers only after identifying which of an employer's practices are problematic, and we would have to be confident that the burden of justification imposed on the employer is one that can be met in appropriate situations without enormous litigation expense.

ANY SHIFT IN THE BURDEN OF PROOF WOULD NEED TO ASSURE

I understand your June 29 proposal to be an effort to meet these last two points by addressing particular concerns that: 1) the bill shifts to the employer the burden of justifying any number of employment practices that have not been shown to cause "disparate impact"; and 2) it does not permit an employer to justify his or her employment practices by showing that they are related to legitimate, non-discriminatory business interests. Although I am sure that you are seriously attempting to address these concerns, the proposal does not do so adequately. I will briefly sketch the reasons why not, indicating at the same time the degree to which we can accommodate the desires of the bill's proponents.

As to the first point, the Supreme Court has never permitted plaintiffs to proceed in a disparate impact case without identifying the employment practices they are challenging and establishing that each of them causes a disparate impact. I do think, however, that we can accommodate your test/school system concern (despite my disagreement with your view that it is fair to penalize a single employer because of the shortcomings of an entire city's school system).

If, under your example, a plaintiff shows that a test causes a "disparate impact," then we could agree that the employer must justify the test or lose the lawsuit; we do not insist that the plaintiff at that stage investigate possible antecedent causes for his or her poor test results. All we would ask is that the plaintiff do what in your example the plaintiff apparently has done -- prove that the test causes a disparate impact, without requiring the employer to justify all of the company's other hiring practices as well. Indeed, we are willing to go further and recognize a prima facie case where multiple practices each contribute to and together cause the disparate impact.

The language you suggest, however, does not solve the problem. Under your proposal, a plaintiff would not even have to identify the test as the cause of the disparate impact unless the defendant provides the evidence the plaintiff needs to establish a prima facie case. Where the defendant cannot provide such evidence, perhaps because the test does not have a disparate impact, your proposal would force the defendant to prove the "business necessity" of the test and of all the employer's other hiring practices as well. The burden would be enormous, and employers could not be expected to await the uncertain results of expensive litigation. Instead, employers would simply adopt quotas to ensure that their numbers come out "right."

I attach some language we have drafted that avoids this intolerable problem while satisfying the point you have raised. Even beyond that, we are willing to stipulate in legislative history how elements of a decision-making process that are not capable of separation for analysis may be treated by the court as one employment practice. I attach proposed history on this point which I believe is responsive to your reasons for being reluctant to ask plaintiffs to specify which particular employment practices they are challenging. We all should be able to agree that an employer whose "numbers are off" need not justify practices that are not proven to contribute to the disparity; otherwise the pressure for quotas would be overwhelming.

Once a prima facie case has been established, your bill would shift to the employer the burden of proving that the employment practice is required by "business necessity." Assuming for the sake of argument that we were willing to accept this highly onerous and unusual shift in the burden of proof (a matter that I know is of the highest importance to proponents of the bill), we would at the very least have to be assured that employment practices would be judged under a reasonable standard.

We might be willing to go along with imposing on an employer the burden of proving that the practice is "reasonably related to job performance or other legitimate business purpose." If an employment practice is related to job performance -- if it makes the business more efficient or productive than the business otherwise might be, even if not "substantially and demonstrably" so -- the practice should not give rise to liability. Nor should employers be confined to seeking workers who are minimally qualified for the jobs at issue; for many jobs, employers must be free to seek outstanding performers, not just "effective" or "successful" workers.

Similarly, your proposal would modify the bill to recognize that an employer may take into account legitimate business purposes other than job effectiveness, but it does so only in extraordinarily narrow circumstances, as to a very limited set of practices and where the employer's purposes are "essential" (or "compelling" or "overarching"). I do not see why a practice that is otherwise related to legitimate, nondiscriminatory business purposes should not be permitted simply because it improves the operation of the business. Your proposal, I am afraid, would have the unintended consequence of contributing to the adoption of quotas and hampering the competitiveness of our nation's productive force.

I have heard it suggested that the standard you propose is designed to stop judges from making common-sense evaluations of whether a given employment practice is actually justified. I hope this is not the case. I cannot believe that you would argue, for example, that a police department should have to prove through complex litigation that a rule against hiring officers with criminal records could be said to be "substantially and demonstrably related to successful job performance" in the future. Nor should an engineering school, to take a more parochial example, be forbidden from requiring that its faculty have doctoral degrees unless it can prove that this requirement (as opposed to some lesser measure of study) is "substantially" and "demonstrably" related to "successful" job performance. Nor can we understand how a company's anti-smoking policy could be successfully defended under the test you propose.

In closing, I return to your city school system example. In the age that we are now entering, getting a good education will be more important than ever before. I know we agree that our goal as a society should not be to reduce educational standards, but to improve educational opportunities for all. America has prospered because merit and effort are still rewarded. Our failures as a society have generally come when we have elevated irrelevant characteristics over individual accomplishment, and your proposals as drafted would inadvertently cause the very problem they seek to solve.

I believe that when you examine the attached language on the Wards Cove issue, you will see that we can accept much of the Kennedy-Hawkins formulation while avoiding the problems the present version creates. If we can reach agreement on this proposal, we can then move on to the other matters raised in your bill. If not, we may have to agree to disagree on this legislation. Either way, I am sure we will work cooperatively on other matters in the future.

Sincerely,

Senator Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510-2101

Group of Employment Practices

Replace (B) in Kennedy-Hawkins with the following:

"(B) a complaining party demonstrates that a group of employment practices, taken together, causes disparate impact on the basis of race, color, religion, sex, or national origin, and that each employment practice has contributed to the disparate impact, and the respondent fails to demonstrate that such group would not cause disparate impact but for employment practices justified by business necessity."

Business Necessity

The term 'justified by business necessity' means reasonably related to job performance or other legitimate business purpose.

Proposed Legislative History
(Wards Cove -- Particularity)

Under this Act, a plaintiff makes out a prima facie case of disparate impact when he or she (1) identifies a particular employment practice and demonstrates that the practice has caused the exclusion of applicants or employees from jobs or promotions because of their race, color, religion, sex, or national origin, or (2) identifies a combination of two or more employment practices and demonstrates that each of the practices has contributed to the exclusion and that together they have caused the exclusion.

In identifying the particular employment practice alleged to cause the exclusion, the plaintiff is not required to do the impossible in breaking down an employer's practices to the greatest conceivable degree. Courts will be permitted to hold, for example, that vesting complete hiring discretion in an individual guided only by unknown subjective standards constitutes a single particular employment practice susceptible to challenge.

It is therefore the specific intention of the proponents of this Act to reaffirm the sort of analysis employed on this issue in Sledge v. J.P. Stevens & Co., 52 EPD para. 39,537 (E.D.N.C. Nov. 30, 1989). The court alluded to the difficulty of "delving into the workings of an employment decisionmaker's mind" and noted that the defendant's personnel officers reported having no idea of the basis on which they made their employment decisions. The court held that: "the identification by the plaintiffs of the uncontrolled, subjective discretion of defendant's employing officials as the source of the discrimination shown by plaintiff's statistics sufficed to satisfy the causation requirements of Wards Cove." This Act contemplates that the use of such uncontrolled and unexplained discretion is properly treated as one employment practice and need not be divided into by the plaintiff discrete sub-parts.

If the elements of a decision-making process are shown to be not capable of separation for analysis, therefore, they may be analyzed as one employment practice, just as where the criteria are distinct and separate each must be identified with particularity and with its causation established. See letter of Charles Fried to Senator Edward M. Kennedy, March 21, 1990 at 4 and n.2 (Hearing Record at ______________).

In addition, the plaintiff may also make out a prima facie case where multiple practices all contribute to causing the disparate impact at issue. Further, in such a case it is not necessary that a plaintiff quantify the degree to which any particular practice has caused the exclusion so long as each practice cited is proven to contribute to the exclusion and so long as the exclusion is proven to be caused by the combination. At that point, the burden shifts to the defendant to prove that the combination would not cause the exclusion but for practices justified by business necessity.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
04. Memo	From C. Boyden Gray to John Sununu Re: Senator Kennedy's 6/29 Letter (6 pp.)	7/3/90	~~P5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (1 of 2) [3]

Open on Expiration of PRA
(Document Follows)
By JA (NLGB) on 1/19/09

Date Closed:	12/17/2004	**OA/ID Number:**	29144-009
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

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

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

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

PRM. Removed as a personal record misfile.

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

(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE

WASHINGTON

July 3, 1990

MEMORANDUM FOR GOVERNOR JOHN H. SUNUNU
CHIEF OF STAFF TO THE PRESIDENT

FROM: DICK THORNBURGH
ATTORNEY GENERAL

C. BOYDEN GRAY CBG
COUNSEL TO THE PRESIDENT

SUBJECT: Senator Kennedy's June 29 Letter

This memorandum details the problems with Senator Kennedy's June 29 proposal, explains the counteroffer we propose you make, and discusses the reasons why we think this defines the general parameters as to how far we can recommend that the Administration go.

As we have discussed, when looked at without the distorting lens of politics, Wards Cove clearly stated sound law and sound policy. Kennedy-Hawkins would overrule three interrelated parts of Wards Cove through the bill's "group of practices" provision, its imposition of the burden of proof on the defendant with respect to "business necessity," and its definition of business necessity. In combination, these provisions work together to drive employers to adopt quotas, as follows.

The "group of practices" provision allows the plaintiff to bring a disparate impact claim by showing that the employer's bottom line numbers deviate statistically from the racial, sexual, ethnic, or religious makeup of the labor pool. This could be sufficient for the plaintiff to charge that this "disparity" is attributable to the entire "group of hiring practices" the employer uses. The burden shifting provision then forces the employer to prove that all of these practices are "required by business necessity," which the definition provision states means "substantially and demonstrably related to effective job performance" (or "successful job performance" if the new language is used). Rather than run that gauntlet, employers will avoid having disparities by making sure their bottom line numbers come out "right."

Our general strategy for a compromise that would not lead to quotas but would contain significant concessions has been along the following lines. We believe that it would be tolerable to impose on the defendant the burden of proving "business necessity" if and only if the plaintiff has to identify the practice that causes the disparity and if what the defendant has to prove in order to make out the business necessity is something reasonable (which turns on the definition of business necessity and the types of evidence he is allowed to use).

Requiring the plaintiff to identify the particular practice that causes the disparity (which the Supreme Court has always found to be required in this kind of case) is critical for two reasons. First, and most obviously, it limits the number of practices that the employer has to defend, and thus helps prevent these cases from becoming unduly burdensome. Second, as the Supreme Court has pointed out, it avoids making employers liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of their workforces." Unless this is addressed properly, quotas will be inevitable.

The definition of business necessity is also extremely important. If the employer is permitted to prove that his employment practices are related to legitimate business purposes, and he can rely on common sense evidence, that is something he can hope to accomplish even bearing the burden of proof. Any tougher standard, however, will make statistical disparities too risky and too expensive to tolerate, and quotas will be the natural alternative. It also is very hard to see why the employer should have to prove more than this, since he ought to be able to use hiring practices related to legitimate business purposes.

Nevertheless, shifting the burden of proof to the defendant on business necessity is still a very significant concession. It allows the plaintiff to indict particular hiring practices simply by showing that they produce disparities, and then forces the defendant to prove their legitimacy. Therefore this concession alone will tend to push employers toward quotas to some extent. Because the burden of proof provision significantly changes the law in the direction Kennedy wants to go, and because it is the point that the civil rights groups have been stressing publicly, we think it is a major concession that Kennedy may ultimately take without getting anything significant on the other two points. But this can only happen if we let him know that this is as far as we will go. And we can only recommend making this major concession as a last resort in order to get an agreement.

Any major concession on either of the other two points, however, will leave the President vulnerable to the charge that he is signing a quota bill. Kennedy's June 29 language almost completely dismisses our position on both.

We rejected the first half of Kennedy's "group of practices" proposal on June 26, and Blattner and the groups walked out. This proposal was only a very marginal improvement over the bill in its original form. The plaintiff can still challenge the entirety of an employer's practices by pointing to a disparity and blaming it on the employer's "group of practices" unless the defendant proves to a court that the plaintiff could have pinpointed the practice on the basis of information provided by the employer himself. This means that in order to avoid being forced to justify his entire group of practices, the employer will have to produce information he had in hand to show that the plaintiff could have specified the particular practice. If he does produce this information, however, the employer has just made out the plaintiff's case under the first prong of this section of the bill, which allows the plaintiff to prevail on the basis of an identified practice that results in disparate impact. Thus, the employer is caught between Scylla and Charybdis.

