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

OA/ID Number: 29145
Folder ID Number: 29145-005

Folder Title:
Civil Rights 1990 (2 of 2) [4]

Stack:	Row:	Section:	Shelf:	Position:
G	15	24	7	4

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--

selected primarily involving a measure of
(1) in the case of employment practices designed to measure an employee's *abilities to perform* ~~qualifications~~ for the job, the practice ~~or group of practices~~ must bear a significant relationship to successful performance of the job.

primarily involving a measure
(2) in the case of other employment practices that are not designed to measure an employee's *abilities to perform* ~~qualifications~~ for 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~~

a
or ~~any other~~ practice designed to further a ~~legitimate~~ business purpose
significant

3 of 3

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

17) Legislative history on business necessity: "This language is meant to codify the meaning of business necessity as used in *Greggs* and other opinions of the Supreme Court." ^{up to} *Ward's Cove*

→ particularly as attached

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From Frederick McClure to John Sununu Re: Statement Regarding Kennedy-Hawkins Bill (1 pp.)	8/2/90	P-5	

Collection:

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WHORM Cat.:
File Location: Civil Rights 1990 (2 of 2) [4]

Open on Expiration of PRA
 (Document Follows)
 By *[Signature]* (NLGB) on 10/28/05

Date Closed: 12/17/2004	OA/ID Number: 29145-005
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]
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 P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
 P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

PRM. Removed as a personal record misfile.

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

(b)(1) National security classified information [(b)(1) of the FOIA]
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 (b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE

WASHINGTON

August 2, 1990

MEMORANDUM FOR JOHN H. SUNUNU

FROM: FREDERICK D. McCLURE *fm*

SUBJECT: Statement Regarding Kennedy-Hawkins Bill

Although the House enacted the "this is not a quota bill" language and capped the punitive damages section of H.R. 4000 tonight (by amendment), I believe that we should be prepared for a possible defeat on the Michel-LaFalce amendment tomorrow. Another approach is to "turn up the heat" tomorrow morning **before** the vote. The attached can easily be re-drafted with that thought in mind. In other words, this vote can be made much more important **if** we get ahead of the curve. Nonetheless, the vote remains close, dependent upon how many Democrats are persuaded by the Democrat leadership to not support the substitute.

Several weeks ago, you and I discussed an immediate veto of the so-called civil rights act as soon as it reached the President's desk, coupled with the sending of acceptable legislation to the Hill with the veto message. If we lose on LaFalce, I still maintain that this is the course we should take.

Should the House not adopt the Michel-LaFalce substitute tomorrow, in my view, we should be prepared to issue a statement similar to the attached **immediately** upon final passage of H.R. 4000.

My first draft was a bit stronger, but I have mellowed somewhat upon further reflection. It is important that we sort of "draw a line in the sand" in preparation for that which will follow. I remain convinced that we have the upper-hand in defining the bill and subsequent debate, e.g., if the President **signs** the bill, then H.R. 4000 is a civil rights bill; if the President **veto**es the bill, then it is a quota bill.

DRAFT 8/2/90 9:32 p.m.

STATEMENT BY THE PRESIDENT

Today [8/3/90] the House of Representatives passed H.R. 4000, a measure known as the Kennedy-Hawkins bill. During consideration of the legislation, the Administration strongly supported a bipartisan substitute bill offered by Representatives Bob Michel (R-IL) and John LaFalce (D-IL). This alternative was defeated by a vote of ____ to ____.

In May, I said I wanted to sign a civil rights bill this year that would overturn decisions regarding employment discrimination that were handed down by the Supreme Court last summer. At that time, I also made it clear that I would not sign a quota bill. Since then, I have repeatedly indicated my support for a reasonable compromise that would address the legitimate issues raised in last summer's Supreme Court cases without resulting in employers adopting quotas. In fact, working with Senator Ted Kennedy (D-MA), the White House came close to reaching such a compromise in the Senate. In the House, we worked with Republicans and Democrats alike to fashion a workable alternative to the Michel-LaFalce substitute.

