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OA/ID Number:	29145
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Folder Title:
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01. Memo	From Dick Thornburgh to POTUS Re: S. 2104, the Civil Rights Act of 1990 (10 pp.)	10/22/90	~~P-5~~	

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Record Group: Bush Presidential Records
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Series: Sununu, John, Files
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Date Closed:	12/17/2004	**OA/ID Number:**	29145-002
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Office of the Attorney General
Washington, D.C. 20530

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October 22, 1990

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MEMORANDUM FOR THE PRESIDENT

FROM: DICK THORNBURGH
ATTORNEY GENERAL

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

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

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

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

I. INCENTIVES FOR EMPLOYERS TO ADOPT QUOTAS

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

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court ruled that Title VII of the Civil Rights Act of 1964 prohibits hiring and promotion practices that unintentionally but disproportionately exclude persons of a particular race, sex, ethnicity, or religion unless these practices are justified by business necessity. Law suits challenging such practices are called "disparate impact" cases, in contrast to "disparate treatment" cases brought to challenge intentional discrimination.

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

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

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

Sections 3 and 4 of S. 2104, however, go far beyond this shift in the burden of proof. First, the bill effectively creates a new presumption of discrimination whenever a plaintiff shows a sufficient statistical disparity in the racial, sexual, ethnic, or religious makeup of an employer's workforce, even if the plaintiff fails to identify any employment practice that has caused the disparity. Second, it defines "business necessity" in an unduly restrictive way. Finally, it imposes unreasonable restrictions on the type of evidence an employer may use in proving business necessity. In combination, these provisions will force employers to choose between (1) lengthy litigation, under rules rigged heavily against them, or (2) adopting policies that ensure that their numbers come out "right." Put another way, the bill exerts strong pressure on employers to adopt surreptitious quotas.

A. THE PRESUMPTION OF DISCRIMINATION ARISING FROM STATISTICAL DISPARITIES

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

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

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

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

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

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

B. THE BUSINESS NECESSITY DEFINITION AND THE EVIDENTIARY RESTRICTIONS

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

1. The Business Necessity Definition

S. 2104 forces employers to defend any employment practice "involving selection" by showing a "significant relationship to successful performance of the job." This standard is new; it is found nowhere in any holding of the Supreme Court. On its face, it is defective because a narrow requirement of this type denies that there can be legitimate and desirable selection or promotion practices aimed at objectives other than successful job performance. Moreover, its very novelty guarantees that it will generate litigation for employers seeking to defend themselves. Finally, the bill's peculiar treatment of prior cases is likely to suggest to courts that ambiguities should be resolved against employers. In combination, these defects again make it likely that employers will adopt quotas rather than risk expensive litigation whose outcome will be highly uncertain.

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

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

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

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

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

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

2. Evidentiary Restrictions

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

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

C. CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

Section 9 contains a provision complementing the provisions in Section 6. For the first time, Title VII would say that certain civil rights plaintiffs -- those challenging the legality of quotas adopted under a consent decree -- could be required to pay attorneys fees where their lawsuit was neither frivolous nor otherwise unreasonable. The clear effect would be to discourage many challenges to illegal discrimination. The creation of fundamentally unfair obstacles to the vindication of our citizens' civil rights has no place in a civil rights bill.

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

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

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

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

Other provisions in S. 2104 will also contribute unnecessarily to fostering litigation instead of conciliation. An amendment to 42 U.S.C. 2000e-5(k), for example, permits plaintiffs to recover attorneys fees for continuing to litigate even if the judgment they ultimately obtain is less favorable than a settlement offer they rejected. Similarly, a new paragraph (2) in 42 U.S.C. 2000e-5k creates special rules impeding waiver of attorney's fees as part of settlement, which will inevitably discourage settlements because defendants will not be able to estimate accurately the total cost of the settlement to which they are being asked to agree.

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

IV. CONCLUSION

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

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

90 OCT 22 PM 2:40

THE DIRECTOR

October 22, 1990

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Enrolled Bill S. 2104 - Civil Rights Act of 1990
Sponsors - Sen. Kennedy (D) Massachusetts and 48 others

Last Day for Action

November 1, 1990 - Thursday

Purpose

Amends provisions of the Civil Rights Act of 1964 relating to employment discrimination.

Agency Recommendations

Office of Management and Budget	Disapproval
Department of Justice	Disapproval
Equal Employment Opportunity Commission	Disapproval
Department of Labor	Defers to Justice (Informally)
Small Business Administration	Approval

Discussion

In a May 17, 1990, Rose Garden ceremony, you said, "I want to sign a civil rights bill, but I will not sign a quota bill." You also stated that any new civil rights legislation:

-- Must operate to obliterate consideration of factors such as race, color, religion, sex, or national origin from employment decisions.

-- Must reflect the fundamental principles of fairness that apply throughout our legal system.

-- Should contain a deterrent against workplace harassment, but must do so in a manner that is reasonable and does not produce a windfall for lawyers.

Although amendments were made to the legislation during its consideration by Congress, the Department of Justice and the Equal Employment Opportunity Commission (EEOC) recommend that you veto S. 2104. Justice states in its views letter that the enrolled bill is likely to result in quotas, to fail in providing due process of law, and to "produce a bonanza for lawyers."

S. 2104 passed the Senate by a vote of 65-34. H.R. 4000, the House companion, passed by a vote of 272-154. The conference report on S. 2104 passed the Senate by a vote of 62-34 and the House by a vote of 273-154.

The Administration made substantial efforts to amend S. 2104 to make it consistent with your policy. For example, in a July 10, 1990, letter to Senator Kennedy, Governor Sununu proposed statutory language intended to avoid quota schemes. The language was not accepted.

In letters sent to Senate and House members prior to congressional consideration of S. 2104 and H.R. 4000, the Attorney General stated that he and other senior advisers would recommend a veto if the bills were not modified. A Statement of Administration Policy sent to the House on H.R. 4000 on August 2, 1990, stated that the President's senior advisers would recommend a veto of the bill in its then-current form.

On October 20, 1990, you announced that you would veto S. 2104, and urged Congress to enact an alternative proposal that you transmitted on that date. The proposal contains numerous compromises designed to accommodate the concerns of proponents of S. 2104.

Congressional supporters of the enrolled bill argue that it will not require hiring or promotion quotas. They also claim that several amendments made during the legislative process address Administration concerns.

<u>Major Provisions of S. 2104</u>

S. 2104 reverses or modifies at least six recent Supreme Court decisions regarding employment discrimination. It also authorizes compensatory and punitive damages in cases involving intentional discrimination. The provisions of S. 2104 are described and analyzed in the Justice Department's enrolled bill views letter. This memorandum discusses the provisions most at variance with your three stated principles. These are the provisions regarding "disparate impact" cases, finality of consent decrees, and damages.

-- <u>"Disparate Impact" Cases (Wards Cove Packing Co. v. Atonio)</u>

Title VII of the Civil Rights Act of 1964 outlaws employment discrimination on the basis of race, color, religion, sex, or national origin. Remedies available under Title VII include back pay, restoration to rightful status, and court orders to cease a prohibited practice.

In the landmark 1971 case of Griggs v. Duke Power Co., the Supreme Court unanimously held that employment practices having a disparate impact violate Title VII unless they are "required by business necessity." ("Disparate impact" practices exclude certain groups disproportionately even if unintentionally.)

Proponents of S. 2104 believe that the Supreme Court's 1989 Wards Cove decision overruled Griggs and other precedents on three major issues: identification of employment practices, the burden of persuasion, and the definition of business necessity. S. 2104 is intended to overrule Wards Cove on each of these issues. The decision, the bill's provisions, and Justice's views are described below.

Wards Cove Decision. In Wards Cove, the five-member majority held that:

-- The plaintiff must identify the particular employment practice that is challenged as discriminatory.

-- The burden of persuading a court that the practice is not required by business necessity is on the plaintiff. (The employer must only produce evidence of a business justification for its employment practice.)

-- A challenged employment practice is deemed required by business necessity if it "serves, in a significant way, the legitimate employment goals of the employer."

Identification of Employment Practices. Section 4 of S. 2104 provides that a plaintiff need not demonstrate which specific practices are responsible for a disparate impact if the employer destroyed, concealed, refused to produce, or failed to keep records necessary to make such a demonstration. In such cases, a "group of employment practices" that results in a disparate impact could be held unlawful unless the employer demonstrated that it was required by business necessity.

Justice objects to this provision, in particular the portion relating to failure to keep records. According to Justice, under S. 2104, "the employer must either produce evidence showing that one of its practices could have been challenged or admit that it does not have such evidence." Thus, this provision "appears to place the employer in a no-win situation." According to Justice, S. 2104 could cause an employer's liability to be "premised entirely on statistics showing 'bottom line' racial imbalance . . . ."