The new, second half of the June 29 proposal (after the semi-colon) does recognize, although only in a very limited circumstance, the validity of practices serving an employer's legitimate business purposes. However, overall the new language does not improve the bill, and probably makes it worse. Without this addition, if the plaintiff relies on the "group of practices" theory, the employer is at least allowed to exonerate individual practices if he can show that they do not contribute to the disparity or that they are required by business necessity. The new section would also make the employer prove that the entire group, as well as each practice in the group, is required by business necessity. That problem can be corrected by redrafting, but in any event the core difficulty remains: the requirement that a court find that a plaintiff could not identify a practice before the plaintiff can use the "group" theory is an utterly trivial concession, particularly in light of the realities of litigation. This supposed concession will not significantly reduce the pressure on employers to adopt quotas.

The language we have attached for you to propose on this point is not nearly as open to these objections, although it goes farther than many courts have allowed. It would allow a plaintiff to challenge a group of practices if he can affirmatively show that ch contributed to the disparity, and would allow the employer defend by showing that a subgroup among them sufficient to event the impact is justified by business necessity. We made a milar proposal earlier, but it used less of the Kennedy-wkins language. We have also attached legislative history that ould further help Kennedy on this issue by making it clear that urts have flexibility in defining what constitutes a single ployment practice. (Our current proposal continues to use the rd "cause." Terms like "results in," "leads to," or roduces," are non-legal terms that would be acceptable only if e legislative history made it perfectly clear that they meant ause." If Kennedy will not agree to the word "cause," he is t likely to agree to the legislative history we would have to ave.)

e problems with Kennedy's new proposal on the business ecessity standard are more easily explained. It is essentially he same old standard, which we have consistently rejected ecause we are convinced that requiring employers to prove a ubstantial relationship between a hiring practice and job erformance is requiring too much, because requiring that the elationship be demonstrable will lead courts to demand cientific-type evidence (as opposed to common sense or xperience), and because it will not permit consideration of ther business objectives, such as keeping costs down. Kennedy's ew proposal addresses only the third of these concerns, and only y allowing such justifications to be used when they are 'essential" (which is nearly impossible) and only as to a very imited set of practices which may not even be susceptible to challenge under current disparate impact law (but the inclusion of which might now make them challengeable). Thus, Kennedy's new proposal is either no better than his previous proposal or, perhaps, significantly worse.

We must add that the range of acceptable options here is quite limited. New words must clearly allow employers to show any reasonable fit between the practice and the business objective. Otherwise, they will create substantial litigation risk while the courts wrestle with the meaning of the new words, and employers will adopt quotas to avoid that risk. In addition, Kennedy will help push the courts in bad directions on any ambiguous new words through legislative history unless that too is worked out through ironclad guarantees in advance. The language we suggest to you meets these requirements, but we note that Blattner and the groups have thus far said that it is unacceptable.

On the other hand, old words coming from past cases have to come from cases that clearly took a reasonable position on the fit required. Any other words from past cases will be interpreted as requiring more than a reasonable fit requirement, because they will be viewed as a rejection of Wards Cove on this issue as well as on the burden of proof, and because Kennedy will create legislative history saying just that.

The only other possibly tolerable fallback position is to have the legislation address only the burden shifting issue, although this is technically difficult to do without including the phrase "business necessity" (whose inclusion would allow Kennedy to cause significant legislative history mischief). If we can devise a way of doing this, it may ultimately be more acceptable to Kennedy than agreeing to one of our formulas. Specter proposed this option on Thursday although he has apparently backed away from it since then. We would hasten to note, however, that we see dangers in such an approach. Failure to codify the requirements of identifying the offending business practice or practices and failure to define business necessity would leave courts free to roam unrestricted in this area.

We would like to say just a few words about the legislative situation. No Senate Republicans except Danforth and Heinz have joined as cosponsors of Kennedy-Hawkins since its introduction, despite great efforts by Danforth. To the contrary, moderate Republicans like Kassebaum and even Chafee have continued to indicate real skepticism about much of the bill. In addition, a significant number of Southern Democrats also have stayed off the bill despite heavy lobbying by civil rights groups. Dole's staff person reports that Dole believes we have enough leverage to insist on a reasonable bill, both because Kennedy does not have very many cosponsors and because he is running out of legislative days. He also says that if we do not get one, we ought not settle for less. Specter says that Kennedy will not start talking seriously until he gets to the floor and is hit by reality. And Kennedy has been enormously anxious to negotiate, even while refusing to make anything but trivial concessions in these negotiations.

Meanwhile, in the world outside the Beltway, mainstream publications like the Christian Science Monitor, the Chicago Tribune, and even the New Republic have editorialized against this legislation. Democratic pollster Greenberg reports overwhelming opposition to racial preferences even among Democrats, and views this as a huge problem for that party. For all these reasons, we ought to be able to get a reasonable bill.

But as you are well aware, in order to get peace on tolerable terms, we must show that we are willing to fight unless such terms are offered. Unless Kennedy believes the President is serious about rejecting a quota bill, he will continue to insist on one.

cc: Roger Porter

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
05. Memo	From Marianne McGettigan to Roger Porter Re: Civil Rights--Kennedy Letter (2 pp.)	7/1/90	~~P5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (1 of 2) [3]

Open on Expiration of PRA
(Document Follows)
By JH (NLGB) on 10/28/05

Date Closed:	12/17/2004	**OA/ID Number:**	29144-009
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

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

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

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

PRM. Removed as a personal record misfile.

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

(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE

WASHINGTON

July 1, 1990

MEMORANDUM FOR ROGER B. PORTER

FROM: MARIANNE McGETTIGAN

SUBJECT: Civil Rights - Kennedy Letter

As Senator Kennedy's letter indicates, on Thursday night, he convened a meeting that included representatives of the civil rights community and Republican cosponsors of S. 2104, Senators Jeffords, Specter, Durenberger, Hatfield and Packwood. Although the letter did not mention Senator Danforth, I understand he attended also.

A Republican staffer in attendance explained the meeting as one in which the Republicans conveyed the message to Kennedy that he had to "moderate" the bill. Contrary to the implication of the letter, the Republicans did not "sign off" on the language attached to it. Rather, they stated that they wanted to "return to <u>Griggs</u> on the <u>Wards Coves</u> issue, and that there is a strong inclination to place a cap on compensatory and punitive damages on the part of the Republicans.

I have the clear impression that if we offered Kennedy language right out of <u>Griggs</u>, the Republican cosponsors would find that reasonable, although I have not discussed that possibility with anyone, nor do I know how that would be received by Republicans who have not cosponsored the bill. If the Republicans find that reasonable, the failure of Kennedy to agree to that type of language could cause serious problems for the bill. It has only 39 Democrats as cosponsors, to date.

With respect to remedies, Senator Jeffords apparently stated that any cap should involve parity, applying to Section 1981 as well as Title VII. That is the approach taken in the language previously supplied to you for your review.

Although not foreclosing any proposal we might make, the Republicans in the meeting specifically stated to Kennedy that they thought the term "significant" was more appropriate than "compelling/overarching/essential" with respect to employment practices not involving selection criteria. The Republicans did not understand the inclusion of "overarching" but were told it was offered by the Administration. Although all the Republicans want to return to <u>Griggs</u>, they would accept the use of the term "significant". I was told that notwithstanding Kennedy's assertions that he must stand behind the deal he made with Senator Danforth, Senator Danforth is more interested in language the Administration can support than in his own choice of words.

Concern was also expressed by Republicans that a word be found to substitute for "results in" if Senator Kennedy will not accept "causes".

Finally, it is likely that if not resolved prior to the Senate floor, there may well be a battle between Senator Kennedy and Senator Danforth over what "demonstrably" means with respect to subjective criteria. That understanding, or lack of it, could be used prior to debate to require the definition of "demonstrably" in the bill or, if that is rejected or a definition cannot be agreed to, Senator Danforth might be persuaded to request its deletion.

United States Senate
COMMITTEE ON FINANCE
LLOYD BENTSEN, CHAIRMAN

CAPITAL GAINS ↓ 28%	STET @ 15% CAP ON S/L $ INC. TAX

NO OTHER SET OF EVENTS.

THERE IS SOME MERIT TO TAKING THESE NEGOTIATIONS SERIOUSLY

$70B

$ 58 B

~~$70~~

28%
CAP GAINS

$15000.

$134B

$ 10,000.

$ 2000 15%

$ 57.B.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
06. Memo	From James Cicconi to John Sununu Re: Exchange of letter w/Morris Abram (1 pp.)	7/18/90	~~P-5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (1 of 2) [3]

Open on Expiration of PRA
(Document Follows)
By JP (NLGB) on 10/28/05

Date Closed: 12/17/2004	**OA/ID Number:** 29144-009
FOIA/SYS Case #: 1998-0004-F[1]	**Appeal Case #:**
Re-review Case #: 2005-0426-S	**Appeal Disposition:**
P-2/P-5 Review Case #:	**Disposition Date:**
AR Case #:	**MR Case #:**
AR Disposition:	**MR Disposition:**
AR Disposition Date:	**MR Disposition Date:**

RESTRICTION CODES

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

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

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

PRM. Removed as a personal record misfile.

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

(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

6

THE WHITE HOUSE
WASHINGTON

July 18, 1990

TO: CHIEF OF STAFF

Attached is the exchange of letters with Morris Abram. The President's reply is the one I drafted and showed to you last night.

Do you want to make these letters available to the public?

-- White House press release of both?

-- Have McClure make both available on the Hill?

The only down side I see is that we are locking ourselves more into a public veto posture (via this letter and the speech insert today) if no real changes are made in the bill. I really think that's where we are anyway, though. The other side is turning up the pressure on us to compromise-- it doesn't hurt for us to do the same.

Jim

[redacted]

THE WHITE HOUSE

WASHINGTON

July 18, 1990

Dear Morris:

Thank you for your insights and thoughtful comments about the "Civil Rights Act of 1990." Your letter captured the essence of our concerns about this bill.

As you know, we are in the midst of conversations with Senator Kennedy and others in hopes of resolving our problems with the bill. I am sincere when I say that I want to sign a civil rights bill. The corollary is equally true, though: I will not sign a quota bill -- that would be neither right nor good for the Nation.

Warmest best wishes to you, in which Barbara joins.

Sincerely,

[redacted]

The Honorable Morris B. Abram
The Representative of the
United States of America to the
European Office of the United Nations
Geneva

3, plateau de Frontenex
1208 Geneva

June 7, 1990

The President
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

If I were still practicing law, I would love the "Civil Rights Act of 1990." While it may enrich some lawyers, it will impoverish the principle of equality of all Americans. All my life, even in the darkest days of segregated Georgia, I fought against the principle of color preference, then known as "white supremacy." This bill institutionalizes that principle under the false flag of civil rights. It is not a civil rights bill but a quota bill because it will achieve precisely what the landmark 1964 Civil Rights Act stood foursquare against.

Proportionality of result, not equality of opportunity, is the touchstone of this flawed legislation:

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

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

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

- it denies individuals their day in court by effectively barring challenges to civil rights consent decrees to which they were not parties.

Abraham Lincoln's great friend Frederick Douglass understood the divisive and destructive influence of proportional representation based on race. "Equality of numbers," he wrote in 1871, "has nothing to do with equality of attainments."

This legislation, despite its flaws, has meritorious portions, including further sanctions on racial and sexual harrassment in the workplace. There is no reason why these advances should be held hostage by the objectionable aspects of the bill -- particularly since its race- and gender-conscious elements are easily deleted or modified.

You have the opportunity, perhaps more so than any other president in recent years, to forge a new and lasting civil rights consensus. Every opinion poll confirms that the American people, including blacks, share the goals of equal opportunity and color blindness and will support the vision of Martin Luther King, Jr., who urged that we judge ourselves "not by the color of our skin but by the content of our character."

Mr. President, my own participation in the civil rights struggle has shaped my deepest moral and political beliefs. It is because of this that I urge you to refuse your concurrence to this bill as it stands.

Most respectfully,

Morris

Morris B. Abram

THE CHIEF of STAFF
has seen

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

From: Douglas Johnson, NRLC (626-8820, fax 347-3668)

Date: Monday, July 16, 1990

Re: Humphrey Amendment to Kennedy-Hawkins bill (S. 2104)

It is the opinion of NRLC General Counsel James Bopp, Jr., and of Senate Republican Policy Committee attorney Lincoln Oliphant, that S. 2104 and its committee report would nullify the current availability of the "business necessity" defense by employers who seek to protect unborn children from job-related hazards. The fetal-protection policy of Johnson Controls, Inc., a Milwaukee-based battery manufacturer, was upheld by the 7th Circuit partly on the basis of the business necessity defense. The Johnson Controls case is currently awaiting review by the U.S. Supreme Court.

According to these lawyers, under S. 2104 employers would be left only with the more rigorous "bona fide occupational qualifications" ("BFOQ") defense for fetal-protection policies.

I regret that this problem did not come to our attention much earlier in the process. Now that we are aware of it, however, we here must do what we can to attempt to preserve the availability of the "business necessity" defense. Toward this end, Senator Humphrey is today filing an amendment (attached), which NRLC intends to support.

If you are able to provide any assistance to this effort, we would be most appreciative. Thank you for your consideration of this request.