The Michel-LaFalce substitute would have cured the defects in the Kennedy-Hawkins legislation. I believe the measure passed by the House of Representatives, almost identical to legislation passed by the Senate last month, is a quota bill. It is a quota

bill because inescapably it will have the effect of forcing businesses to adopt quotas in hiring and promotion. I cannot and will not sign such a bill. Instead of solving problems it will foster divisiveness and litigation, and in so doing, do more to promote legal fees than civil rights. Although we worked in good faith with Congress on this issue, I cannot in good faith as President affix my signature to this quota bill. I cannot accept legislation that turns back the clock on progress that has occurred since passage of the Civil Rights Act of 1964.

Since the measures passed by the House and Senate are nearly identical, I implore Congress to act quickly in conference, or forego a House-Senate conference and send either bill to me before Congress adjourns for the August recess. I will act quickly to veto such bill and at the same time forward to Congress legislation that I find acceptable; legislation like the Michel-LaFalce bill that will further the cause of civil rights without resulting in quotas. If Congress acts swiftly, together we can enact real civil rights legislation this year that accomplishes the goal of overturning the recent Supreme Court decisions regarding discrimination in hiring and promotion.

Because I believe Congress shares my commitment to civil rights and my opposition to quotas -- an opposition that I believe is shared by almost all Americans -- I believe together we can enact good legislation. We will not, however, be advancing the worthy cause of civil rights in this Nation by

enacting legislation that encourages confrontation and greater divisiveness among the American people.

[Some may prefer to preserve this issue for political debate, rather than acting responsibly to send me a bill I can sign. If necessary, I will join in that political debate and explain to the American people how the legislation as passed will lead businesses -- large and small -- to adopt quotas. The American people would be better served if Congress immediately reconsidered this legislation and send me a bill I can sign.]

To repeat, I will not sign a quota bill. I will sign a civil rights bill that benefits all Americans who may be subject to discrimination.



National Center for Neighborhood Enterprise

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National Center for
Neighborhood Enterprise
Washington, D.C.

July 18, 1990

The President
The White House
Washington DC 20500

Dear Mr. President:

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

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

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

- 1) Become the "educational choice President" and give poor Americans the same choice in education enjoyed by middle and upper income Americans. By promoting educational vouchers and parental choice, you can introduce competition to the public school monopoly and thus improve a system which has failed so many of our young people.
- 2) Promote entrepreneurship as a means of economic empowerment. By repealing discriminatory legislation such as the 1931 Davis-Bacon Act, you can help many minority Americans fulfill their dream of participating in the market place which has made America the world's envy.

"Turning Problems Into Opportunities"

The President
July 18, 1990
Page 2

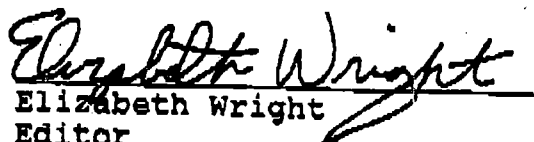
- 3) Vigorously enforce existing civil rights laws. If you aggressively enforce anti-discrimination laws, you will show the entire nation that bigotry is truly unacceptable and intolerable.

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

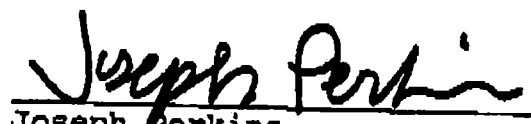
Sincerely,


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


Councilman Keith Butler
Detroit City Council


Elizabeth Wright
Editor
Issues & Views


Glenn Loury
Professor of
Political Economy
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THE WHITE HOUSE
WASHINGTON

Date: July 20, 1990

FOR: FRED MCCLURE

FROM: GOVERNOR JOHN H. SUNUNU

☐ Action

☐ Your Comment

☐ Let's Talk

xx☒xx FYI

The
Heritage Foundation

214 MASSACHUSETTS AVENUE, N.E.

WASHINGTON, D.C. 20002

TELEPHONE: (202) 546-4400

FAX: (202) 546-2260

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FACSIMILE TRANSMISSION SHEET

Date: 7/19/90
Time: 9:55To: Governor SumnerFacsimile #: 456-2397This cover plus 3 pages

Message #: _____

From: Dave MasonComments: Original sent to President
via messenger yesterday. Copy sent to
Bill Kunstl as well.