Burden of Persuasion. Section 4 shifts to the employer the burden of demonstrating that a practice shown to have a disparate impact is required by business necessity. It states, however, that the mere existence of a statistical imbalance "is not alone sufficient to establish a <u>prima facie</u> case of disparate impact violation."

Justice advises that the burden of persuasion should remain with the plaintiff throughout a disparate impact case. The Department states that "it would be unjustifiable" to impose a greater burden on an employer in a disparate impact case than in a case of intentional discrimination. According to Justice, the bill's provision that statistical imbalance alone does not establish a <u>prima facie</u> case of violation could easily be circumvented. A plaintiff could simply allege that the imbalance results from the unspecified group of employment practices.

<u>Business Necessity</u>. Section 3 of S. 2104 defines the circumstances under which an employment practice is "required by business necessity." Employment practices involving selection (e.g., tests and requirements regarding experience and physical characteristics) "must bear a significant relationship to successful performance of the job." Other employment decisions "must bear a significant relationship to a manifest business objective of the employer."

Justice objects to requiring employers to show that a practice has a "significant" relationship to "successful" job performance or to a "manifest" employment objective. According to Justice, a "reasonable relationship to job performance or a legitimate business purpose is the most that a defendant should be required to show."

-- <u>Finality of Consent Decrees (Martin v. Wilks)</u>

In <u>Martin v. Wilks</u>, a five-member majority of the Court held that persons not a party to, but adversely affected by, decrees mandating unlawful racial preferences can challenge them in court.

Section 6 of S. 2104 bars challenges by non-parties to such decrees. For decrees entered less than 30 days after the enactment of the enrolled bill, non-party challenges are precluded if: (1) the non-parties had sufficient notice of the proposed judgment and a reasonable opportunity to object to the judgment; (2) their interests were "adequately represented" by another person who challenged the decree; or (3) a court determines that "reasonable efforts" were made to provide notice to them. For decrees entered into 30 days or more after its enactment, the enrolled bill would establish similar -- but stricter -- criteria for precluding challenges to a decree.

Justice states that "portions of section 6 run afoul of the Constitution" -- specifically, the Due Process Clause -- by insulating illegal or unconstitutional quota decrees from judicial review. Justice specifically objects on constitutional grounds to the provisions that would:

-- allow a court to find that an individual's interests had been adequately represented by another party; and

-- cut off future challenges where it is determined that reasonable efforts were made to provide notice to interested persons.

Justice also objects to the bill's rules governing challenges to decrees entered 30 days or more after enactment of S. 2104. Justice states that those rules would in part "bind individuals who never heard of the action or had an opportunity to assert their interests."

-- <u>Damages in Cases of Intentional Discrimination</u>

Under current law, compensatory and punitive damages are available only in cases of discrimination based on race. Section 8 of S. 2104 authorizes such remedies for discrimination based on gender, religion, color, national origin, or disability. Compensatory damages would be allowed for intentional discrimination; punitive damages would be allowed in cases involving malice or callous indifference to the rights of others. Section 8 also authorizes jury trials in intentional discrimination cases. The enrolled bill caps punitive damages at the greater of $150,000 or the combined total of the amount of compensatory damages and back pay awarded in the case.

Justice states that this section "represents a major change in Title VII and is in no way related to any of last Term's Court decisions." According to Justice, part of the original compromise that led to passage of Title VII was that back pay would be the only form of monetary relief. The broad availability of damages under S. 2104 "threatens to hinder the effectiveness of Title VII and produce a bonanza for lawyers." Justice notes that while the $150,000 cap is "helpful," a "general damage remedy is unnecessary . . . ."

Justice believes that section 8 will: "encourage employees to pursue claims in court in the hope of achieving large monetary victories . . . . [P]laintiffs' lawyers will inevitably include claims for pain and suffering, emotional harm, and the like . . . . Placing these issues before a jury . . . will turn Title VII litigation into a time-consuming, high risk venture for both plaintiffs and defendants."

<u>Agency Views</u>

The <u>Department of Justice</u> recommends a veto of the enrolled bill for the reasons discussed previously. Justice's views letter also objects to several other provisions in S. 2104 that could result in increased litigation and raise due process concerns. These include provisions relating to attorneys' fees and rules of statutory construction. Justice supports certain provisions of S. 2104 that are consistent with a legislative proposal that it submitted to Congress this February.

The EEOC also recommends a veto of S. 2104 because it "contains no meaningful improvements over previous versions."

The Small Business Administration (SBA), in its enrolled bill views letter, recommends approval of S. 2104. The Administrator notes that she expressed concerns about the bill during its consideration by Congress. Her concerns related to the provisions on the burden of proof and damages.

With respect to the burden of proof, the Administrator states that "[w]hile the possibility remains that employers may be required to meet a new and as yet undefined burden of proof, I believe that Congress is genuinely seeking to restore the application of the law to its pre-Wards Cove state." Regarding damages, SBA notes that employers would still be subject to costly and lengthy litigation, even though the conferees agreed to the $150,000 cap.

SBA concludes that S. 2104 strikes the correct balance between the protection of civil rights and the legitimate business needs of employers "by recognizing the concerns of business while attempting to provide a framework within which individuals can seek to redress grievances."

Conclusion and Recommendations

Justice concludes that the enrolled bill "would encourage quota systems or otherwise divide our society along racial lines." We join Justice and the EEOC in recommending disapproval of S. 2104.

We have been advised that the Office of the White House Counsel is preparing a veto message for your consideration.

Richard G. Darman
Director

Enclosures

THE WHITE HOUSE
WASHINGTON

Date: 10/22/90

ok

TO: THE CHIEF OF STAFF

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

The attached has been forwarded to the President.

HOUSE OF REPRESENTATIVES
WASHINGTON, D. C. 20515

JOHN LEWIS
FIFTH DISTRICT
GEORGIA

Sir:
We will draft a thank you unless you prefer to handle personally.

JC

October 17, 1990

Dear Mr. President:

As one who has tasted the bitter fruit of racism and been victimized by discrimination and racial violence, I appeal to you to sign the Civil Rights Act of 1990. It is the right thing for you to do.

The battle for civil rights was hard fought. The civil rights battlefield was littered with the bodies of countless men, women and children whose only "crime" was their desire for freedom, fairness and equality.

We've come too far, paid too high a price, lost too many lives, to turn back now. Certainly, you agree, Mr. President.

I ask you, have any of the men and women, who are advising you to veto the Civil Rights Act of 1990, ever been denied a job or refused a promotion because of their race, color or sex? Have any of them ever been denied service in a place of public accommodations because of their race, color or sex? Well, I have! And, so have millions of other Americans.

I have been beaten and jailed more than forty times. Why? Because I dared to exercise my rights as an American citizen and I happen to be Black.

I have been told by department store managers that I couldn't sit at public lunch counters. Why? Because of what they called "legitimate community or customer relationship efforts" and I happen to be Black.

But, I -- along with many other students in the South in the 60's -- sat down at those lunch counters. We stood up for what was right. As a result, America made progress toward what Martin Luther King called the "Beloved Community."

The Civil Rights Act of 1990 is in the best interests of the common good because we are one people, one nation, one community and one family -- the American family.

Please, Mr. President, don't allow this great nation of ours to regress. Reaffirm America's commitment to justice and equality for all of her citizens. Please sign the Civil Rights Act of 1990.

Sincerely,

John Lewis
Member of Congress

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

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02a. Memo	From John Sununu to POTUS Re: Civil Rights Bill (1 pp.)	10/21/90	~~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 (2 of 2) [1]

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

Date Closed: 12/17/2004	**OA/ID Number:** 29145-002
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]

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

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(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
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(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

PHOTOCOPY
GB HANDWRITING

THE WHITE HOUSE
WASHINGTON

DATE: 10-21-90

FROM THE PRESIDENT

TO: John Sununu

I talked to Alles today- just checking up.

On the Civil Rights Bill he says we ought to make it:

A GUILTY TIL PROVEN INNOCENT BILL

that added to The Qutoas....

The only way to avoid 'guilty til porven innocent' is to establish quotas...

Not Bad.

We need ot get a coordinated line out there through all outlets (RNC etc)
President has ALWAYS been for Civil Rights
But:
gb

THE CHIEF of STAFF
has seen

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02b. Note	POTUS note re conversation w/Roger Ailes (1 pp.)	10/21/90	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 (2 of 2) [1]

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By SP (NLGB) on 4/21/08

Date Closed:	12/17/2004	**OA/ID Number:**	29145-002
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AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
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(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

Presidential Phone Calls

DATE: 12-21-90 TIME: 8 25
incoming/outgoing

WITH: Roger Ailes

SUBJECT:

Guilty Til Proven Innocent Bill

- or -

Only way to Establish Innocence v to be quotas.