AMENDMENT NO. ____ Calendar No. 586

Purpose: To clarify that a defense of business necessity may be raised in Title VII cases based upon an employment practice or policy adopted to protect the health or safety of employees or their offspring.

IN THE SENATE OF THE UNITED STATES -- 101st Cong., 2d Sess.

S. 2104

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

Referred to the Committee on ____________ and ordered ~~to be printed~~.

Ordered to lie on the table and to be printed.

Amendment intended to be proposed by MR. HUMPHREY

Viz:

1 On page 6, delete all on lines 3 through 5 and insert the following in lieu thereof:

"(2) A demonstration than an employment practice is required by business necessity may be used as a defense only against

(A) a claim under this subsection; or

(B) a claim which is based on an employment practice or policy adopted to protect the health or safety of employees or their children, including unborn children.

BRAMES. McCORMICK. BOPP & ABEL
ATTORNEYS AT LAW
THE TUDOR HOUSE
191 HARDING AVENUE
P.O. BOX 410
TERRE HAUTE. INDIANA 47808-0410

ARNOLD H. BRAMES
B. MICHAEL McCORMICK
JAMES BOPP, JR.
ERIC M. ABEL
RHONDA D. OLDHAM
RICHARD E. COLESON
BARRY A. BOSTROM

TELEPHONE
(812) 238-2421
TELECOPIER
(812) 232-2940

July 12, 1990

Mr. Douglas Johnson
Legislative Director
National Right to Life Committee, Inc.
419 Seventh Street, N.W., Suite 500
Washington, D.C. 20004

Re: Civil Rights Act of 1990 (S. 2104)

Dear Doug,

You have asked my advice, as General Counsel for the National Right to Life Committee, Inc., on whether NRLC should support an amendment to the Civil Rights Act of 1990 in order to ensure that the Act will not invalidate fetal protection policies of employers, where those policies are reasonably necessary to protect pregnant women and their unborn offspring.

A number of employers have adopted fetal protection policies in order to protect pregnant women and their unborn offspring where there are unavoidable risks to their life and health in certain areas of the employers' plants or operations. In those areas, pregnant women may be required to employe special protection, or their activities may be limited. In some circumstances, pregnant women may be completely excluded from working in these areas.

Because these policies have a disproportional impact upon female workers, the courts have interpreted Title VII, 42 U.S.C. § 2000e, as requiring employers to justify such policies under the "business necessity" defense. This defense requires the employer to demonstrate the existence of substantial health risks to the unborn child and establish that the hazard to the unborn child is transmitted only through women. If the employer meets this burden, the employee may still overcome the defense if the employee shows that there is a less discriminatory alternative to the fetal protection policy. Under this business necessity defense, some fetal protection policies have been upheld, while others have been found unlawful. See UAW v. Johnson Controls, 886 Fd.2d 871 (7th Cir. 1989) (en banc); Wright v. Olin Corporation, 697 Fd.2d 1172 (4th Cir. 1982); Hayes v. Shelby Memorial Hosptial, 726 Fd.2d 1543 (11th Cir. 1984).

The proposed Civil Rights Act of 1990, however, would require the courts to impose a more rigorous standard for fetal protection policies. The Senate Committee report interprets the Act as requiring the narrower "bona fide occupational qualifications ('BFOQ')" defense as the only defense available to facial gender discrimination. Senate Report 101-315, at 46-47. The bona fide occupational qualifications defense requires the employer to show that the policy is "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). While some fetal protection policies would be upheld under this test, see Johnson Controls, 886 Fd.2d at 893-901, it is clearly a more rigorous standard. Senate Report 101-315, at 47 n.39 ("The BFOQ defense [is] . . . extremely stringent.").

It is my opinion that the business necessity defense strikes a more reasonable balance between the interest in protecting the life and health of the unborn and the woman's employment interest than does the bona fide occupational qualifications defense. Therefore, it is my opinion that we should support an amendment which would ensure that the business necessity defense would be applicable to fetal protection policies of employers under Title VII.

Sincerely,

BRAMES, McCORMICK,
BOPP & ABEL

James Bopp, Jr.

James Bopp, Jr. (RD)

JB/rd

United States Senate

REPUBLICAN POLICY COMMITTEE
RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510-7064
202-224-2846

June 21, 1990

Honorable William L. Armstrong
United States Senate
Washington, District of Columbia

Dear Mr. Chairman:

The Civil Rights Act of 1990 (S. 2104) will nullify the fetal protection laws of the United States as they have been developed by the United States courts of appeals. One obscure sentence in S. 2104 will overturn Auto Workers v. Johnson Controls, 886 F.2d 871 (7th Cir. 1989) (en banc), cert. granted, 58 U.S.L.W. 3614 (Mar. 26, 1990); Hayes v. Shelby Memorial Hospital, 726 F.2d 1543 (11th Cir. 1984); and Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982). Unfortunately, the Committee Report breathes not one word of this.

In fetal protection cases the courts of appeals have allowed employers to assert a "business necessity" defense. Section 4 of this bill, adding a new paragraph 703(k)(2) to the Civil Rights Act of 1964, will eliminate this solicitude for the unborn. If the bill is enacted, fetal protection policies presumably would be required to meet the stringent bona fide occupational qualification (bfoq) defense. See, 42 U.S.C. 2000e-2(e)(1) (1982). The Hayes and Wright courts already have said that a fetal protection policy cannot meet the bfoq standard, and if the bfoq defense is defined as narrowly as the Committee would like, S. Rpt. 101-315 at 47 n. 39, every fetal protection policy in the country will shrivel and vanish. The way the Committee figures, bfoq's aren't for fetuses but for actors and actresses.

Perhaps Congress wants to narrow or eliminate altogether the legal defense now available for fetal protection policies. Perhaps Congress agrees with Judge Easterbrook's amazingly frank assessment that, "The statute has its costs; prenatal injuries are among these." Johnson Controls, 886 F.2d at 920 (dissenting opinion). If that assessment sounds harsh, it is at least a forthright and accurate description of the effect of Section 4 of this bill, which is a whole lot more than can be said for the Committee Report which does not mention fetal protection policies or cases at all. On the other hand, perhaps Congress will sympathize with a large corporation's medical director who said, "We'd rather face the EEOC than a deformed baby." In either case, Congress should make its policy in the full light of day after solemn deliberation. This bill, accompanied by its mute report, revokes nearly a decade of fetal protection law with no deliberation at all, solemn or otherwise. I can't believe an informed Congress would act so casually.

Sincerely,

Lincoln C. Oliphant
Legislative Counsel

THE KING CENTER

THE CHIEF of STAFF
has seen

July 16, 1990

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

Dear President Bush,

The Civil Rights Act of 1990 is the number one legislative priority of the Black Leadership Forum and the Black Leadership Roundtable for this session of Congress. This legislation is essential for realizing the spirit and purpose of Title VII of the Civil Rights Act of 1964 and for eradicating the scourge of discrimination on the job in our nation.

It is gratifying that you will sign the Americans with Disabilities Act this week. If you will also support the Civil Rights Act of 1990 when it comes before the U.S. Senate, this can be one of the greatest weeks for civil rights in American history. I hope you will seize this unique opportunity to promote interracial justice and a new spirit of healing and reconciliation in America. For the sake of a more just and unified nation, I appeal to you to lend your strongest support and leadership to secure enactment of this legislation.

Sincerely,

Coretta Scott King

Coretta Scott King

THE MARTIN LUTHER KING, JR. CENTER FOR NONVIOLENT SOCIAL CHANGE, INC.
449 AUBURN AVE., NE / ATLANTA, GA 30312-1590 / (404) 524-1956 / TLX 201988 MLK CTR

OFFICE OF THE VICE PRESIDENT

WASHINGTON

July 20, 1990

NOTE TO: GOVERNOR SUNUNU
JIM CICCONI
DAVID DEMAREST
BOYDEN GRAY
FRED MCCLURE
ROGER PORTER
BOBBIE KILBERG

FROM: BILL KRISTOL WK

The enclosed letter (and the people who signed it) might prove useful in helping frame the debate over civil rights. I also enclose an excerpt from remarks by the Vice President yesterday in Houston.

National Center for Neighborhood Enterprise

1367 Connecticut Avenue, N.W., Washington, D.C. 20036 / (202) 331-1103

July 18, 1990

The President
The White House
Washington DC 20500

Dear Mr. President:

We are writing to urge you to embark on a bold, new course for civil rights, a course which will embrace the ideas of individual empowerment and reject race-conscious quotas that do nothing to help the most disadvantaged members of our community.

Not only does the "Civil Rights Act of 1990" promote racial quotas and thus undermine the goal of equal opportunity, it does nothing to tear down the barriers to economic opportunity, which are the greatest obstacles confronting minority Americans today.

We urge you to reject this racial quota approach, and instead offer a new civil rights strategy that embraces the following tenets:

1) Become the "educational choice President" and give poor Americans the same choice in education enjoyed by middle and upper income Americans. By promoting educational vouchers and parental choice, you can introduce competition to the public school monopoly and thus improve a system which has failed so many of our young people.

2) Promote entrepreneurship as a means of economic empowerment. By repealing discriminatory legislation such as the 1931 Davis-Bacon Act, you can help many minority Americans fulfill their dream of participating in the market place which has made America the world's envy.

3) Vigorously enforce existing civil rights laws. If you aggressively enforce anti-discrimination laws, you will show the entire nation that bigotry is truly unacceptable and intolerable.

Mr. President, if you offer this alternative civil rights agenda of empowerment, we and many millions of minority and poor Americans will support you.

Sincerely,

Robert L. Woodson, Sr.
President
The National Center for
Neighborhood Enterprise

Councilman Keith Butler
Detroit City Council

Elizabeth Wright
Editor
Issues & Views

Glenn Loury
Professor of
Political Economy
Harvard Univrsity

Joseph Perkins
Editorial Page
San Diego Union

Thomas Ahart
President
Crispus Attucks Society

Robert L. Woodson, Sr.
President
The National Center for
Neighborhood Enterprise
1367 Connecticut Avenue, N.W.
Washington, DC 20036
202-331-1103

Councilman Keith Butler
Detroit City Council
Word of Faith Church
7616 E. Nevada
Detroit, MI 48234
313-224-1337

Elizabeth Wright
Editor
Issues & Views
P.O. Box 467
Cathedral Station
New York, NY 10025
212-655-7847

Glenn Loury
Professor of Political Economy
Harvard University
Cambridge, MA 02138
617-495-0807

Joseph Perkins
Editorial Page
San Diego Union
P.O. Box 191
San Diego, CA 92112
619-293-2030

Thomas Ahart
President
Crispus Attucks Society
1629 K Street, N.W.
Suite 1100
Washington, D.C. 20059
202-785-6718

Michigan Citizen, May 6, 1990
black interest

Log

How to help poor neighborhoods —a conservative view

2768

By Robert L. Woodson

In communities across America during the Depression, churches, neighborhood associations, and families stood between the private lives of individuals and large-scale government programs. This gave communities cohesiveness of spirit and purpose during a time of setback and retrenchment. Rent parties, rummage sales, quilting bees, church socials, homecomings, lodge meetings, and neighborhood gatherings around a communal potbellied stove served as methods of information exchange and resource sharing for neighborhoods throbbing with the will and desire to survive.

Such grass-roots, self-help approaches were, however, abandoned by the liberal social policy-makers of the New Deal era and beyond. Since the 1960s, there has been a 25-fold increase in the amount federal, state, and local dollars spent to meet the needs of the poor. Yet one-third of black America is still in danger of becoming a permanent underclass. Moreover, the number of children living in poverty has expanded while the quality of their education has declined.

The funding that was designated to help poor people has gone, for the most part, to support a large class of counselors, bureaucrats, and social workers — what I call the "Poverty Pentagon." There are hundreds of aid programs that administer over $100 billion each year. In New York City, the Community Service Society (a 100-year-old social-work agency) examined how funding intended to meet the needs of that city's 1.4-million poop people (or one-fifth of its population) was actually spent. The results: of the $14.5 billion spent to help the poor in 1983, 74 cents of every dollar went to the service industry; only 26 cents was spent on rent, food, clothes, and other such needs. In many cases, social welfare programs actually exacerbate the very problems they were designed to solve and destroy families in the name of helping.

Americans, especially black Americans, have become frustrated and infuriated with well-intended programs that do not lead to the desired results. They are not prepared to continue to have money thrown at the problems.

Old-line government remedies and patchwork programs have not significantly helped the unemployed underclass, who by their sizable numbers seem to mock the ideals of a free enterprise system. But it is this very system that could enable them to join the economic mainstream. Aggressive efforts must be made to introduce new approaches that build on both the free enterprise system and the strengths and resources already existing in our communities.

Many analysts cite poverty as a condition inextricably linked to racism. The argument is made that racial integration, nurtured by preferential government programs, will ultimately bring blacks and other minorities into the economic mainstream. But this strategy has been tried and hasn't worked.