If you have any problems with this transmittal please call _____ at (202) 546-4400.

EXHIBIT A

Changes noted

221012.A33

S.I.C.

in yellow

PROPOSED CHANGES TO

KENNEDY-JEFFORDS ~~COMPROMISE~~ SUBSTITUTE

1

2 SECTION 1. SHORT TITLE.

3 This Act may be cited as the "Civil Rights Act of
4 1990".

5 SEC. 2. FINDINGS AND PURPOSES.

6 (a) Findings.--Congress finds that--

7 (1) in a series of recent decisions addressing
8 employment discrimination claims under Federal law, the
9 Supreme Court cut back dramatically on the scope and
10 effectiveness of civil rights protections; and

11 (2) existing protections and remedies under Federal
12 law are not adequate to deter unlawful discrimination or
13 to compensate victims of such discrimination.

14 (b) Purposes.--It is the purpose of this Act to--

15 (1) respond to the Supreme Court's recent decisions
16 by restoring the civil rights protections that were
17 dramatically limited by those decisions; and

18 (2) strengthen existing protections and remedies
19 available under Federal civil rights laws to provide more
20 effective deterrence and adequate compensation for
21 victims of discrimination.

22 SEC. 3. DEFINITIONS.

23 Section 701 of the Civil Rights Act of 1964 (42 U.S.C.
24 2000e) is amended by adding at the end thereof the following
25 new subsections:

1 “(1) The term ‘complaining party’ means the
2 Commission, the Attorney General, or a person who may
3 bring an action or proceeding under this title.

4 “(m) The term ‘demonstrates’ means meets the burdens
5 of production and persuasion.

6 “(n) The term ‘group of employment practices’ means
7 a combination of employment practices that produces one
8 or more decisions with respect to employment, employment
9 referral, or admission to a labor organization,
10 apprenticeship or other training or retraining program.

11 “(o)(1) The term ‘required by business necessity’
12 means--

13 “(A) in the case of employment practices
14 involving selection (such as hiring, assignment,
15 transfer, promotion, training, apprenticeship,
16 referral, retention, or membership in a labor
17 organization), the practice or group of practices
18 must bear a significant relationship to successful
19 performance of the job. *or bear a manifest relationship
to the employment in question.*

20 “(B) in the case of employment practices that do
21 not involve selection, the practice or group of

22 practices must bear a significant relationship to a
23 significant business objective of the employer. *or bear a
manifest*

24 “(2) In deciding whether the standards in paragraph *relation-*
25 (1) for business necessity have been met, unsubstantiated *ship to
the employment
in question.*

1 opinion and hearsay are not sufficient; demonstrable
2 evidence is required. The defendant may offer as evidence
3 statistical reports, validation studies, expert
4 testimony, prior successful experience and other evidence
5 as permitted by the Federal Rules of Evidence, and the
6 court shall give such weight, if any, to such evidence as
7 is appropriate.

8 "(3) This subsection is meant to codify the meaning
9 of 'business necessity' as used in Griggs v. Duke Power
10 Co. (401 U.S. 424 (1971)) and to overrule Ward's Cove
11 Packing Co., Inc. v. Atonio (109 S. Ct. 2115 (1989)).

12 "(p) The term 'respondent' means an employer,
13 employment agency, labor organization, joint labor-
14 management committee controlling apprenticeship or other
15 training or retraining programs, including on-the-job
16 training programs, or those Federal entities subject to
17 the provisions of section 717 (or the heads thereof)."