FOLLOW UP: Voinovitch "close"

X Martin herself asked Roger to do press conference - then apologized

P/

give cc of this to JS

October 19, 1990

DRAFT STATEMENT ON THE QUOTA BILL

If an employer's numbers are "wrong," even though there has been no intentional discrimination, this bill would make it virtually impossible for an employer to defend normal business practices, such as hiring and promotion, in court. The bill would rig the rules of litigation against employers. If this bill becomes law, employers would be in a statistical trap. The only way employers could escape from this trap is by establishing a de facto quota system so that their numbers are never "wrong."

Nelson Lund in the Counsel's office cautions that we should not peg our entire argument against the quota bill on the above argument, since that is only one piece of the bill. Other arguments include:

The bill closes the courts to some victims of discrimination.

The bill creates for the first time unlimited compensatory damages, as well as punitive damages, under the employment discrimination laws, thereby inviting a litigation explosion.

The bill contains a host of rules especially designed to help plaintiff's lawyers, often at the expense of victims of discrimination.

#

October 12, 1990

Committee on Education & Labor

SUMMARY OF BIPARTISAN 7-POINT COMPROMISE ON THE S. 2104, CIVIL RIGHTS ACT OF 1990

The proposed bipartisan compromise on the Civil Rights Act of 1990 addresses a number of important concerns, including any remaining concerns regarding quotas. Specifically, the bill would be amended to:

-- provide expressly that nothing in the bill should be interpreted even "to encourage" an employer to adopt quotas.

-- require that the plaintiff prove which "specific practice or practices are responsible for the disparate impact in all cases," except where the employer does not have the relevant records or has concealed, destroyed or refused to make them available.

-- modify the definition of "business necessity". Where practices do not involve job performance or selection or where they concern methadone, alcohol or tobacco use, an employer would have to prove only that they have a "significant relationship to a manifest business objective" to avoid liability. The bill also specifies additional types of evidence that a court may consider on the issue, including "testimony of individuals with knowledge of the practice".

-- completely eliminate compensatory and punitive damages in "mixed motive" cases, <u>i.e.</u>, where an employer proves that it would have taken the same job action even in the absence of discrimination.

-- allow any person to challenge consent decrees or other judgments in job discrimination cases in the future except for certain categories of employees, former employees, applicants or persons whose interest were adequately and completely represented by a similarly situated person, and strengthen notice requirements for such decrees.

-- provide specifically that it would not overrule existing cases involving "comparable worth".

-- provide that where an unsuccessful challenge to a court order or consent decree is brought by a third party, the court would have the discretion to determine how attorney's fees should be assessed.

FAIR EMPLOYMENT COALITION ALERT

October 15, 1990

TO: Fair Employment Coalition Members

FROM: Pete Lunnie

RE: The Saga Continues . . . But Not for Much Longer

Ladies and Gentlemen:

The language of S. 2104 is final and the president's plan to exercise the veto is firm. **The ball is in our court to make sure we have the votes to sustain the veto -- each of us has to make that extra call or calls for that one vote needed to win. We are the only ones that can make that happen.**

Timing is still not confirmed though the Senate is still expected to move first on Tuesday. House Speaker Foley is reported to have said he wants assurances of veto override strength before bringing the bill up. All of this, however, is conjecture. But its going to happen and soon.

Coalition and association materials were hand delivered to all House and Senate offices this afternoon. We hope to counter the characterizations that the new conference language represents a compromise.

At their request, Vernon Jordan and Bill Coleman met this morning with senior administration officials. The objective was not to negotiate further changes to the language of S. 2104 but to persuade the president to accept the measure. That effort was rebuffed and the veto strategy is on. Based on characterizations of the meeting, the tenor of the debate is likely to get ugly, full of recriminations.

The Coalition will use the Executive Suite (4th Floor) of the Capitol Hill Club as a coordinating point, beginning at 9:00 am Tuesday. We need as many people as possible with buttons to make our presence known when the House and Senate come in. Budget, reconciliation, etc. has all of us stretched to the limit. **If you can, please join us tomorrow and let members know we are watching.**

We've come too far and have too much to lose not to give it that last push. None of us wants to look back and wonder "If I had only . . ."

THE WHITE HOUSE

WASHINGTON

October 16, 1990

Dear Bob:

I have consistently expressed my desire to sign into law a civil rights bill. I have also consistently worked with both the Senate and the House to forge a bipartisan consensus to address these issues in a constructive manner.

I understand that the Senate may soon consider the conference report on the Kennedy-Hawkins bill. The bill as amended in conference is neither sound nor practical. I am convinced it will have the effect of forcing businesses to adopt quotas in hiring and promotion. It will also foster divisiveness and litigation rather than conciliation and do more to promote legal fees than civil rights. If this bill is presented to me, I will be compelled to veto it.

I also understand that a motion may be offered to recommit to conference with instructions to adopt a substitute along the lines of the one proposed by Senators Kassebaum and Gorton last July. This approach represents a sound, practical compromise, and I will sign such a bill if it is presented to me.

I commend you, Senator Kassebaum, Senator Gorton, and all the others who are working to produce sound civil rights legislation.

Sincerely,

Geo Bush

The Honorable Bob Dole
Republican Leader
United States Senate
Washington, D.C. 20510

THE WHITE HOUSE

WASHINGTON

October 16, 1990

Dear Nancy:

I have consistently expressed my desire to sign into law a civil rights bill. I have also consistently worked with both the Senate and the House to forge a bipartisan consensus to address these issues in a constructive manner.

I understand that the Senate may soon consider the conference report on the Kennedy-Hawkins bill. The bill as amended in conference is neither sound nor practical. I am convinced it will have the effect of forcing businesses to adopt quotas in hiring and promotion. It will also foster divisiveness and litigation rather than conciliation and do more to promote legal fees than civil rights. If this bill is presented to me, I will be compelled to veto it.

I also understand that a motion may be offered to recommit to conference with instructions to adopt a substitute along the lines of the one proposed by you and Senator Gorton last July. This approach represents a sound, practical compromise, and I will sign such a bill if it is presented to me.

I commend you, Senator Gorton, and all the others who are working to produce sound civil rights legislation.

Sincerely,

George Bush

The Honorable Nancy Landon Kassebaum
United States Senate
Washington, D.C. 20510

cl

THE WHITE HOUSE

WASHINGTON

October 16, 1990

Dear George:

I have consistently expressed my desire to sign into law a civil rights bill. I have also consistently worked with both the Senate and the House to forge a bipartisan consensus to address these issues in a constructive manner.

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I commend you, Senator Kassebaum, Senator Gorton, and all the others who are working to produce sound civil rights legislation.

Sincerely,

Geo Bush

The Honorable George J. Mitchell
Majority Leader
United States Senate
Washington, D.C. 20510

THE WHITE HOUSE

WASHINGTON

October 16, 1990

Dear Slade:

I have consistently expressed my desire to sign into law a civil rights bill. I have also consistently worked with both the Senate and the House to forge a bipartisan consensus to address these issues in a constructive manner.

I understand that the Senate may soon consider the conference report on the Kennedy-Hawkins bill. The bill as amended in conference is neither sound nor practical. I am convinced it will have the effect of forcing businesses to adopt quotas in hiring and promotion. It will also foster divisiveness and litigation rather than conciliation and do more to promote legal fees than civil rights. If this bill is presented to me, I will be compelled to veto it.

I also understand that a motion may be offered to recommit to conference with instructions to adopt a substitute along the lines of the one proposed by you and Senator Kassebaum last July. This approach represents a sound, practical compromise, and I will sign such a bill if it is presented to me.

I commend you, Senator Kassebaum, and all the others who are working to produce sound civil rights legislation.

Sincerely,

Geo Bush

The Honorable Slade Gorton
United States Senate
Washington, D.C. 20510

WARREN B. RUDMAN
NEW HAMPSHIRE

COMMITTEES:
APPROPRIATIONS
GOVERNMENTAL AFFAIRS
BUDGET
SELECT COMMITTEE ON ETHICS,
VICE-CHAIRMAN

United States Senate

WASHINGTON, DC 20510-2902

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PORTSMOUTH, NH 03801
157 MAIN STREET
603-752-2604
BERLIN, NH 03570

October 15, 1990

CC

THE CHIEF of STAFF
has seen

CR

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

Dear Boyden:

As you know, the Senate is about to vote on the Conference Report accompanying the Civil Rights Act of 1990. The Administration has stated its intention to veto this legislation, most recently in a letter by Attorney General Thornburgh, with accompanying talking points, dated October 12, 1990.