An alternative approach rests on a cardinal principle: Those suffering from the problems must be involved in designing the executing solutions to them. They have firsthand knowledge, and they have the greatest interest in the outcome. A successful community-based development strategy therefore must be based on several steps:

— Give assistance to community efforts that are genuinely the product of neighborhood initiatives and that have shown themselves capable of mobilizing local resources and sustaining an organization to deal with local issues.

— Explore welfare assistance approaches that enable

-continued from Michigan Citizen

recipients to invest public assistance payments in small businesses or job-training programs. There are several ways in which welfare could be restructured to stimulate general economic improvement in poor communities. One would be to convert assistance payments into vouchers to be used by employers as wages. This action would make low-income residents in distressed areas more competitive in the employment market as well as promote greater self-sufficiency. A simple voucher plan also would be more attractive to employers than complicated tax credit programs. In addition, policies which prevent the unskilled from getting entry-level work experience, such as the minimum wage and labor union licensing restrictions, should be eliminated.

— Explore ways to provide private health insurance to families who leave aid to families with dependent children (AFDC). This would eliminate one of the most significant barriers to welfare recipients taking jobs — the loss of medical benefits in the form of vouchers to newly employed low-income persons.

With these and other innovative self-help steps, America's most depressed neighborhoods can be nurtured back to good health.

Note: Robert Woodson is president of the National Center for Neighborhood Enterprise. This essay is adapted from the Heritage Foundation monograph "A Conservative Agenda for Black Americans," published as part of the think tank's recent Black History Month observations.

OFFICE OF THE VICE PRESIDENT

WASHINGTON

EXCERPTS FROM REMARKS OF THE VICE PRESIDENT

HOUSTON, TEXAS

JULY 19, 1990

...Now, let me comment on the so called Civil Rights Act that passed the Senate last night. I say the "so called Civil Rights Bill" because this is not a civil rights bill. It is a quota bill.

President George Bush and I are committed to civil rights. President Bush has a long history of opposing discrimination, and so do I. However, this President is not going to be intimidated into signing a bill just because it has the label "civil rights" on it.

Last night the national Democratic leadership whipped every Democrat Senator into line to support this so called civil rights bill. In fact, this bill, as presently written, would pressure business to impose quotas, would deprive some Americans of their equal right to a day in court, and would produce an avalanche of lawsuits that would severely and unjustly burden American business, especially the small business men and women.

Unfortunately, it appears that some in Congress want to have a political issue rather than acting responsibly to prevent discrimination in the workplace. Well, they can go ahead and play politics. Our president is going to do what is right.

The American people stand firmly: for equal opportunity, for equal justice, for civil rights. But the American people are against quotas. Quotas discriminate; they are unfair; they are divisive; they are contrary to our basic principles. The president wants to sign a civil rights bill. But he will not sign a quota bill.

I'm proud that under the leadership of George Bush, we are the party of civil rights. Unfortunately, the Democrats in Congress are becoming the party of quotas. Now, the Democrats can still decide to work with the president to get a real civil rights bill or they can continue to play partisan politics. The choice is theirs.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

July 27, 1990

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

Dear Mr. President:

I want to express my appreciation for your efforts to find a workable civil rights bill. Governor Sununu undertook a necessary effort, in good faith, to reach agreement with Senator Kennedy. I have never witnessed a chief of staff more willing to go the extra mile to resolve such difficult and technical legal issues. I am skeptical, however, that Senator Kennedy will agree this year to a reasonable piece of legislation. Should you find it necessary to veto the bill, for the reasons you stated in the Rose Garden in May, I believe we can sustain that veto. I will do everything I can to support a veto.

The way Senator Kennedy's Civil Rights Act of 1990 rewrites the rules of bringing Title VII disparate impact cases, it is inevitable that employers will resort to quotas to avoid massive liability.

Somewhere along the line, the leadership of a number of civil rights groups moved away from the principle of equality of opportunity for individuals. Instead, they seem to have embraced the doctrine that every group in society is entitled to its proportional share of jobs. Affirmative action changed from a policy calling for outreach, recruitment, and training of persons from hitherto excluded groups to a policy of preference for a select few.

<u>Wards Cove v. Atonio -- The Quota Problem</u>

The bill that passed the Senate is based on these mistaken principles. While not requiring quotas by its terms, it effectively makes it illegal for employers not to hire by the numbers. It does so by overturning three important principles of established law.

Group of Practices

First, under the bill, a plaintiff no longer needs to identify the specific employment practice or practices causing a statistical racial, ethnic, or gender imbalance in a job. A plaintiff need merely show that a bottom line imbalance exists in a job. For example, the plaintiff might show that 20 percent of the plumbers in a metropolitan area are minority, but that a plumbing company has only 10 percent minority plumbers and charge that all of the company's employment practices "cause" this imbalance and the company is therefore presumed guilty of racial discrimination.

As I understand it, the Administration is willing to compromise on this specificity requirement. The Administration's position would allow a plaintiff to challenge a group of employment practices in some cases. Thus, under the Administration's proposal, where "the elements of a decision-making process are not capable of separation for analysis, they may be analyzed as one employment practice, just as where the criteria are distinct and separate each must be identified with particularity."

I believe this concession is unwise and one which is a large loophole. It is inappropriate to apply the disparate impact theory where the plaintiff does not identify specific practices causing disparate impact. The disparate impact theory is supposed to address only instances of specific, identifiable practices shown to cause an imbalance in a job. If a plaintiff cannot identify those practices, he or she can allege intentional discrimination under Title VII. One of the consequences of this concession will be the resurrection of the discredited "comparable worth" theory of pay discrimination and the inability of employers to rely on the marketplace to set its wages. Women, for example, may allege pay discrimination in one job because they are being paid less than a different, predominantly male job which they claim is "comparable" in worth according to a subjective job evaluation study. The employer will lose that case under the Kennedy bill, as well as under the concession the Administration is weighing. An employer will respond that it relied on market surveys, supply and demand for persons in the two jobs, what competitors are paying people in the two different jobs, its own economic condition, the different educational and experience requirements for the jobs, and so on. It will be impossible to separate out specific causes of the pay disparity; thus, plaintiffs will be able to challenge the entire paysetting process of the employer. As lower courts have noted, the disparate impact theory is not appropriate for such a challenge.

Guilty Until Proven Innocent

Second, after the plaintiff alleges that the employer's practices cause an imbalance in a job, the bill holds the employer guilty until proven innocent by forcing the employer to prove it is not discriminating. The employer must do so by justifying the racial imbalance. But in our legal system, a plaintiff must prove a defendant is doing wrong, in this case, that an employer is discriminating. An employer does not have to prove it is not discriminating -- to prove a negative. As you pointed out in the Rose Garden, one should not have to prove one's innocence. As technical as this "burden of persuasion" issue is, it is of enormous consequence. Currently, Title VII explicitly states that a mere statistical disparity in the percentage of members of a racial, ethnic, or gender group in a job and the percentage of that group in the relevant labor market is not illegal. Shifting the burden of persuasion to the employer to prove its innocence upon the mere showing of such a disparity in a job dramatically overturns this 25-year-old policy. Thus, even before the bill describes what justification the employer must make, this bill achieves something I never thought I would see in America: it makes racial, ethnic, and gender imbalance alone illegal. This is a terrible principle to enshrine in our law. I am concerned that the Administration is prepared to give up this enormously important principle. The Democrats will use this concession as a basis for shifting the burden of persuasion in as many areas of law as they can get away with. They are already seeking to do so in their effort to overturn The Public Retirement System of Ohio v. Betts (1989) decision, concerning employee benefits under the Age Discrimination in Employment Act.

New Definition of "Business Necessity"

Third, the only way an employer can prove its innocence under the Senate-passed bill is under a justification standard which is much more onerous than prior law.

Unfortunately, the definition of business necessity offered to Senator Kennedy by the Administration is also more onerous than long-standing Supreme Court precedent: "In the case of employment practices primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to successful performance of the job." In Griggs v. Duke Power Co. (1971), however, the term the Court used is "manifest relationship to the employment in question." This is the standard used in several subsequent Supreme Court decisions, including Albemarle Paper Co. v. Moody (1975), Dothard v. Rawlinson (1977), New York Transit Authority v. Beazer (1979), and Connecticut v. Teal (1982). The phrase "significant relationship to successful performance of the job" comes from the question presented to the Court, not from the Court's holding in the case. As far as I can determine, it is not relied upon in subsequent Supreme Court decisions.

The second half of the definition is: "In the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to a significant business objective of the employer."

I have several concerns with this clause. It seems to cover an employment practice unrelated to job performance like a no-smoking rule. It does not, on its face, however, cover a decision to close a plant because the product it produces is no longer profitable. Such a plant-closing decision is not itself an "employment practice"; it is more aptly characterized as a business decision or an economic decision. Another example is the installation of new equipment reflecting technological changes that causes a reduction in force. While this clause may be intended to cover these kinds of business decisions, I am fearful that, at best, it is insufficiently clear on this point.

Moreover, the Supreme Court's Beazer case from 1979 uses the term "legitimate" not "significant" to describe employment goals for business objectives which survive scrutiny under the disparate impact standard. Courts will construe the term "significant" as more onerous to the employer than the term "legitimate."

Legislative history saying that this language "is meant to codify the meaning of business necessity as used in Griggs and other opinions of the Supreme Court" will not be helpful because the language of the statute does not reflect Griggs and its progeny in the last 19 years.

I urge you to return to the definition of "business necessity" set forth in Governor Sununu's July 10, 1990, letter to Senator Kennedy.

With the rules of bringing a disparate impact case stacked against an employer, how will an employer ever be able to avoid massive liability? By never being sued in the first place. Employers will hire and promote persons on the basis of race, sex, and national origin quotas in order to avoid being sued.

For instance, any business has innumerable employment practices and standards, not to mention the day-to-day employment decisions employers must make. This employer would have to justify <u>all</u> of them any time any of his jobs are not in "balance" and a plaintiff sues him. The mere burden of proving that every such practice and standard is "significantly related to successful job performance" makes the business's defense virtually impossible in all cases. Only the most minimal standards can be successfully defended under this bill. Hiring the most qualified person is not a defense; and, by the time the business spends weeks in court defending itself, even if it somehow manages to win, its legal costs will be enormous. The simplest thing for such a business to do is to avoid litigation altogether by hiring the right number of minimally qualified or unqualified persons from every group in the community.

Under these principles, merit and high standards in the work place go out the window, and obtaining the "right numbers" of the minimally qualified from every group is all that matters. This approach is sure to result in discrimination on the basis of race, sex, and religion and erode America's competitiveness. Ironically, in the end, it will hurt minorities and women too. What looks like a "floor" for these groups today will soon become a ceiling beyond which qualified minorities and women cannot move. This is not only because encouraging people to think in race- or gender-conscious terms is likely to have that result. Rather, the bill would create presumptive liability if an employer had too many members of a minority as well as too few. And such an approach does nothing to help disadvantaged, poor minorities acquire the tools to compete in the labor market. We should focus on strategies aimed at enhancing the skills of the underclass, not reducing standards in the workplace.

<u>Price Waterhouse v. Hopkins -- Liability for Supervisor's Thoughts</u>

Under the Kennedy bill adopted by the Senate, if an impermissible characteristic, such as race or gender, is <u>a</u> contributing factor for any employment practice, a plaintiff can win compensatory and punitive damages <u>even if the employer</u>

would have made the same decision for legitimate, nondiscriminatory reasons.

Thus, if two of 50 partners vote against an unqualified woman's candidacy for partnership because of her gender, and the other 48 vote against her because she is unqualified, she can still win compensatory and punitive damages for the emotional distress caused by her rejection.

Under Price Waterhouse, in a Justice Brennan opinion, if the employer can show that it would have made the same decision in the absence of the discriminatory motive, it is not subject to any liability. This is the same principle applicable under the National Labor Relations Act. The Administration is on solid ground in adhering to Justice Brennan's opinion, but its June 27 draft position, while seeking to ameliorate the Kennedy provision, actually overturns it.

Martin v. Wilks -- The Equal Protection Right of Every Citizen to a Day in Court

The Kennedy bill adopted by the Senate still denies Americans an equal right to a day in court. As I understand the Administration's position, it, too, abandons this right.

I realize the Administration tendered me its proxy on this issue. With no lobbying and after only 20 minutes of debate, I won 40 votes for my position. I have always believed this issue, involving the insulation of reverse discrimination in consent decrees, is of equal importance to Wards Cove.

The problem arises when there is a lawsuit claiming employment discrimination which is settled in court, and the settlement or consent decree contains numerical hiring or promotion provisions in favor of a particular group or groups. As a result of these provisions, people who were not parties in the lawsuit are subsequently barred from being hired or promoted because of their race or gender when they apply. Currently, these people have the right to bring their own independent lawsuit to challenge this discrimination when it occurs, which may be years later. But, under the Kennedy bill and the Administration's June 27 draft bill, they are effectively denied the right to challenge the consent decree when they are actually excluded from being hired or promoted.