Quite frankly, after carefully reviewing the conference report as well as the Attorney General's letter and talking points, it appears to me that the Administration's major objections to the bill have been satisfied. I am writing a letter to request a clear and understandable explanation of how my analysis is wrong. Unless I receive such an explanation, I do not see what basis there is to vote against the bill.

The Attorney General personally told me that the "particularity" language in section 4 in the measure is the single most significant problem with the current version of the bill. As I understand section 4, the burden is on the complaining party to demonstrate the existence of a disparate impact and which employment practice or practices are responsible for that. The only exception is where the employer has destroyed, concealed, refused to produce, or failed to keep records necessary for a complainant to make such a showing.

As I read this language, the complainant has to establish the existence of a disparate impact, with the mere existence of a statistical imbalance in the workforce insufficient to make the prima facie case [see new section 703(k)(4)], and to specify which practice or practices are responsible for this. The Attorney General's assertion that this language would permit the complainant to "simply [point] to a statistical disparity and ... list everything the employer does" is difficult for me to follow. Moreover, I find his statement, that the exception for cases where the employer has destroyed ... or failed to keep records "necessary to make this showing" would apply if the employer could not produce records showing that his practices "could have been challenged", to be a tortured reading. It is certainly inconceivable that any court would apply this ludicrous reading of this language. I would like to know what is wrong with my analysis. In addition, what does the Administration propose as an alternative to a perfectly straightforward, and appropriate, record-keeping requirement?

With respect to the definition of "business necessity", I would at the outset note that I have read virtually every competing definition proposed for the last three months. For the most part, it seems to me that a group of academic attorneys who have never practiced law are arguing over hair-splitting terms that will make no difference in the real world of litigation. Inasmuch as the proposed statutory definition of this term specifically states that it is intended to codify its meaning as used in Griggs, what is wrong with it? In answering this question, please do not waste my time with the ludicrous, inflammatory statements in the talking points accompanying the October 12 letter -- for example, that seeking the best people for the job or avoiding applicants with criminal records would not be a permissible employment practice. In addition, if the Administration supports the Griggs definition, why did its latest proposal in this area permit "legitimate community or customer relationship efforts" as an employment practice, suggesting that discrimination is acceptable if the community or customers support such?

Attorney General Thornburgh's letter states that section 13's anti-quota language fails to address the problem because the employers will "surreptitiously" adopt quotas to avoid litigation. Is is fair to assume that the Administration would not be concerned about the quota issue if it believed the language of the law simply overruled Griggs? The accompanying talking points further state that section 13 "specifically excepts and thus protects quota systems established through court-ordered remedies, affirmative action plans, or conciliation agreements." Since section 13 actually protects such remedies, plans, or agreements that "otherwise are in accordance with the law", am I to infer that the Administration believes such quota systems are protected under the law? What is the basis for this assertion?

With respect to section 5, I do not understand the Administration's concerns over the "motivating", as opposed to "contributing", factor in mixed-motive cases. In the first place, I do not see much difference between the two terms. Second, the proposed law would prohibit the recovery of any damages by the plaintiff, if the employer could show it would have taken the same action in any event. If it is proven that an employer was motivated to take an adverse personnel action against an individual by virtue of his or her race, gender, etc., why should he be

Mr. C. Boyden Gray
October 15, 1990
Page 3

permitted to avoid a finding of liability or attorney's fees simply because he were able to put together a valid reason for the adverse action?

Finally, the talking points object to the availability of "unlimited compensatory damages". What is the rationale for limiting compensatory damages to an amount less than the damages suffered?

While I might not have written the consent decree and attorney's fees provisions exactly the way they are in this bill, they do not, in my view, merit a presidential veto.

I would appreciate your responding directly to each of these issues so that I can figure out what the Administration's problems actually are.

Sincerely,

Warren

Warren B. Rudman
United States Senator

WBR/tp

cc: The Honorable John Sununu
The Honorable Richard Thornburgh

O'MELVENY & MYERS

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WRITER'S DIRECT DIAL NUMBER
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October
15th
1 9 9 0

OUR FILE NUMBER
600,000-010

The Honorable John H. Sununu
Chief of Staff
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Governor Sununu:

As you probably know, Vernon Jordan and I had a meeting this morning with the Attorney General and with Boyden Gray. We hope that the substance of the meeting is conveyed to the President, but since it appears, based upon the previous public statements of the Attorney General and Boyden, that they were still hostile to the Civil Rights Bill of 1990 even with the amendments as to which Senator Hatch played the significant role, Vernon and I would like an opportunity to present our recommendations and observations directly to the President. We know that in public life one often has to deliver important messages through the messenger but when the message is oral and the messenger who heard the arguments disagrees on the merits, one would think it would be only fair that we have the right to talk to the President in person or at least to have the message reported by persons not against the message. That is why we also urge that at least the President should have a meeting with Senators Hatch, Specter, Danforth, Rudman and Jeffords before he decides to do other than support the Bill.

Very truly yours,

Bill

William T. Coleman, Jr.

WTC:nob

DATE: October 18, 1990

TO: Honorable John H. Sununu

FROM: William T. Coleman, Jr.

SUBJECT: <u>Civil Rights Act of 1990</u>

Enclosed herewith is a letter which I have sent to the President today. I would appreciate it if you would put it among any papers he will receive to help him make his decision as to whether to sign or veto, or to permit it to become law without his signature, the Civil Rights Act of 1990 which I understand the Congress will send him today or tomorrow. In the letter to the President I reiterate my request for the meeting which he promised me before he took action on the bill.

O'MELVENY & MYERS

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

OUR FILE NUMBER

October
18th
1 9 9 0

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

Re: The Civil Rights Act of 1990

Dear Mr. President:

Our Country and your Administration are at a crucial juncture in matters of race and sex discrimination: if you sign the Civil Rights Act of 1990 as passed by large majorities in both Houses, the Country will not lose ground in the fight to eliminate present race and sex discrimination, as well as the lingering effects of past race and sex discrimination, in the workforce; if you veto it, whether such veto is sustained or overridden, you subject this Country and the Republican Party to years of divisiveness over these issues.

A life of reason always appealed to me. Thus I embraced the legal profession, the Republican Party and your public career of forty years as three embodiments of the effective contribution that people of reason can make to public affairs. All reliable criteria of reason demonstrate that the bill, as finally passed, is not a quota bill. First, there is not a word in the bill that would require quotas; in fact, the bill actually provides that a statistical shortage of minorities or women in the employer's workforce is not by itself sufficient to hold the employer liable under this Act. It further provides that nothing in the bill shall be construed to require or encourage quotas. See Section 13 of the bill. Second, the Jewish leadership to which quotas are an anathema have said in strong terms that this is not a quota bill and will not lead to quotas. Third, Senator Hatch has publicly conceded that with the Hatch-Specter changes, all of which the Congress adopted, it is not a quota bill and he would vote for it if you said you would sign it. Fourth, the overwhelming majority of editorials urge you to sign the bill because it is not a quota bill (local newspapers are often close to the pulse of the people). Fifth, quotas are an anathema to most legislators, so the vote in the Senate and House should convince you that those nearest to the people, save for you, do not feel it is a bill which will result in quotas. Sixth, the bill reenacts the Griggs standard and eighteen years under Griggs did not result in employers adopting quotas.

In my talks with the Attorney General he said that he objected to certain language in Section 4 of the bill, which applies when the complaining party alleges that there is more than one business practice which is responsible for a disparate impact. The bill provides that in such cases the complaining party "shall be required to demonstrate which specific practice or practices are responsible for the disparate impact in all cases . . . ." The only exception to such burden is when the employer "has destroyed, concealed or refused to produce existing records that are necessary to make this showing, or (b) that the respondent failed to keep such records." The Attorney General takes the position that even when the employer destroys such records the plaintiff must lose the lawsuit.

One brief example will illustrate why the Attorney General's objection to this provision is not well taken. When I met with the Attorney General, Senator Specter and Senator Rudman, I put the following hypothetical: The State police of Alabama decide to hire 100 new employees. The State gives a Civil Service test for the job and 300 pass it, 150 of which are women and 150 of which are male. There are three other requirements for the job which are then applied to make the final decisions: one is a minimum height requirement, the second is a minimum weight requirement and the third is that the person must be articulate in his or her use of the English language. A week later it is announced that as the result of these three requirements 90 males are selected for the 100 jobs and the other 10 go to females. Obviously it looks as though these three requirements have resulted in a disparate impact. But under the bill the women would also have to show the specific degree that each of the three requirements contributed to the overall disparate impact. I asked the Attorney General to assume further that the employer has destroyed all the records or never kept any records of the results of these three factors, contrary to the Justice Department's own regulations requiring him to keep such records.

Certainly in those circumstances the women should be able to make out their case on the basis of the overall disparate impact and shift the burden to the employer, for the obvious reason that the employer's failure to keep records made it impossible for them to break it down and isolate how much each of the three requirements contributed to the disparate impact. Applying such rule is no more than what happens when a taxpayer claims a $100,000 charitable deduction on his income tax but when he is asked to prove it he says I destroyed all my records. Clearly, the government and the courts do not permit the taxpayer to claim the deduction.

When this Alabama state police hypothetical was put to the Attorney General he said that the women should lose the case and that the only remedy might be citing the employer for contempt. In the Attorney General's view, the burden would never shift to the employer and the women would therefore have no chance of getting the job or back pay for loss thereof. I do not think anyone else in the room supported such a position.

You called me in August from Kennebunkport and asked me to get involved in the Civil Rights bill. You indicated that I could come see you if there were any problems. I herewith request such a meeting before you do other than sign the bill. I would like a meeting where the Attorney General, Boyden Gray, Senator Specter, Senator Rudman, Senator Danforth, Senator Hatch, Civil Rights Commission Chairman Arthur Fletcher, and Secretary Louis Sullivan would be among those present. Since I believe in reason I think 15 minutes of conversation among these people before you would convince you that you should sign the bill.

Mr. President, a very significant percentage of the military personnel you now have in Saudi Arabia defending the liberty and other ideals of this Country are racial, ethnic and religious minorities and women. Surely when they come home they are entitled to find that their rights to find and keep a job without bias against them have been restored and that last year's Supreme Court rulings will not cause any further loss of these rights.

Respectfully,

Bill

William T. Coleman, Jr.

O'MELVENY & MYERS

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WRITER'S DIRECT DIAL NUMBER
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October
15th
1 9 9 0

OUR FILE NUMBER
600,000-010

The Honorable John H. Sununu
Chief of Staff
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Governor Sununu:

As you probably know, Vernon Jordan and I had a meeting this morning with the Attorney General and with Boyden Gray. We hope that the substance of the meeting is conveyed to the President, but since it appears, based upon the previous public statements of the Attorney General and Boyden, that they were still hostile to the Civil Rights Bill of 1990 even with the amendments as to which Senator Hatch played the significant role, Vernon and I would like an opportunity to present our recommendations and observations directly to the President. We know that in public life one often has to deliver important messages through the messenger but when the message is oral and the messenger who heard the arguments disagrees on the merits, one would think it would be only fair that we have the right to talk to the President in person or at least to have the message reported by persons not against the message. That is why we also urge that at least the President should have a meeting with Senators Hatch, Specter, Danforth, Rudman and Jeffords before he decides to do other than support the Bill.

Very truly yours,

Bill

William T. Coleman, Jr.

WTC:nob

THE CHIEF of STAFF
has seen

Mr. President:

After months of negotiations on the Civil Rights Act involving high White House officials, I have become involved much as I did at your request in 1988 in the Fair Housing log jam.

The effort is to reach out to meet your concerns I heard you express in the ceremony introducing your Civil Rights Commission.

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

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

Ham Fish

THE WHITE HOUSE

WASHINGTON

[redacted]

THE WHITE HOUSE
WASHINGTON

DATE: October 4, 1990

FROM THE PRESIDENT

TO: Governor Sununu

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

[redacted]

cc: Boyden Gray

[redacted]

Oct 4, 90

Mr. President,

After months of negotiations on the Civil Rights Act involving high White House officials, I have become involved [redacted] much as I did at your request in 1988 in the Fair Housing legislation.

This effort is to reach out to meet your concerns I heard you express in the ceremony introducing your Civil [redacted] Rights Commission.

(over)

[redacted]

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

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

-2-

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

[redacted]

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

[illegible]
Regula

Ham Fish

THE WHITE HOUSE

WASHINGTON

AC/ER
(+ Boyden)

October 2, 1990

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: EDE HOLIDAY

SUBJECT: Secretary Sullivan's request for a meeting with the President

During a telephone conversation I had today with Secretary Sullivan, he repeated his desire to continue a discussion of the Civil Rights Bill with the President. He very much would like to have the opportunity to meet with the President before any final action is taken on the Bill.

cc: Andy Card
Joe Hagin

JAMES M. JEFFORDS
VERMONT

COMMITTEES:
ENVIRONMENT AND PUBLIC WORKS
LABOR AND HUMAN RESOURCES
VETERANS AFFAIRS

United States Senate

WASHINGTON, DC 20510-4503

October 3, 1990

Governor John Sununu
Chief of Staff
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Governor:

After our positive conversation of last Thursday night, and your subsequent invitation to offer suggestions on breaking the civil rights logjam, I was disappointed to receive neither a response nor a counter offer to my proposal of September 28.

I am aware of the tremendous demands of this past weekend, and understand the constraints on your time. However, I believe that the President is sincere when he says that he does not want to veto a civil rights bill, and also believe that the differences are not insurmountable. I am committed to helping in any way I can.

I believe that with all the politically difficult decisions we must make before the election, we must do everything we can to see that Republican Senators need not vote against a civil rights bill on which there is so much agreement.

As you know, the crux of our differences lies in the area of <u>Ward's Cove</u>. On the issues raised by <u>Ward's Cove</u>, there is more agreement than disagreement. We agree that the respondent should bear the burden of proving business necessity. As far as I am concerned, there is no outstanding difference on the "black box" or evidentiary standards. The sole difference lies in the definition of business necessity.

I will not repeat the description of the proposal contained in my earlier memo. Suffice it to say that it does not strike me as very distant from your proposal of July 12. It does differ from your proposal of September 21. I doubt very seriously that Members of Congress would ever agree to sanction practices that weed out women or minorities based on customer preferences, potential for promotion and the like. Under these standards, the <u>Griggs</u> court would have come to exactly the opposite conclusion.

PLEASE REPLY TO:

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Perhaps it would be useful to put the issue in "real world" questions, which might clarify whether our differences can or cannot be reconciled, and whether further discussions are warranted. I believe that the answer to the following questions would be "yes" under your proposal of September 21, but would be "no" under my proposal.

1) Our customers prefer males (whites, Jews, etc.), therefore, can we hire males to increase sales and retain business?

2) We need to control health care costs, thus can we avoid hiring single parents or heads of household who will cost us more?

3) We promote from within, and want to hire individuals accordingly. Can we impose selection requirements with that in mind, eg., can we require skill or educational requirements for an unskilled job?

Since we seem to have such trouble on agreeing to language, perhaps we should start by trying to be sure we agree on policy. No doubt you have questions along the same lines; I'd be happy to discuss them.

The House, of course, is expected to vote on the conference report shortly. While it may not be possible to alter the content of the conference report at this point, it is my understanding that the President may send a proposed bill to Congress to accompany his veto message. I hope that this bill will be an attempt at a substantive proposal that might bridge our differences.

I look forward to working with you and Boyden on this issue and hope we can find a mutually acceptable alternative.

Sincerely,

JMJ

James M. Jeffords

JMJ/mep

employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or

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

``(i) except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact;

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

``(iii) if ~~the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through~~

See att.

~~discovery or otherwise), which specific practice~~ or ~~practices contributed to the disparate impact--~~

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

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

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

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

``(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses an illegal drug as defined in Schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or

Strike in Section 4 of the bill subparagraphs (k)(1)(B)(iii) and (k)(1)(B)(iii)(I), and insert in lieu thereof the following:

"(iii) the complaining party shall be required to demonstrate which specific practice or practices are responsible for the disparate impact in all cases unless the court finds after discovery (a) that the respondent has destroyed, concealed, or refused to produce the records that are necessary to make this showing, or (b) that the evidence relevant to the employment practice or practices has not been made available to the plaintiff."

Add in Section 4 of the bill after the final paragraph a new paragraph (5) which reads as follows:

(5) nothing in this subsection (k) is intended to affect in any way the litigation of a claim of employment discrimination which alleges compensation discrimination, in whole or in part, on the basis of a disparity in pay between dissimilar jobs.

possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of the race, color, religion, sex, or national origin.

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

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

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

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

(b) ENFORCEMENT PROVISIONS.--Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended by inserting before the period in the last sentence the following: ``or, in a case where a violation is established under section 703(1), if the respondent establishes that it would have taken the same action in the absence of any discrimination. In any case in which a violation is established under section 703(1), injunctive relief and attorneys' fees may be awarded. ~~damages may be awarded only for injury that is attributable to the unlawful employment practice~~''.