Under the Administration's June 27 draft, a current employee or applicant for employment, not a party to the case at the time a consent decree is entered, can be shut out from bringing his or her own case at the time the consent decree operates to harm him or her. The Administration's June 27 draft merely assures that the employee gets actual notice that he or she would likely be affected by the consent decree and that the person's subsequent legal challenge would be barred. It also limits the scope of the subsequent bar to challenges of practices specifically required by a consent decree, but this will merely result in these decrees being more meticulously drafted by plaintiffs' lawyers.

In short, an innocent nonparty is still denied his or her equal right to a day in court. All such a person may get under the Administration's June 27 draft is an appearance at a mere fairness hearing, where there is a limited opportunity for discovery, a limited right to present evidence, and no right to appeal. This is not a right to a day in court. Further, it is an important principle that unless one voluntarily intervenes or is mandatorily joined to a case, one is not bound by the outcome of that case.

The right to a day in court accrues from the time a person is actually harmed. The Supreme Court has indicated that the type of hearing one is entitled to depends, in part, on the nature of the rights at stake. The rights at stake here are the right to equal protection of the law and the right to be free of illegal discrimination -- among the most important rights we have. Surely, a person exercising these rights should have an opportunity to be fully heard in his or her own trial on the merits after being harmed. We are both legally and morally right to defend <u>Martin v. Wilks</u>. The Administration's June 27 draft overturns it. Knocking out the two most extreme provisions of this Section is desirable, as that draft does; but, in my view, it's not enough.

I ask that you consider this common scenario. Suppose there is a nonminority employee at a fire department (or any other public or private employer). Assume that the employer is being sued under Title VII by the federal government on behalf of members of a particular minority group, seeking large backpay awards and "numerical" relief, whether labeled goals or quotas, in future hiring and promotion. These individuals, on behalf of whom the government has sued, are not parties to the case.

The nonminority employee does not know how hard the employer will resist the lawsuit or for how long. He doesn't know whether the case will be settled. He doesn't know whether the remedy in that case might harm him at some point in the future. And, if he tries to intervene in the case too early, he could be denied intervenor status because he is premature and will slow down and clutter up the case.

After a few years of litigation, a proposed consent decree suddenly becomes public. It includes "numerical" relief based on race, ethnicity, or gender. If the nonminority employee seeks to intervene upon learning of the proposed consent decree, he can be denied intervenor-party status as untimely. He has a chance to comment on the proposed remedy at a fairness hearing scheduled several weeks after the consent decree is announced, but that is a limited opportunity. It is <u>not</u> the same as being a party in the case. He has little opportunity for discovery, to present evidence, or to prepare his arguments. He can't even appeal an adverse decision. And, of course, it would cost a good deal of money to get into the case, and he still can't be completely certain he is going to be hurt by the consent decree.

A year after the consent decree is entered, he seeks a promotion. He is ranked sixth on the promotion list but is passed over for someone else ranked eighty-fifth with no equivalent experience, because of his race or gender, in order to implement the consent decree.

When would he prefer to be able to assert his fundamental right to equal protection of the laws and the right to be free of unlawful discrimination? When the loss of that right is speculative, before the consent decree is adopted, or when he is actually harmed in fact by operation of the consent decree? The Supreme Court says he should be able to assert his right when he is harmed. Senator Kennedy's Civil Rights Act and the Administration's June 27 draft say no.

Is there any substitute for the nonminority employee being able to bring a case claiming concrete harm? He studied hard for the promotion test. He learned various job skills, including qualification as a paramedic. He obtained a Fire Science Degree. He had a variety of experiences, including being chief of a small suburban fire department and service as a lead worker and acting officer. He placed sixth on the promotion list. But he was passed over by number 85 on the list who had none of these qualifications because of his skin color in order to implement the consent decree. Isn't that a more appropriate point to have his claim heard by a court?

This is the position a witness before the committee, Birmingham, Alabama firefighter James Henson, found himself in. Even if it meets constitutional minima to provide people like him merely with better notice, and I do not believe it does, this provision remains unfair. We should adhere to Martin v. Wilks.

The failure to do so creates a terrible inconsistency in the scenario I described. If members of the minority group on whose behalf the government sued did not get relief under the consent decree, they can sue the employer for such relief notwithstanding the consent decree. The bill and the Administration's June 27 draft expressly preserve this right to a day in court. Yet, a nonminority who is not a party in that same case merely gets a letter from the parties warning that he or she is losing his or her right to a subsequent challenge to the consent decree and the only opportunity to be heard is now upon him or her. How can the Administration justify this result? If this Section were expected to have a clear adverse impact on minorities and women, it would not, and should not, be countenanced. Nor should it be countenanced when white males are the expected victims.

There is another inconsistency in this position. The Kennedy Civil Rights Act overturns Lorance v. AT&T Technologies Inc., 109 S.Ct. 2261 (1989). There, the Supreme Court held that a facially neutral seniority provision adopted for the purpose of discrimination against women must be challenged within a certain time from the adoption of the seniority provision. The Kennedy bill, instead, permits persons like the women in Lorance to sue an employer at the time they are harmed in fact by such a seniority provision, even though they were represented in the collective bargaining which produced the seniority provision. We both agree with that. But why not let every American have his or her right to a day in court at the time they are actually harmed by a consent decree?

I assume that the Administration's position is premised on the assumption that the Constitution requires that a nonparty receive no more than adequate notice and an opportunity to be heard before the consent decree is entered. I have provided Administration lawyers the basis for my disagreement on this legal point. But I believe we should rise above the narrow legal point, in any event.

Even if Section 6 of the bill is constitutional, we are not obligated to provide Americans only the bare constitutional minimum. For example, the Constitution prohibits only intentional racial discrimination by state and local government employers. Yet, we are all prepared to place in Title VII rules barring neutral employment practices causing disparate impact.

The Constitution does not prohibit racial or gender discrimination by private employers, but Congress outlawed it in 1964 and gave people a right to sue in federal court. The Constitution does not grant compensatory or punitive damages for such discrimination, but the Kennedy bill does, and I understand the Administration is prepared to agree to some form of such relief. The Constitution does not prohibit racial discrimination in the terms and conditions of private contracts, but we are agreed that we should do so in Section 1981. The Constitution does not prohibit racial and disability discrimination in private housing, but Congress outlawed such discrimination and gave people a day in court to vindicate those rights.

Similarly, even if Section 6 is constitutional, why should we grant the bare minimum required by the Constitution when it comes to equal protection of the law? Why shouldn't firefighter Jim Henson and others have a right to a day in court if they feel they are being denied that right? In order to answer this question, we only need to ask ourselves another -- is it fair to keep out of court people who are asserting equal protection claims? They don't win their case under Martin v. Wilks. They just get a chance to be heard after they are actually harmed by implementation of the consent decree.

S. 2104 and other statutes already on the books give plenty of rights to women and minorities not required by the Constitution. Why shouldn't we allow a right for a day in court to allow people to protect their civil rights and their right to equal protection of the laws?

Is it because the beneficiaries of such a right are likely to be primarily white males? I know that is not the Administration's reason. All Americans should have equal rights under the law.

Mr. President, I feel so strongly about this because Martin v. Wilks is right and the persons adversely affected by this Section, even as amended by the June 27 draft, have no one to speak for them except the persons they elect to office. They are our firefighters, police officers, and working class citizens. They do not have organizations and glib spokespeople with easy media access making their case. They deserve our protection in asserting their claims of discrimination. I respectfully believe that a contrary position is inconsistent with your remarks in the Rose Garden on May 17, that "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...."

I think you are free to argue that you had wanted to see if I could work this out with Senator Kennedy. Since I was unable to do so, I believe the Administration is in a position to renew its original concern and insist that Martin v. Wilks be preserved.

Other Flaws

The bill has many other flaws. Many of the provisions will convert Title VII from a statute fostering conciliation and settlement into one in which costly, lengthy litigation is the weapon of first resort. I believe these provisions are peripheral to the major objectives of the supporters and that they should be removed as part of any final agreement. The bill:

Statute of Limitations

- Extends the statute of limitations within which a person can sue an employer from six months to two years. Thus, employees no longer need to come forward in a timely way. Instead, they are permitted to allow their backpay and other claims to accrue and fester before bringing a complaint.

- 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); and Chardon v. Fernandez, 454 U.S. 6 (1981).

- This opens the door to many stale claims. For example, suppose a person is laid off for intentionally discriminatory reasons in 1990 but does not bring a Title VII action within six months (or within two years, if this provision is changed, per S. 2104). Under current law, this person has foregone his or her Title VII claim. If the person is later rehired in 1995, under this bill, he or she can seek retroactive seniority lost due to the 1990 discrimination, two years of backpay, plus compensatory and punitive damages as a result of the loss of five years seniority and lowered earnings, pain, and suffering since 1990.

Prohibits Employers from Making Lump Sum Settlements

o Helps lawyers by overturning a 1986 Supreme Court decision by Justice Stevens, Evans v. Jeff D., 475 U.S. 717 (1986), which allows a defendant, such as an employer, to condition a lump sum settlement offer on the plaintiff's waiver of attorneys fees, leaving the plaintiff to work out the fee with his or her lawyer. By overturning this case, an employer will have a more difficult time assessing its total exposure because attorneys fees will be a wild-card in the case. This will discourage employers -- and plaintiffs -- from settling cases.

Provides Plaintiff's Lawyers More Attorney's Fees

o 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 attorneys fees much easier. Thus, under current Title VII, suppose that an employer offers a plaintiff a $100,000 settlement and the plaintiff rejects it. Then, the plaintiff later winds up recovering less at trial than the employer offered. The employer need not pay the plaintiff's attorneys fees for work undertaken from the date the plaintiff turned down the offer. This bill, in contrast, would allow the plaintiff to recover attorneys fees from that date. This is an incentive to litigate, not settle cases.

I am prepared to provide equivalent damages for women, ethnic minorities, and persons with disabilities. I certainly understand, however, the desire to limit such recoveries in this bill.

I know how hard you have worked to reach a compromise on this. I also realize you have been "getting it" from all sides. I believe we have a position of strength in the Congress and among the American people if you explain why you cannot sign a bill that transgresses the principles you enunciated in the Rose Garden on May 17.

Thank you for considering my concerns.

Sincerely,

Orrin G. Hatch
United States Senator

OGH:mdt

cc: The Honorable John Sununu
The Honorable Dick Thornburgh
Mr. C. Boyden Gray

COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY

570 Seventh Avenue
New York, N.Y. 10018
(212) 391-2396

Chairman: Edgar F. Borgatta, CUNY, Queens
Treasurer: Erich Isaac, CUNY, CCNY
Coordinator: Miro Todorovich, CUNY, BCC

July 18, 1990

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

Dear Dr. Sununu:

Our Committee on Academic Nondiscrimination and Integrity (CANI) is pleased to learn that President Bush plans to veto the proposed Civil Rights Act of 1990 <u>as written</u> if it gets the approval of both Houses of Congress.

The interpretation of the existing laws already requires the development of Affirmative Action plans by colleges and universities which enbody <u>de facto</u> quotas. This despite the fact that there are simply by far not enough qualified applicants to fill the quotaic slots.

Universities have often instituted these quota-promoting policies out of simple fear of protracted, costly litigation.

The proposed new Act would only make things worse by diverting, for bureaucratic and litigatory purposes, limited educational funds from needed educational uses, and by exacerbating even further racial animosities on our Nation's campuses caused by the implementation of quotas and other preferences currently earning the name of Affirmative Reverse Discrimination.

In New York, Miami and elsewhere, misguided racialist policies, paraded under Civil Rights sheepskin, are already pitting minorities against minorities, i.e., blacks against Koreans, Latinos against Haitians. The new Civil Rights Act of 1990 would pour even more oil on this divisiveness fire. Let us stop misguided lawmaking before it generates further and more grave damage.

Sincerely,

Miro M. Todorovich

Miro M. Todorovich

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release July 17, 1990

BRIEFING BY CHIEF OF STAFF GOVERNOR JOHN SUNUNU
AND ATTORNEY GENERAL DICK THORNBURGH

The Briefing Room

5:12 P.M. EDT

GOVERNOR SUNUNU: As you know, the Senate is currently considering the piece of legislation which has been termed the civil rights bill of 1990. President Bush is unequivocally committed to supporting a civil rights bill. He made that clear in his statement in the Rose Garden several weeks ago. He also made it very clear at that time that he is unalterably opposed to a bill that would be a quota bill. Certainly the commitment he has to the issue has been clear in terms of his support of making sure that all Americans have an equality of opportunity and that equality of opportunity is real and protected under the law.