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

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

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

DEFINITION OF BUSINESS NECESSITY

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

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

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

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

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

MARTIN V. WILKS

Strike page 7 line 11 through page 10 line 2, and insert in lieu thereof:

Any person not a party in a case in which a litigated or consent judgment or order is entered resolving a claim of employment discrimination, who claims the implementation of the consent decree or litigated decree violates such person's right to be free of discrimination under federal civil rights laws or the United States constitution, shall:

1) (a) Request the EEOC to issue a right to sue letter within 180 days of the claimed violation.

(b) (i) If within 180 days of receipt of such request, the EEOC issues a right to sue letter or issues no letter or finding, such person may file a lawsuit in District Court:

(ii) If the EEOC issues a finding within 180 days that the claimed violation likely did not occur, such person may appeal the finding to the District court. The District Court shall hear the appeal de novo on an expedited basis. If the District Court determines that the person's claim is substantially justified, such person may file a lawsuit in District Court to be heard by a judge other than the judge hearing the appeal of the EEOC finding.

Additional Legislative History:

The term "substantially justified" means less than a preponderance of the evidence but more than not frivolous.

AC/ER
(and Boyden)

UNITED STATES SENATE
WASHINGTON, D. C.

ORRIN G. HATCH
UTAH

September 27, 1990

THE CHIEF of STAFF
has seen

Dear John:

I sent this letter to several senators who voted for the Civil Rights Act of 1990. I also sent a virtually identical letter to every senator who voted against it to urge them to stay the course.

Warmest personal regards,

Orrin G. Hatch
United States Senator

The Honorable John H. Sununu
The White House

United States Senate

COMMITTEE ON LABOR AND
HUMAN RESOURCES

WASHINGTON, DC 20510-6300

September 26, 1990

The Honorable David L. Boren
453 Russell Senate Office Building
Washington, D.C. 20510

Dear Dave:

The Conference Report on the so-called Civil Rights Act of 1990 will soon be on the Floor. I realize you voted in favor of this bill in July. I urge you to reconsider your position and vote against the Conference Report--it is still a quota bill.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In short, a mere imbalance in a <u>job</u>--regardless of the overall workforce's numbers--is still the basis of a claim under this bill. Moreover, a plaintiff never alleges a <u>mere</u> statistical imbalance anyway; he or she always alleges that employer practices, together with the statistical imbalance, are illegal. This language does not solve the problem.

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

I also want to reiterate briefly that Section 6 of the bill continues to strip Americans of an equal right to a day in court. You were among the 40 senators who voted against Senator Kennedy's second degree "killer" amendment to my amendment which would have restored that right. The Conference Report denies Americans the access they now have to go into court and challenge a consent decree or litigated judgment entered in a case to which they were not even a party, on the grounds that the operation of the judgment denies him or her the equal protection of the laws. This is terribly unfair. It is not enough to allow a nonparty the opportunity to comment on a proposed consent decree prior to its entry. Such a person, asserting a claim that he or she was denied equal protection of the laws, should have the opportunity fully to assert that claim after the alleged harm occurs, not just when that harm is speculative. And I believe it is the first time in over 25 years Congress would be narrowing access to Court for civil rights plaintiffs. But just because the great majority of those expected to be excluded from court are white males is no reason to accept this injustice.

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

Sincerely,

Orrin G. Hatch
United States Senator

OGH:mdt

UNITED STATES SENATE
WASHINGTON, D. C.

ORRIN G. HATCH
UTAH

September 27, 1990

Dear John:

I sent this letter to several senators who voted for the Civil Rights Act of 1990. I also sent a virtually identical letter to every senator who voted against it to urge them to stay the course.

Warmest personal regards,

Orrin G. Hatch
United States Senator

The Honorable John H. Sununu
The White House

United States Senate

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

September 26, 1990

The Honorable David L. Boren
453 Russell Senate Office Building
Washington, D.C. 20510

Dear Dave:

The Conference Report on the so-called Civil Rights Act of 1990 will soon be on the Floor. I realize you voted in favor of this bill in July. I urge you to reconsider your position and vote against the Conference Report--it is still a quota bill.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In short, a mere imbalance in a <u>job</u>--regardless of the overall workforce's numbers--is still the basis of a claim under this bill. Moreover, a plaintiff never alleges a <u>mere</u> statistical imbalance anyway; he or she always alleges that employer practices, <u>together with</u> the statistical imbalance, are illegal. This language does not solve the problem.

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

I also want to reiterate briefly that Section 6 of the bill continues to strip Americans of an equal right to a day in court. You were among the 40 senators who voted against Senator Kennedy's second degree "killer" amendment to my amendment which would have restored that right. The Conference Report denies Americans the access they now have to go into court and challenge a consent decree or litigated judgment entered in a case to which they were not even a party, on the grounds that the operation of the judgment denies him or her the equal protection of the laws. This is terribly unfair. It is not enough to allow a nonparty the opportunity to comment on a proposed consent decree prior to its entry. Such a person, asserting a claim that he or she was denied equal protection of the laws, should have the opportunity fully to assert that claim after the alleged harm occurs, not just when that harm is speculative. And I believe it is the first time in over 25 years Congress would be narrowing access to Court for civil rights plaintiffs. But just because the great majority of those expected to be excluded from court are white males is no reason to accept this injustice.

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

Sincerely,

Orrin G. Hatch
United States Senator

OGH:mdt

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 have just spoken to you by telephone. As I told you, the proposal you sent Senator Kennedy on September 21 is completely unsatisfactory. In subparagraph (A) Boyden reinserts "manifest" although a long time ago you agreed with "significant." Boyden is also still using the word "intend" when you are dealing with a statute not based upon intent. But even more subparagraph (B) is nothing but a reenactment of Wards Cove.

The "etc." in the cover memo also reveals that in Boyden's mind every provision in the bill is open for rewriting.

As you know, I have worked diligently on trying to bridge the gap between what you and Senator Kennedy had attempted to agree upon on July 12, 1990. The President said he would see me and I herewith make that request. If he cannot find time to see me I will understand as I do appreciate the other pressing issues on his shoulders. But I do think, however, that the Civil Rights Act of 1990 is so important to minorities and women that you should attempt to find time in the President's schedule so that he can see me sometime on Saturday.

THE WHITE HOUSE

WASHINGTON

DATE 9/21/90

FACSIMILE TRANSMITTAL SHEET

TO Senator Kennedy (Att: Deb)

FAX NUMBER

TELEPHONE NUMBER

FROM John H. Sununu

TELEPHONE NUMBER

NUMBER OF PAGES: TOTAL 1

COMMENTS Attached is the revised version of your proposal that I asked Boyden to prepare. If there is agreement on this, we must still deal with other issues, such as damages, Wilks, Price-Waterhouse, attorney's fees, etc.

JHS

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

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

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

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

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

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

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

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

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

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

September 20, 1990

DEFINITION OF BUSINESS NECESSITY

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

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

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

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

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

. . .

September 20, 1990

GROUP OF EMPLOYMENT PRACTICES

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

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

[(2) and (3) remain unchanged.]

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

as a criterion of selection

The term "required by business necessity" means:

(A) 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; or

as a criterion of selection

(B) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must significantly serve the legitimate business goals of the employer;

(C) provided, however, notwithstanding the provisions in subsections (A) and (B) of this section, that a high school diploma or equivalent requirement may be used only if such a twelve-year education requirement is substantially and demonstrably related to the objective sought to be achieved by the employer.

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

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

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

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

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

1. BUSINESS NECESSITY

The term required by business necessity means:

(1) in the case of employment practices primarily involving a measure of job performance (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 demonstrable relationship to successful performance of the job.

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

In deciding whether the above standards have been met, the court may rely on as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in <u>Griggs</u> and to reflect the state of law prior to <u>Ward's Cove</u>.

REWRITE OF <u>WARDS COVE</u>

9/17/90 WTC -- <u>Wards Cove</u>/Business Necessity

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

(a) in the case of (1) employment practices that do not involve employee selection or (2) employment practices involving rules relating to drug, methadone, alcohol, [tobacco] use, plant closings or bankruptcies, or ____________ -- whether or not involving selection -- the practice or group of practices must bear a significant relationship to a significant business objective of the employer;

(b) except as provided in (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.

WTC, Jr. Proposal -- September 17, 1990

NO

"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."

The term "required by business necessity" means:

(A) 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; or

(B) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must significantly serve the legitimate business goals of the employer;

(C) provided, however, notwithstanding the provisions in subsections (A) and (B) of this section, that a high school diploma or equivalent requirement may be used only if such a twelve-year education requirement is substantially and demonstrably related to the objective sought to be achieved by the employer.

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

"Subsection (C) would, for example, permit an employer to require high school diplomas, or the equivalent, in cases where a firm's internal promotion policy has been frustrated as a result of accepting entry-level employees who lacked a high school education.

"Subsection (C) would also, for example, permit an employer (especially in cases where it is the dominant employer in a local job market) to require applicants to possess high school diplomas in order to discourage high school students from dropping out of school, thereby serving the community in which the employer is located and building good relations between that community and the employer."

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

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

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

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

The term "required by business necessity" means:

(A) 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; or

(B) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must significantly serve the legitimate business goals of the employer;

(C) provided, however, notwithstanding the provisions in subsections (A) and (B) of this section, that a high school diploma or equivalent requirement may be used only if such a twelve-year education requirement is substantially and demonstrably related to the objective sought to be achieved by the employer.

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

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

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

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

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

The term "required by business necessity" means:

(A) 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; or

(B) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must significantly serve the legitimate business goals of the employer;

(C) provided, however, notwithstanding the provisions in subsections (A) and (B) of this section, that a high school diploma or equivalent requirement may be used only if such a twelve-year education requirement is substantially and demonstrably related to the objective sought to be achieved by the employer.

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

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

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

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

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

FRED — This is an attempt to mimic Griggs more precisely

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 HAS A MANIFEST RELATIONSHIP TO AN ~~is substantially related to a legitimate business interest.".~~ EMPLOYMENT IN QUESTION or the legitimate goals of the respondent are significantly served by — but need not require, the challenged practice.

CONFORMING AMENDMENT:

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

AMENDMENT NO. __

Calendar No. __

Purpose: To amend Section 3 of S. 2104

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

S. 2104

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. Danforth,

Viz:

Strike the language of the 1st degree amendment and insert in lieu thereof the following:

Strike out Section 3(o) and insert in lieu thereof the following:

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

(1) in the case of employment practices primarily designed to measure an employee's ~~qualifications for~~ abilities to perform the job, 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 designed to measure an employee's ~~qualifications for~~ abilities to perform the job (such as plant closings, a decision to file for bankruptcy, or the health and safety of workers or prospective clients), the practice ~~or group of practices~~

or ~~any other~~ a practice designed to further a ~~legitimate~~ significant business purpose must bear a significant relationship to a significant business objective of the employer.

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

Plus

1) legislative history on business necessity: "This language is meant to codify the meaning of business necessity as used in Griggs and other opinions of the Supreme Court."

2) particularity as attached

Sec. 6 Minnesota Statutes 1988, section 363.03, is amended by adding a subdivision to read:

Subd. 11. [DISPARATE IMPACT CASES.] If the complaining party has met its burden of showing that an employment practice is responsible for a statistically significant adverse impact on a particular class of persons protected by section 363.03, subdivision 1, clause (2), an employer must justify that practice by demonstrating that the practice is manifestly related to the job or significantly furthers an important business purpose. Upon establishment of this justification, the charging party may prevail upon demonstration of the existence of a comparably effective practice that the court finds would cause a significantly lesser adverse impact on the identified protected class.

..nd Widens Job Rights Law

NYT 5/12/90

By WILLIAM E. SCHMIDT
Special to The New York Times

ICAGO, May 11 — In a direct re- ıl to the United States Supreme t, Minnesota expanded its human ts law today to broaden the rights mployees and subcontractors to ; job discrimination complaints in courts.

w. Rudy Perpich, a Democrat, ed legislation that is the most far- hing so far in seeking to overturn ffects of Supreme Court decisions June on employment discrimina-

vil rights advocates have said the gs by the High Court made it more cult for individuals to press dis- ination lawsuits under Federal

What the Measure Provides

e Minnesota measure would help a tiff in an employment discrimina- case in three ways:

: would permit a person to claim imination not only in hiring deci- , but also at any time after the n was hired. Subcontractors l make similar discrimination as against a contractor.

. would require the employer to. e that a job requirement that has ffect of screening out minority bers or women is justified as a iness necessity."

¶It would give the plaintiff more time to file a suit alleging that an employer's seniority system was discriminatory.

The amendments to the state law are patterned in part after rights legislation proposed in Congress by Senator Edward M. Kennedy, Democrat of Massachusetts. The Kennedy bill is opposed by business interests, and President Bush has vowed to veto it if it reaches him.

The Kennedy legislation recently cleared the Senate Labor Committee on an 11-to-5 vote and is expected to reach the Senate floor in June. The measure passed the House Education and Labor Committee on Tuesd

Continued on Page 10, Colum

Continued From Page 1

10. A committee staff member said he expected the bill to reach the House floor late this spring.

Prospects for Congressional passage are said to be good, but Capitol Hill aides say it is unclear whether the House bill could survive a veto.

Other States Are Considered

Julius Chambers, director-counsel of the N.A.A.C.P. Legal Defense and Educational Fund, said Minnesota was the first state to confront the the Supreme Court decisions so broadly. Earlier this year, he said, Massachusetts passed a much narrower bill, overturning limits that the Supreme Court imposed in interpreting a 1866 law that has been used as a basis for suing over employment discrimination.

Mr. Chambers said legislation like Minnesota's was under consideration in Indiana, Wisconsin and North Carolina. "The Minnesota action closes a big gap," he said. "It has important lessons for people in Washington and other states."

Stephen Cooper, the Minnesota Commissioner of Human Rights, said the intent of the legislation adopted today "is to restore to people the rights they enjoyed before the Supreme Court took its buzzsaw to them in the last session."

The Legal Defense Fund concluded last fall that because of the Supreme Court's actions, scores of racial discrimination claims had been dismissed or withdrawn because the plaintiffs found it nearly impossible to keep the cases going.

Restoring rights enjoyed before the Court 'took its buzzsaw to them.'

The amendments to the Minnesota law passed the Democratic-controlled Legislature unanimously this spring after state business organizations agreed to drop their opposition.

The amendments also had broad support among civil rights organizations in Minnesota, including the Urban Coalition of Minneapolis, the Council on Asian-Pacific Minnesotans and the Minnesota chapter of the National Organization for Women.

State Representative Howard Orenstein of St. Paul, an author of the legislation, said the state's support of the law underscored A long tradition of civil rights leadership in the tradition of Hubert H. Humphrey.

Five Key Moves by High Court

The three rulings at issue were among five decisions issued by the Court last summer. Mr. Cooper said Minnesota legislators chose to address only those decisions that they believed they could specifically affect by changing the state law.

The Supreme Court decisions were each all handed down last June by a 5-to-4 margin.

In one, Patterson v. McLean Credit Union, the Court narrowly interpreted an 1866 Federal law that had long been thought a bar to race discrimination in employment. The Court held that the law applied only to racial discrimination in hiring, not racial discrimination on the job.

Under the new Minnesota law, Mr. Cooper said, it is illegal not only to refuse to hire a person on the basis of race, gender, disability or color, but also to discriminate against that person once he or she is hired.

A second Supreme Court ruling, Wards Cove Packing v. Antonio,

...-old precedent governing the burden of proof on an important question in employment discrimination lawsuits.

The 'Business Necessity' Strategy

Previously employers had been required to defend, as a "business necessity," any job requirement that had the effect of screening out minorities or women. Under the Wards Cove ruling, the person bringing suit is required to prove that there is no "business necessity" for such a requirement, an often insurmountable obstacle for plaintiffs in bringing such lawsuits.

The third Supreme Court decision at issue, Lorrance versus A.T.T., set strict time limits on challenges to employers' allegedly discriminatory seniority systems. The Court held that the statute of limitations on such cases begins to run from the time the system is put into place. Under the new Minnesota ruling, the statute begins to run from the time a person who challenges the system says he or she was first adversely affected by it.

Under the Lorrance decision, Mr. Cooper said, companies could set up a seniority system that would effectively discriminate against workers by age or sex; then the companies could evade any liability if they were not caught within the period of the statute of limitation, as measured from the time the seniority system was established.

Selecting Their Targets

Mr. Cooper and Mr. Orenstein said they focused on those decisions that involved interpretations of the law, rather than Constitutional grounds.

Mr. Orenstein said the legislative measure was at first opposed by Minnesota business interests, which took issue with provisions that would have amended state laws and procedures dealing with workmen's compensation. The bill's original version would also have allowed, for the first time, jury trials to hear job discrimination cases.

After negotiations, Mr. Orenstein and proponents of the legislation agreed to drop those provisions, and four major business groups promised not to oppose the remaining sections of the law. "I think one important message from what happened here is that legislators can work successfully with the business community on these matters," Mr. Orenstein said.