Over the past few weeks, the administration has been negotiating with leadership in both the Senate and the House to try and craft language that would address the differences in the perspectives on this issue. The President feels very strongly that the bill as currently crafted will, by virtue of its language and by virtue of the implications of that language, create a situation in which the only reasonable, the only secure defense the private sector would have against some of the constraints and limitations as structured in the bill, which allow, for example, actions to be brought on the basis of the statistics of employment within a company, would be to respond in a like basis in terms of statistics and, in fact, function with quotas in place.

Americans across the board have recognized the negative impact that quotas have on the system, and I think that it is clear to everybody discussing the legislation that it is undesirable to have legislation that does produce quotas.

We worked -- have been working for the past few weeks on language to try and address that. Frankly, last week, last Thursday, we thought we had an agreement on two of the critical sections of the bill -- the sections associated with the definition of business necessity and the section associated with dealing with groups of practices associated with impacts in terms of the reality of hiring and the hiring practice principles that companies may have. We thought we had that agreement. It appears that, as a result of a follow-up meeting yesterday, that the other parties to the agreement felt that they could not continue with it.

That basis -- that agreement is still a functional basis for changes in the legislation that would provide a bill that the President could sign. We hope that as this process moves forward -- and it has -- starting in the Senate, working its way through the House -- that the changes can be made to convert this piece of legislation from being a quota-producing bill to a piece of legislation that truly is a civil rights bill. And as those changes are made, the President will then have a piece of legislation he can sign.

We really do want to continue working on this. We really do believe it is important that members of both sides of this issue come together in a bipartisan way to craft a piece of legislation

MORE

that can be passed, that can be signed, and that can be brought into law. And we are committed to continue that effort.

Helen.

Q So you're not threatening to veto it?

GOVERNOR SUNUNU: The bill as crafted right now will -- the President has said -- the bill as crafted right now is a quota bill and the President has said he will veto that quota bill.

Q Governor, I just wanted to clarify, did Senator Kennedy renege on a deal that you had?

GOVERNOR SUNUNU: I believe Senator Kennedy and I had an agreement last week. Senator Danforth and Senator Specter also felt that there was an agreement. Senator Danforth and Senator Specter have said so on the floor. And I believe we had an agreement.

Q Why were you unable to pick up any of the eight Republicans today in the effort to -- on the cloture vote?

GOVERNOR SUNUNU: Well, that was a procedural vote, and I must admit I have not talked to the eight Republicans. I don't know -- the best answer to that would probably come from the Republican leadership in the Senate.

Q So you're saying you did not work any of the Republicans on the Hill in connection with this cloture vote today?

GOVERNOR SUNUNU: We met with Republican leadership this morning and encouraged everyone to be supportive of Senator Dole's position. We did not ourselves take a senator-by-senator effort. That was being handled by the leadership down there. We would have loved to have had the cloture result different than it was, because it would have given an opportunity then for full debate of the issues. It would have given an opportunity for the discussion of some of the concerns that we've had on the legislation; with the vote that was taken, that's obviously been forestalled.

Q Are you unwilling now to use the word "renege," and have you talked to Senator Kennedy today to see where the common ground is?

GOVERNOR SUNUNU: I'm not unwilling to use the word "reneg." I don't know what the difference would be in using it or not. I think that we had an agreement. I thought we had an agreement. The Senator came in yesterday after we had the agreement, and then we didn't have an agreement. Whether that's renegging or not, I'm not going to quibble. It is going back on what I thought was in place.

Q And do you have any idea why he can no longer accept it?

GOVERNOR SUNUNU: I think you'll have to ask the Senator.

Q Governor Sununu, the civil rights establishment has said that they did not agree with this language. They just said it on the Hill.

GOVERNOR SUNUNU: That may be why the Senator then felt he couldn't support it.

Q I was just going to say, Senator Simpson said out here today that after the meeting with the President that Senator Kennedy had been bludgeoned over the weekend by the civil rights lobby, and that that was the apparent reason. Did he give you any indication whether that was true or not?

MORE

GOVERNOR SUNUNU: The Senator certainly made it clear that he had second thoughts about the language we had agreed on, and I suspect the source of some of the pressure might be what you had referenced, what was referenced in the question there.

I do think that the differences in perspectives, even from those that were not a party to the agreement, are such that an agreement can be developed on the basis that was outlined. What I've tried to do in handling these negotiations with the help of the Attorney General and Boyden Gray and others over the last few weeks is to take the principles that everyone agreed on -- that what we wanted to do was return to Griggs, the condition under Griggs, and some of the cases that followed Griggs, and overturned that section of Wards Cove that created a problem. And what I tried to do in the language that I presented to the Senator that we worked back and forth and, frankly, the final language as I recall was actually crafted by one of the staff members to Senator Kennedy, and it was, in fact, I agreeing to their language that had me so optimistic that the agreement would hold.

What we have tried to do in all of that was to take as directly as we could not a word here and a word there, but operative phrases from the Griggs decisions and the related decisions and build those into statutory language that would codify, put into law, the results that everyone agreed were a functioning result that we're moving towards elimination of discrimination in the workplace in the United States. And it was on that basis that I sent the Senator a letter a little over a week ago suggesting that the key to it would be to extract direct language from the court cases, Griggs and Beazer in particular -- two court cases that everyone felt were important to be codified -- and I made a proposal to him that he felt at that time he could not accept. We then continued our face-to-face discussions which had been going on, and it was in, I believe, a Thursday morning meeting that we came to a meeting of the minds.

Q Could you explain why quotas are so offensive that continuation of discrimination is preferable?

GOVERNOR SUNUNU: I think the best answer to that -- first of all, the concerns that are associated with quotas are some of the comments that the President received in a letter from Morris Abrams. I think that one of the references that Morris Abrams made in there was way back in 1871, Frederick Douglass himself understood that quotas were both divisive and destructive influence, and that it creates a divisive characteristic that causes problems even beyond the good that they are attempting to solve. And we do feel that there are ways of solving the problems of discrimination without creating a system of laws that either directly or indirectly, either intended or unintended, has the results of creating a quota structure.

I think everybody agreed to that. They may not have agreed that a given phrase or another given phrase would have that result, but I think everyone agreed that it was undesirable to have something that produced a quota.

Q Governor, several weeks ago as the President was meeting with the civil rights groups and various others, it was plain that this is precisely the sort of situation you hoped to avoid to be able to come up with a bill. Can you offer any insight on what you think happened? Was it, in fact, a civil rights step, and was there a strong reaction from the administration's own conservative supporters? Where did it go wrong?

GOVERNOR SUNUNU: We made an agreement and we were willing to stick with the agreement. So whether there was -- it was not the administration that backed out on the agreement. I don't know the background of the discussions that Senator Kennedy had with others before he asked to meet again yesterday, and to come in. I do know that there were some members of the civil rights community that

MORE

felt the language wasn't precisely what they wanted, and were trying to suggest changes -- changes which, in our opinion, would have brought us back to the starting point all over again -- and so we said no, we wanted to stay with the agreement.

Q How costly is this going to be politically for the Republican Party that's been trying to woo blacks?

GOVERNOR SUNUNU: The important issue is to try and make sure that the legislation that comes through the process is legislation that the President can sign. We will continue to do that. I think that Americans, whether they are members of the majority or members of the minorities, understand the problems associated with quotas. I think everyone understands that they can be divisive and be counterproductive, and I think people, if they have an opportunity to recognize the unintended consequences or the indirect consequences of this legislation would have that effect, would understand that what the President wants is a civil rights bill that works, but not a civil rights bill that has the right title, but has the wrong result of generating a quota structure.

Q Will President Bush take part in a budget negotiating session tomorrow? And if so, what's on the agenda?

GOVERNOR SUNUNU: There will be discussions down here tomorrow. We're continuing the budget summit process, and the agenda is a very simple one: let's get a solution to the deficit, get a package to come out of the summit and move it forward.

Q Will the President be involved? Will the President be in on that?

MR. FITZWATER: Let's take two final questions.

Q Will the President be in on that meeting --

GOVERNOR SUNUNU: Yes.

Q What time?

GOVERNOR SUNUNU: In the afternoon. I don't have the exact time.

Q I can't remember a chief of staff and a Cabinet member coming out to talk about language negotiations in a bill before. Are you worried that you're going to be perceived as anticivil rights, that you're facing a public relations problem here and you're trying to shift the blame to Senator Kennedy if it appears as it does now that you're going to lose?

GOVERNOR SUNUNU: You probably can't remember a chief of staff and a Cabinet officer spending as many hours on detailed language in a piece of legislation as the Attorney General and I have spent on this particular piece of legislation. Frankly, we have worked long and hard on it, and it is an important piece of legislation that the President wants crafted correctly. We're out here to try and indicate that that opportunity still exists in the process, that the language that was a formula for success is still there, and that if that language can be implemented, or language that does change the bill from a quota bill to a civil rights bill, the President is eager to sign it.

We're eager to try and make sure that the long and hard efforts of trying to make good legislation out of this bill which had significant flaws and still has significant flaws in it is not wasted. And we would like to encourage those who care about this piece of legislation to understand that the President still feels strongly about that distinction and we would like to continue to work.

MORE

Q So you're not angry with Senator Kennedy?

GOVERNOR SUNUNU: No, I'm never angry. You know that.

Q Governor, did you have the Senate Republicans aboard on this agreement?

Q Your nose, watch your nose. (Laughter.)

Q Were the Senate Republicans who are deeply involved in this bill -- Senator Hatch and the others -- privy to and on board in this agreement?

GOVERNOR SUNUNU: Senator Hatch I don't believe was. Senator Hatch was not a party to the detailed discussions. We kept the Senator informed, but the key senators that were involved in working this particular language were Senator Danforth, Senator Jeffords, Senator Specter, and a few other Republicans in the discussion. But the three involved in the details, particularly Senator Danforth and Senator Specter, were the ones that were involved in the crafting of the language.

Now, we talked to a lot of Republican senators in the process. But in terms of the interactions between Republican senators, Senator Kennedy and myself in this particular set of language it was those senators.

Q Was there a problem about your being able to -- or the Senate Republican leadership being able to deliver votes to this bill because Senator Hatch and perhaps others were not on board on this deal?

GOVERNOR SUNUNU: I don't know how they would have voted on this particular language. I suspect they would still have preferred -- there are some who would still have preferred significantly different language. But I think if you create a hierarchy of where the legislation is, I think it has been made clear to me by Senator Hatch and others that might have preferred a little bit more in one direction, that the language that we had was significantly better than the language of the current bill and went a long, long way towards -- and we feel it went all the way towards eliminating the --

Q What is the offending language?

GOVERNOR SUNUNU: Well, it's lawyers' language.

Q You've got your lawyer there, Governor.

GOVERNOR SUNUNU: Why don't you copy it. I mean, it's a full page. We'll copy it and distribute it.

Q What are the other issues in the bill? Is there still --

GOVERNOR SUNUNU: There still are other issues, and I should emphasize that. These were two of many issues. There are other issues. There's another issue that, even beyond this language, is very critical, relative to the quota implications, and that is the section on damages and remedies. And that section is still a difficult one as crafted in the bill. It is one that is still a serious problem. But it is one that we felt all along, if we dealt with the first two sections that we were talking about, that would follow rather smoothly from the discussions that we had. It obviously -- not that it had any less import, but seemed less difficult to deal with than these. And we felt that these would be the ones that we would handle.

Q Were you as angry as Senator Dole at Senator Mitchell's calling for a cloture vote when there really wasn't a

MORE

filibuster going on?

GOVERNOR SUNUNU: Well, I think the interesting thing is that the only debate on the legislation that had taken place in the Senate was on one provision where the Senate exempted itself from the provisions of the bill. And I thought that was an unusual time then to move immediately to a cloture vote.

Q How do you feel about Senator Mitchell's calling for this cloture vote?

GOVERNOR SUNUNU: Well, I think that we obviously would have preferred to have full debate on all the very important issues associated with the legislation.

Q Governor, Congressman Gingrich suggested earlier today that the bubble, the 28-percent income tax rate for higher income Americans, is off the table in terms of revenue increases for the budget agreement. Is that the case, sir?

GOVERNOR SUNUNU: Well, the President has worked very hard not to debate the details of what is going on in the negotiations. He has stuck to his commitment to do that. There have been others who have not retained that fidelity to the commitment. I believe last week Senator Mitchell was talking about his strong commitment to increasing the tax rate from the 28 percent to 33 percent at the upper levels. And so he talked about the fact that what he wanted was an increase in taxes, an increase in rate. But we will continue to keep faithful to our unwillingness to discuss the details.

Q Governor, in light of that, can you correct the situation, sir? Can you tell us whether --

Q What's the meeting about tomorrow? What's the meeting about tomorrow? Is it a critical meeting?

GOVERNOR SUNUNU: No. It's just another one in a series of meetings that we have. There will probably be a lot of these.

Q How close are you to offering a proposal to the Democrats?

GOVERNOR SUNUNU: We did offer one, remember? We've offered two, three, four.

END 5:25 P.M. EDT

HISTORY ROLL NO. 309 RECORDED VOTE TIME REMAINING FINAL
AUTHOR(S):MICHEL SUBSTITUTE
ON AGREEING TO THE AMENDMENT

H R 4000 A03

	YEA	NAY	PRES	NOT VOTING
DEMOCRATIC	28	224		5
REPUBLICAN	160	14		2
OTHER				
TOTALS	188	238		7

CONGRESSIONAL PAGE NO. H

DATE: AUG. 03 1990

Y ALEXANDER
Y ANNUNZIO
Y ANTHONY
Y BARNARD
Y CHAPMAN
Y DARDEN
Y GEREN
Y HATCHER
Y HAYES (LA)
Y HUCKABY
Y HUTTO
Y JENKINS
Y LAFALCE
Y LAUGHLIN
Y LIPINSKI
Y MONTGOMERY
Y MURPHY
Y PARKER
Y PAYNE (VA)
Y RAY
Y ROWLAND (GA)
Y RUSSO
Y SARPALIUS
Y STALLINGS
Y STENHOLM
Y TAUZIN
Y TAYLOR
Y THOMAS (GA)

ROLL NO. 309 DEMOCRATIC - YEAS -

- FOLEY
- FORD (MI)
- HALL (TX)
- LEATH (TX)
- NELSON

ROLL NO. 309 DEMOCRATIC -NOT VOTING -

N CONTE
N DAVIS
N FISH
N GILMAN
N GREEN
N HORTON
N LEACH (IA)
N MORELLA
N RINALDO
N SAIKI
N SCHNEIDER
N SHAYS
N SNOWE
N WALSH

ROLL NO. 309 REPUBLICAN - NAYS -

- BILIRAKIS
- ROBINSON

ROLL NO. 309 REPUBLICAN -NOT VOTING -

IN PROGRESS: ROLL NO. 310 YEA-AND-NAY TIME REMAINING FINAL
AUTHOR(S):
ON PASSAGE

CIVIL RIGHTS ACT OF 1990

H R 4000

	YEA	NAY	PRES	NOT VOTING
DEMOCRATIC	240	12		5
REPUBLICAN	32	142		2
OTHER				
TOTALS	272	154		7

TIME REMAINING FINAL

N ANNUNZIO
N BARNARD
N DARDEN
N HUCKABY
N HUTTO
N JENKINS
N LIPINSKI
N MONTGOMERY
N PARKER
N SARPALIUS
N STENHOLM
N TAYLOR

ROLL NO. 310 DEMOCRATIC - NAYS -
- FOLEY
- FORD (MI)
- HALL (TX)
- LEATH (TX)
- NELSON

ROLL NO. 310 DEMOCRATIC -NOT VOTING -

Y BARTON
Y BOEHLERT
Y CAMPBELL (CA)
Y CONTE
Y COUGHLIN
Y DAVIS
Y FISH
Y GILMAN
Y GRANT
Y GREEN
Y HORTON
Y JAMES
Y JOHNSON (CT)
Y LEACH (IA)
Y MACHTLEY
Y MARTIN (IL)
Y MEYERS
Y MORELLA
Y REGULA
Y RINALDO
Y ROS-LEHTINEN
Y ROUKEMA
Y ROWLAND (CT)

Y SAIKI
Y SCHIFF
Y SCHNEIDER
Y SCHULZE
Y SHAYS
Y SMITH (VT)
Y SNOWE
Y WALSH
Y WELDON

ROLL NO. 310 REPUBLICAN - YEAS -

\- BILIRAKIS
\- ROBINSON

ROLL NO. 310 REPUBLICAN -NOT VOTING -

V,

HISTORY ROLL NO. 309 RECORDED VOTE TIME REMAINING FINAL
AUTHOR(S):MICHEL SUBSTITUTE
ON AGREEING TO THE AMENDMENT

H R 4000 A03

	YEA	NAY	PRES	NOT VOTING
DEMOCRATIC	28	224		5
REPUBLICAN	160	14		2
OTHER				
TOTALS	188	238		7

CONGRESSIONAL PAGE NO. H DATE: AUG. 03 1990

Y ALEXANDER
Y ANNUNZIO
Y ANTHONY
Y BARNARD
Y CHAPMAN
Y DARDEN
Y GEREN
Y HATCHER
Y HAYES (LA)
Y HUCKABY
Y HUTTO
Y JENKINS
Y LAFALCE
Y LAUGHLIN
Y LIPINSKI
Y MONTGOMERY
Y MURPHY
Y PARKER
Y PAYNE (VA)
Y PAY
Y ROWLAND (GA)
Y RUSSO
Y SARPALIUS
Y STALLINGS
Y STENHOLM
Y TAUZIN
Y TAYLOR
Y THOMAS (GA)

ROLL NO. 309 DEMOCRATIC - YEAS -

- FOLEY
- FORD (MI)
- HALL (TX)
- LEATH (TX)
- NELSON

ROLL NO. 309 DEMOCRATIC -NOT VOTING -

N CONTE
N DAVIS
N FISH
N GILMAN
N GREEN
N HORTON
N LEACH (IA)
N MORELLA
N RINALDO
N SAIKI
N SCHNEIDER
N SHAYS
N SNOWE
N WALSH

ROLL NO. 309 REPUBLICAN - NAYS -

\- BILIRAKIS
\- ROBINSON

ROLL NO. 309 REPUBLICAN -NOT VOTING -

IN PROGRESS: ROLL NO. 310 YEA-AND-NAY TIME REMAINING FINAL
AUTHOR(S):
ON PASSAGE

CIVIL RIGHTS ACT OF 1990

H R 4000

	YEA	NAY	PRES	NOT VOTING
DEMOCRATIC	240	12		5
REPUBLICAN	32	142		2
OTHER				
TOTALS	272	154		7

TIME REMAINING FINAL

N ANNUNZIO
N BARNARD
N DARDEN
N HUCKABY
N HUTTO
N JENKINS
N LIPINSKI
N MONTGOMERY
N PARKER
N SARPALIUS
N STENHOLM
N TAYLOR

ROLL NO. 310 DEMOCRATIC - NAYS -
- FOLEY
- FORD (MI)
- HALL (TX)
- LEATH (TX)
- NELSON

ROLL NO. 310 DEMOCRATIC -NOT VOTING -

Y BARTON
Y BOEHLERT
Y CAMPBELL (CA)
Y CONTE
Y COUGHLIN
Y DAVIS
Y FISH
Y GILMAN
Y GRANT
Y GREEN
Y HORTON
Y JAMES
Y JOHNSON (CT)
Y LEACH (IA)
Y MACHTLEY
Y MARTIN (IL)
Y MEYERS
Y MORELLA
Y REGULA
Y RINALDO
Y ROS-LEHTINEN
Y ROUKEMA
Y ROWLAND (CT)
Y SAIKI
Y SCHIFF
Y SCHNEIDER
Y SCHULZE
Y SHAYS
Y SMITH (VT)
Y SNOWE
Y WALSH
Y WELDON

ROLL NO. 310 REPUBLICAN - YEAS -

\- BILIRAKIS
\- ROBINSON

ROLL NO. 310 REPUBLICAN -NOT VOTING -

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
07. Letter	From Evan J. Kemp, Jr. to POTUS Re: Kennedy-Hawkins Bill (4 pp.)	8/31/90	~~P-5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (1 of 2) [3]

Open on Expiration of PRA
(Document Follows)
By JF (NLGB) on 10/28/05

Date Closed:	12/17/2004	**OA/ID Number:**	29144-009
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

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

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

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

PRM. Removed as a personal record misfile.

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

(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF THE CHAIRMAN

August 31, 1990

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

Dear President Bush:

I am writing to express my grave concerns about the Kennedy-Hawkins bill which will, in all likelihood, soon reach your desk. After meeting with constituent groups throughout the country, I am convinced that the American people applaud your stated determination not to sign a quota bill. I believe that amendments notwithstanding, rhetoric notwithstanding, this bill will result in quotas which will tragically exacerbate growing tensions in race relations in America.

The quota issue is quite simple. As the bill is now written, once a plaintiff shows that a job qualification disproportionately excludes minorities and/or women, the employer must justify that qualification by proving it is a "business necessity." As defined in the 1990 Civil Rights Act, proof of "business necessity" imposes an onerous burden. Rather than mustering the type of statistical and analytical evidence to meet this burden for even the simplest of qualifications, most employers will attempt to preempt challenges to their hiring practices by hiring the "correct" number of Asians, Hispanics, African Americans, etc. In fact, quota systems are in place already in state and municipal governments and in colleges and universities. Under the Kennedy-Hawkins bill, merit, once the traditional means in America for getting ahead, will take a back seat to the race and sex of individuals seeking employment. The right of the individual to succeed through excellence will be buried under preferences for members of particular groups based solely on their race or sex. This approach will be destructive both for members of so-called protected groups and for those outside them.

This point was eloquently made in a March 8, 1990 letter to Senator Metzenbaum from the Personnel Commissioners of the diverse Los Angeles Unified School District who argued that the standard of "business necessity" proposed in the bill "would result in lower educational requirements for most occupations... [T]he practice of considering those aspects that relate to exceptional performance will, for the first time, be indefensible and ultimately, will be illegal." (This result was not altered by recent cosmetic changes in Kennedy-Hawkins.) What incentive will such a lowest common denominator standard provide for those still in school? Instead of urging young members of groups which have traditionally faced discrimination to work hard to succeed, the 1990 Civil Rights Act sends the message that they are not expected to attain excellence and that they can instead rely on their race, ethnicity, or sex to get ahead. As black writer Shelby Steele has movingly described, group preferences produce psychological crippling and a cult of victimization that a law such as this can foster but no law can remedy.

Furthermore, far from ameliorating tensions among different groups in America, this legislation would actually foster them. As Chairman of the EEOC, I've travelled throughout the country to meet with representatives of civil rights groups, including Asians, Hispanics, the elderly, women, and African Americans. In these frank sessions civil rights advocates outside the Beltway have expressed their concerns that quotas and preferences--group rights in any form--have caused enormous animosity between groups in our society. They too have seen the enmity: on our campuses, where preferences and quotas are rampant in hiring and admissions; in state employment where preferences and quotas pit one civil rights group against another; in ethnic neighborhoods such as Bensonhurst; in attacks on Asian Americans who own small businesses in African American neighborhoods; in brutal battles between Hispanic and black ghetto youth; and in the support shown for the sophisticated white racism promoted by a former Nazi. Only an expanding economy has prevented more resentment.

Everywhere in the world--take the nationalities of the Soviet Union as a prime example--group identities and preferences prove explosive in the absence of totalitarian rule. Even in our democratic neighbor Canada, French separatism threatens, often enough violently, to shake its foundations. America's unique devotion to the principle of the equality of individual rights has enabled us to bring together a cosmos of different nationalities because we have always tried to look beyond group membership to the individual. America could not have worked any other way. Are we to abandon this principle now? Are we to go the way of the rest of the world and accept group strife and balkanization?

These questions come to mind as I reflect on that proud day, July 26, when you signed the Americans with Disabilities Act (ADA) into law. The ADA reflects civil rights at its best, for it protects the individual and his or her uniqueness and demands that only ability count. What a contrast with the meaning of civil rights embedded in the Kennedy-Hawkins bill.

As Chairman of the Equal Employment Opportunity Commission, I have had to reflect on the ideal of equal opportunity in general and how government can promote it. Of course we begin with the appropriate education, welfare, urban, and economic policies. And here again the model of the Americans with Disabilities Act can help us blaze the civil rights path needed for the 90's. Just as government has removed barriers to those with disabilities, so can it remove barriers to equal opportunity in employment, education, and other areas for all groups. Abraham Lincoln saw both the problem and the solution, when he urged, "Let not him who is houseless pull down the house of another; but let him labor diligently and build one for himself, thus by example assuring that his own shall be safe from violence when built" (March 21, 1864).

This Administration should take the offensive on civil rights. A prime-time television address by you at the time of the veto of the Kennedy-Hawkins bill should announce a positive Republican civil rights agenda: an Administration review of federal laws and regulations with an eye to promoting equality by removing barriers to equal opportunity. What, for example, are the effects of licensing requirements? Will vouchers promote individual choice and parental responsibility in education? Some of these barriers could be eliminated through education, while others might require executive orders and legislation. The end would be the empowerment of the individual, the ability to control one's destiny, free of governmental or other institutional bias. Government, business, labor, education, and the voluntary associations that have produced American greatness would all have to rethink their practices; and the federal government can be the leader in this reform. The aim must be to expand opportunities, not to increase one group's rights at the expense of others. The governmental and other practices that may have served us well in the past are often inappropriate today and sometimes even keep new generations of Americans, often minorities, immigrants, and women, off the playing field. A simple, initial focus on equal opportunity through barrier removal would be a positive and sensible start to rethinking our approach to equal opportunity and saving civil rights as the rights of all individuals.