And Business in Minnesota?

Tom Triplett, executive director of the Minnesota Business Partnership, which represents the state's 80 largest employers, said business leaders would not have proposed the measure themselves, but they had no objections to it in its current form.

In Washington, however, business interests remain sharply opposed to the proposed Senate legislation. Frederick J. Krebs, an official with the United States Chamber of Commerce, said his organization was strongly opposed to the Kennedy bill, arguing that it would have an adverse effect on business.

Among other things, he said it would so alter the legal landscape that businesses would face a proliferation of lawsuits from plaintiffs in search of large damage awards.

from Kennedy
7/16

<u>7/12/90 LANGUAGE WITHOUT CHANGES</u>

The term required by business necessity means:

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

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

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

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

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

> <u>provided, however</u>, that where a group of interrelated employment practices produce a single employment decision and the elements of the decision are not capable of separation for analysis, the group of employment practices shall be treated as a single employment practice and may be challenged as such and defended as such.

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

<u>7/12/90 LANGUAGE WITH CHANGES</u>

The term required by business necessity means:

(1) in the case of employment practices primarily involving/related to [choose one] selection, 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 described in subsection (1), the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

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

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in <u>Griggs</u> and to overrule <u>Wards Cove</u>.

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

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

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

1. BUSINESS NECESSITY

(1) The term required by business necessity means (1) in the case of employment practices primarily involving a measure of job performance (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 demonstrable relationship to successful performance of the job.

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

(3) In deciding whether the above standards have been met, the Court may rely on as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the Court shall give such weight if any to such evidence as it deems appropriate.

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in <u>Griggs</u> and to reflect the state of law prior to Ward's Cove.

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O'MELVENY & MYERS

MEMORANDUM

Desk

Monday AM

DATE: September 19, 1990

TO: Honorable John H. Sununu

FROM: William T. Coleman, Jr.

SUBJECT: Letter to the President

Gave cc to JS 9-24 10:25 AM

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.

PHOTOCOPY
GB HANDWRITING

Bill

Enclosures

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WRITER'S DIRECT DIAL NUMBER
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OUR FILE NUMBER

September
19th
1 9 9 0

PHOTOCOPY
GB HANDWRITING

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

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Report	Talking Points Regarding Negotiations w/William Coleman (2 pp.)	n.d.	~~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 (2 of 2) [1]

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

Date Closed: 12/17/2004	**OA/ID Number:** 29145-002
FOIA/SYS Case #: 1998-0004-F[1] **Re-review Case #:** 2005-0426-S **P-2/P-5 Review Case #:**	**Appeal Case #:** **Appeal Disposition:** **Disposition Date:**
AR Case #: **AR Disposition:** **AR Disposition Date:**	**MR Case #:** **MR Disposition:** **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.

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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 REGARDING NEGOTIATIONS WITH WILLIAM COLEMAN

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

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

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

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

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

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

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

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

Members remain suspicious of the Administration's position. They are very concerned that they not end up to the right of the President. Members are already on the record. If the Administration cuts a new deal now, particularly one that does not address <u>all</u> the problems with Kennedy-Hawkins, Members will feel betrayed and our ability to depend on our Hill allies on any issue in the future will be severely impacted.

* <u>We must let our allies on the Hill know what we are doing.</u>

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

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

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

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

* <u>We can win.</u>

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

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

<u>Comments of Interested Organizations</u>

The Anti-Defamation League of B'Nai B'Rith, the national organization with the longest and most outspoken record of opposition to quotas, supports the Civil Rights Act. A.D.L. endorsed the Bill even in its original form, confident that the Bill would not result in quotas:

> "We are pleased to lend our support to the proposed Civil Rights Act of 1990... It offers necessary and important federal protection to potential victims of discrimination and does so sensibly and reasonably - - without resort to quotas or numerical preferences which can themselves become discriminatory and which we have for many years opposed. We do not believe that the Bill, properly interpreted should result in quotas -- or their functional equivalent."[1]

After the Senate adopted a number of changes to alleviate the concerns described above, a spokesman for A.D. L. reiterated the organization's view in an article entitled "Once and For All, It's Not A Quota Bill".:

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[1] Statement of Anti-Defamation League on H.R. 4000, February 20, 1990, p.1.

COMMENTS

"[T]he Anti-Defamation League ... has fought ... vigorously against the use of quotas, goals, and timetables ... . [T]he Anti-Defamation League does not believe the civil rights bill would authorize or promote quotas... .

Critics charge that the Civil Rights Act would impose liability on employers simply because their work force didn't reflect the racial composition of the community... . This has never been so, and would not be the case under the new Civil Rights Act... .

The Senate-approved Bill defines business necessity context as that which 'bear[s] a significant relationship to successful performance of the job.' This does not mean that to pass muster, practices must be absolutely necessary, as some critics have charged."[2]

The American Jewish Committee also concluded that even the original language of the Civil Rights Act would not lead to quotas:

"[Q]uotas ... we oppose because we believe that quotas

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[2] Legal Times, July 30, 1990

undermine the concept of individual merit... . [N]othing in the Civil Rights Act of 1990 creates or condones the institution of quotas.

Contrary to what some will argue, providing remedies for unjustified employment practices which result in disparate impact has nothing whatsoever to do with quotas. Title VII, as it was interpreted prior to Wards Cove ... and as it will be again once the Bill before us becomes law, did not require that employers adopt immutable percentages for minorities and women in the workforce."[3]

The President of the American Jewish Committee denounced as totally baseless charges that the Bill would lend to hiring or promotions on the basis of percentages. In an article entitled "The Civil Rights Act is Not A Quota Bill", he wrote"

"A small coterie of opponents to the Civil Rights Act of 1990 have sought to advance their cause by labeling the act 'a quota Bill'. Nothing could be further from the truth... The

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[3] Testimony of Sholom Comay, President, American Jewish Committee, on H.R. 4000, February 20, 1990, pp. 3,4,6.

COMMENTS

The American Jewish Committee is an organization long opposed to quotas and is a strong supporter of the Bill... . [T]he Bill would reestablish a Supreme Court standard first developed in 1971 in Griggs v. Duke Power Co. Before the court reversed itself in the June 1989 Wards Cove decision, the Griggs precedent stood for nearly 20 years, without once resulting in racially based numerical quota systems... .[B]efore Wards Cove employers satisfied the business necessity standard without resorting to quotas... The quota scare tactic is much ado about nothing."[4]

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4 Christian Science Monitor, July 11, 1990.

Quotas

When the Civil Rights Act was first introduced, concerns were expressed that sections 3 and 4 -- the provisions which overturn the decision in Wards Cove Packing Co. v. Antonio, would result in hiring or promotion quotas. The language of the Bill, even as originally drafted, did not purport to require quotas. The concern raised, however, was that an employer with a racially imbalanced workforce would be certain to lose a disparate impact case under the terms of the legislation, and that as a consequence employers would resort to quotas as the only way to avoid a lawsuit under Title VII.

In response to these arguments, sponsors of the legislation made 6 different changes specifically designed to assure that the Bill would not induce employers to hire or promote on the basis of race or sex.

(1) Anti-Quota Provision

From the outset the debate about sections 3 and 4 centered on the claim that they could and would be construed to impose on employers a burden so onerous the employer would adopt quotas to avoid lawsuits. Supporters of the Bill insisted that its correct meaning did not impose such burdens, and argued it would not be so interpreted; critics expressed fear of a particularly harsh interpretation. To address this concern in its most general terms,

NO QUOTAS

a provision was added in the House which expressly directs the courts not to give the Bill an interpretation that would, in effect, coerce employers into using quotas:

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

(2) Mere Restoration of Griggs

Most of the concerns regarding quotas have related to the proposed definition of "business necessity". Under Griggs, once a plaintiff establishes a prima facie case of disparate impact, the employer must prove that the practice or practices involved related to job performance and were justified by business necessity. The Wards Cove decision changed and weakened the standard of justification in such cases. The stated purpose of sections 3 and 4 was to restore the standard of business necessity to that which existed under Griggs. Critics objected, however, that the language of the Bill in fact established a new standard far more onerous than Griggs. Opponents did not, in general, object to returning to the law that prevailed prior to Wards Cove. There has been no

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suggestion that Griggs and its progeny ever resulted in quotas, only a concern that the Bill went beyond a simple restoration of the pre-Wards Cove standard. Because we know from 18 years of experience that Griggs did not lead to quotas, mere restoration of Griggs itself could not do so.

For these reasons a provision was inserted in both the Senate and House bills which state expressly

> "This subsection is meant to codify the meaning of 'business necessity' as used in Griggs v. Duke Power Co".