Mr. President, your commitment to civil rights, from your courageous vote for Fair Housing in 1968, to your indispensable support for the Americans with Disabilities Act in 1990, could be questioned only by a prejudiced commentator. Your dedication to civil rights as individual rights would be reaffirmed by your veto of the Kennedy-Hawkins Bill; believe me, vastly more Americans would be relieved than disappointed. And the new emphasis on barrier removal would fight discrimination, not fan its flames. You would be keeping alive that vision of civil rights articulated by Abraham Lincoln, and reaffirmed by Martin Luther King, Jr., who noted America's "amazing" focus on the individual: "America is essentially a dream, a dream as yet unfulfilled. It is a dream of a land where men of all races, of all nationalities and of all creeds can live together as brothers. The substance of the dream is expressed in these sublime words, words lifted to cosmic proportions: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.'"

If I can be of further assistance on this crucial issue, please give me a call. My telephone number is (202) 663-4001 (work) or (202) 337-4119 (home).

Sincerely,

Evan

Evan J. Kemp, Jr.
Chairman

cc: John H. Sununu, Chief of Staff (with enclosures)

C. Boyden Gray, Counsel to the President (with enclosures)

Los Angeles Unified School District

Personnel Commission

Administrative Offices: 450 North Grand Avenue, Los Angeles, California

Mailing Address: Box 3307, Los Angeles, California 90051

Telephone: (213) 625-6523

March 8, 1990

The Honorable Howard Metzenbaum
United States Senator
Senate Office Building
Washington, DC 20510

Dear Senator Metzenbaum:

As Personnel Commissioners of the Los Angeles Unified School District, the second largest school district in the United States, we are advocates and supporters of the principles of the merit system. We also support the goals of affirmative action and recognize the need for strong anti-discrimination laws. Accordingly, we wish to register our support for the Civil Rights Act of 1990 (S 1204, HR 4000) and urge its passage with one small but important amendment. We ask that you delete the proposed definition of the term "required by business necessity" to mean "essential to effective job performance" for the following reasons:

1. The proposed definition would result in lower educational requirements for most occupations.

   As a public educational institution we believe it is important that we and other employers be able to continue to require high school graduation for most occupations and college graduation or completion of college-level courses for most professional and administrative positions. Such requirements serve as an incentive for students to complete high school and to obtain additional academic or job relevant education. The need for a better educated work force is essential to the improvement of the economic well-being of our society. However, the completion of formal education requirements, although desirable, clearly is not "essential for effective performance" for the vast majority of occupations. Thus, formal educational requirements would be among the first casualties of the application of the proposed new definition of "business necessity."

   At a time when the student dropout rate in urban schools is accelerating at an unprecedented pace, it would be counter productive to undermine a practice that serves as an effective attendance incentive. Paradoxically, it would be black and Hispanic children that would be disproportionately disadvantaged.

2. The proposed definition is in conflict with the merit principle that the best qualified persons available should be hired.

   By requiring employers to consider only those aspects that are "essential to effective job performance", the practice of considering those aspects that relate to exceptional performance will, for the first time, be indefensible and ultimately, will be illegal. Very few practices, skills, knowledges and abilities are independently "essential" for satisfactory performance in any occupation. In most job contexts, excellent job performance is a consequence of doing a variety of things well--no one of which is indispensable; each could be compensated for by excellence in some other aspects of the job. The very few factors that are truly "essential" would be the only factors that could be assessed in the personnel selection process. Thus, employers would be required to assess candidates for employment at the minimum level of competency: the level of ability where one can get by, i.e., can do that which is essential, and would be precluded from testing candidates for their competence in all facets that relate to effective job performance--the essential, the important, and the desirable.

We have found that an employment program based on the selection of the best qualified, coupled with an aggressive affirmative action oriented recruitment effort, is fully compatible with the goals of maintaining a representative work force--and that it can be accomplished in an atmosphere that is conducive for racial and ethnic tolerance. We believe that it is essential that you amend the Civil Rights Act of 1990 by deleting the proposed new definition of "business necessity" so that merit system employers may continue to effectively strive for excellence, balance and tolerance.

Sincerely,

Personnel Commission Members

Evelyn C. Martinez

Evelyn V. Martinez

M. E. "Red" Martinez

M.E. "Red" Martinez

John W. Murray Jr.

John W. Murray, Jr.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
08. Memo	From Marc Rosenblum to Evan J. Kemp, Jr. Re: Symposium of Title VII Articles (7 pp.)	8/23/90	~~P-5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (1 of 2) [3]

Open on Expiration of PRA
(Document Follows)
By JP (NLGB) on 10/28/05

Date Closed:	12/17/2004	**OA/ID Number:**	29144-009
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

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

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

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

PRM. Removed as a personal record misfile.

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

(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

August 23, 1990

MEMORANDUM

To: Evan J. Kemp, Jr.
Chairman

Robert Funk
Chief of Staff

From: Marc Rosenblum
Special Assistant

Subject: Symposium of Title VII Articles

The Yale Law and Policy Review has just published an issue devoted largely to employment discrimination. Attached herewith are summaries of several of the key articles. Relevant issues of concern drawn from these papers include:

1. Robert Belton.[1]

Employers do use quotas to avoid disparate impact suits [contrary to Senator Kennedy's claim that S.2104 will not be quota-inducing]. The Wards Cove majority replaced the Griggs disparate impact theory with a functional equivalent of class-based disparate treatment, creating insurmountable burdens for Title VII plaintiffs.

Congress should thus enact the 1990 Civil Rights Act to restore disparate impact theory, which represents the [preferred] equal results rather than the equal opportunities interpretation of Griggs and Title VII.

2. Alfred W. Blumrosen.[2]

Title VII should permit employers to use "bottom line" adverse impact measures [contrary to Connecticut v. Teal, 457 U.S. 440 (1982)]. The restrictions imposed by Teal harm, rather than help, minority employment interests.

---

[1]Professor, Vanderbilt University School of Law.

[2]Professor, Rutgers (State University of N.J.) School of Law.

Title VII enforcement mechanisms should be expanded, to include an administrative hearing option instead of litigation. EEOC, as currently organized and managed, is incapable of handing this alternative.

3. James J. Heckman and J. Hoult Verkerke.[3]

Federal employment discrimination law played a significant role in improving the economic status of blacks, particularly during the 1965-75 decade. There has been little aggregate effect since then.

Title VII is unlikely to have a major influence on aggregate economic disparities by race in the 1990s.

Encl: [3]

---

[3]Professor of Economics, Yale University, and doctoral candidate, Department of Economics, Yale University.

Belton, The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction. 8 Yale Law & Policy Review 223 (1990)

Summary and Recommendations

This article contains an unusually direct endorsement of quotas by a leading civil rights policy theorist, both in his interpretation of Griggs and as a purpose of the 1990 Civil Rights Act to "resolve" the Court's repudiation of Griggs.

The author also acknowledges the past use of quotas by risk-averse employers seeking to avoid disparate impact litigation. Those views, while widely held among sponsors and advocates of H.R.4000/S.2104, are not often publicly acknowledged. Senator Kennedy and other sponsors repeatedly deny either the widespread previous use of quotas or the quota-inducing character of the pending legislation.

This article illustrates and reinforces the point that, absent meaningful amendment prior to final Congressional action, Executive disapproval is again recommended.

Discussion

Belton's thesis rests on a "results" oriented interpretation of Griggs, where each employer can be held responsible for the effects of societal discrimination as well as its own practices. This contrasts the "opportunities" oriented approach ascribed to Wards Cove, namely nondiscriminatory but non-affirmative. (It also ignores the mid-range position that employers are responsible for both the intent and the effects of their own policies, but not for other disparities including societal discrimination).

He starts from the premise that Griggs endorsed two approaches to Title VII, equal treatment and equal achievement, but by 1988 the Court no longer endorsed both goals. It thus used Wards Cove in 1989 to "dismantle" disparate impact as a means of promoting workplace equality.

The Court's shift followed a decade of experience subsequent to Weber, where the majority endorsed voluntary quotas reflecting past societal discrimination not attributable to the particular employer, and Teal, which rejected the bottom-line defense to disparate effects within the selection process. In effect, the current majority decided that Title VII had become too burdensome on employers and sought to eliminate the excess.

Belton provides an analysis of Watson, which agreed that disparate impact theory applies to subjective as well as objective selection criteria. This is followed by reference to the specific Watson provisions that formed the precedents for Wards Cove. These provisions require articulation of particular employer practices and modify the established burden-shifting rule, both having the effect of dropping societal discrimination as a basis for Title VII liability.

Discussing Wards Cove further, the author asserts that only an equal-results, nondiscrimination theory of Title VII remains. Plaintiffs are required, in effect, to prove classwide disparate treatment to prevail under disparate impact theory. These steps reflect the present Court's concerns that Weber, Teal and similar holdings had put excessive pressure on employers to adopt quotas rather than litigate from a defensive, prima facie-rebutting posture.

The author concludes that Congress should pass the Civil Rights Act of 1990, so that Title VII can remedy the present "and continuing" effects of societal discrimination against minorities and women. Otherwise, Title VII would only reach present employer acts and ignore the Nation's historical legacy that could be attacked under Griggs.

Analysis

Belton's thesis is simple: Griggs originally was intended to reach the effects as well as the intent of employer practices. After Weber essentially nullified the anti-quota provisions of Section 703(j) and Teal eliminated the bottom-line defense, employers faced the choice of assuming a share of the present effects of past societal discrimination or risk liability and monetary damages.

Wards Cove rejected the reparations theory and restored Title VII to an anti-discrimination posture. In his view, a political solution (the 1990 Civil Rights Act) is required to restore the pre-Wards Cove status quo ante.

Blumrosen, Society in Transition I: A Broader Congressional Agenda for Equal Employment - The Peace Dividend, Leapfrogging, and Other Matters

8 Yale Law & Policy Review 257 (1990)

Summary

Blumrosen takes the view that the "traditional" civil rights agenda, reflected in the 1964 Act generally and Title VII in particular, have had only limited effect because of adverse structural changes in the U.S. economy since then. Minorities, especially blacks, still experience wage and relative unemployment disparities relative to whites, requiring further Congressional action.

He identifies changes in employment structure and demographics as the factors impeding further black gains. As the proportion of blacks increased over the past quarter-century and the number of jobs available to lesser-skilled workers decreased, most blacks were unable to improve their relative economic status.

His solution is to expand federal policy and program activity to provide suburban minority housing near job sites now inaccessible to urban workers; to require affirmative employment of military personnel displaced by defense cutbacks (the "Peace Dividend"); to consider the employment effects on minorities and women of merge and trade policy; and income redistribution through more progressive capital-gains taxation.

More directly linked to Title VII enforcement are two proposals. The first would permit employer reliance on "bottom-line" defenses. The second calls for structural change in statutory enforcement methods to permit (at plaintiff option) administrative hearing resolution of Title VII complaints instead of bench trials. He cites the Federal Courts Study Committee report as authority for this approach, but then observes: "The well-documented inadequacies of the EEOC as an investigating agency make it incapable as currently organized and managed as functioning in this new context."

Blumrosen's conclusion is that civil rights enforcement must include minority economic and political problems as well as traditional Title VII enforcement. He indicates that this approach is "in addition" to and not a "substitute" for ongoing enforcement efforts.

Analysis

Without identifying his agenda as utopian-liberal, Blumrosen's solution is to expand federal policy and program activity even beyond President Johnson's Great Society. In the author's view, no area of American economic life operates without some negative effect on minorities; all these areas are fair game for legislative and/or regulatory revision.

To that extent, he shares the outcome-oriented view expressed by Belton, ante. Blumrosen goes even further, however, in that he finds a nexus to Title VII in all aspects of economic activity rather than just employment.

Heckman & Verkerke, Racial Disparity and Employment Discrimination Law: An Economic Perspective

8 Yale Law & Policy Review 276 (1990)

Discussion

Heckman and Verkerke examine black economic status, as defined by relative wage and occupational gains over the past quarter century. During that time, after an initial decade of progress, the data show no further aggregate gains.

They evaluate the two competing economic policy approaches to black/white differences, and find evidence to support both positions. The "continuous change", or market incentive approach, downplays federal regulatory intervention in favor of long-term adjustments in education and geographic mobility as a means of boosting black incomes. The "discontinuous change", or comprehensive regulatory view, attributes much of the observed increase in demand for black workers to federal pressure on employers.

The observed economic progress was nonuniform, even during the decade up to 1975 when gains were most visible. The increases, primarily in the South, reflected elimination of racial wage differences that had been widespread before the enactment of Title VII.

The authors attempt to evaluate the quantitative effects of Title VII, but are unable to separate the relative influence of ongoing long-term trends, the Executive Order program, and EEOC. During the 1990s, they conclude, basic economic factors will dominate the relative status of black workers. These factors include the continuing decline of manufacturing employment, and the increasing value of skilled relative to unskilled labor -- two measures negatively impacting relative black incomes.