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

20 Section 703 of the Civil Rights Act of 1964 (42 U.S.C.
21 2000e-2) is amended by adding at the end thereof the
22 following new subsection:

23 "(k) Proof of Unlawful Employment Practices in Disparate
24 Impact Cases.--

25 "(1) An unlawful employment practice based on

disparate impact is established under this section when--

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

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

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

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

1 “(iii) if the court finds that the
2 complaining party can identify, from records or
3 other information of the respondent reasonably
4 available (through discovery or otherwise), which
5 specific practice or practices contributed to the
6 disparate impact--

7 “(I) the complaining party shall be
8 required to demonstrate which specific
9 practice or practices contributed to the
10 disparate impact; and

11 “(II) the respondent shall be required
12 to demonstrate business necessity only as to
13 the specific practice or practices
14 demonstrated by the complaining party to have
15 contributed to the disparate impact.

~~provided that~~

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

19 “(3) Notwithstanding any other provision of this
20 title, a rule barring the employment of an individual who
21 currently and knowingly uses or possesses an illegal drug
22 as defined in Schedules I and II of section 102(6) of the
23 Controlled Substances Act (21 U.S.C. 802(6)), other than
24 the use or possession of a drug taken under the
25 supervision of a licensed health care professional, or

Expressly
allow
Market
defense

1 any other use or possession authorized by the Controlled
2 Substances Act or any other provision of Federal law,
3 shall be considered an unlawful employment practice under
4 this title only if such rule is adopted or applied with
5 an intent to discriminate because of the race, color,
6 religion, sex, or national origin.''.
7

SEC. 5. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE

8 CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR
9 NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

10 (a) In General.--Section 703 of the Civil Rights Act of
11 1964 (42 U.S.C. 2000e-2) (as amended by section 4) is further
12 amended by adding at the end thereof the following new
13 subsection:

14 `` (1) Discriminatory Practice Need Not Be Sole
15 Contributing Factor.--Except as otherwise provided in this
16 title, an unlawful employment practice is established when
17 the complaining party demonstrates that race, color,
18 religion, sex, or national origin was a contributing factor
19 for any employment practice, even though other factors also
20 contributed to such practice.''.
21

22 (b) Enforcement Provisions.--Section 706(g) of such Act
23 (42 U.S.C. 2000e-5(g)) is amended by inserting before the
24 period in the last sentence the following: ``or, in a case
25 where a violation is established under section 703(1), if the
respondent establishes that it would have taken the same

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THE WHITE HOUSE
WASHINGTON

August 2, 1990

MEMORANDUM FOR JOHN H. SUNUNU

FROM: NICHOLAS E. CALIO

SUBJECT: Civil Rights Calls

I know your time is likely to be limited, but these calls, if they can be made from the plane, would be helpful.

Campbell - Until yesterday, he was a solid supporter of LaFalce. However, he may be wavering under increasing Democratic Leadership pressure.

Richardson - Has not really focused. Could be a key vote among Hispanic Members.

Byron - Does not like quotas and is concerned about excessive litigation. Wants to be with President but is concerned that her frequency of voting with us is becoming an issue in her campaign.

Costello - Very concerned about the quota issue. Is worried about bucking his leadership. His vote would be a key pick up among urban, blue-collar Democrats.

Carr - He is another key vote among urban/suburban mid-west Democrats.

Gibbons - Original cosponsor of Kennedy/Hawkins but thinks changes need to be made. Would be flattered by call. Is key ally on trade issues.

Side-By-Side Comparison

Kennedy-Hawkins Bill

Section 1. Short title.

Section 2. Findings and Purpose.

Section 3. Definitions.

Section 4. Overrules Wards Cove Packing Co. v. Atonio. If plaintiff proves disparate impact, defendant must prove business necessity, defined as "essential to effective job performance." Plaintiff need not identify the specific employment practices he challenges.

Section 5. Overrules Price Waterhouse v. Hopkins by stating that Title VII is violated if an impermissible ground was "a motivating factor," regardless whether the outcome of the decision would have been the same if that ground had not been considered. If respondent can prove that it would have taken the same action in the absence of any discrimination, that affects remedy but not liability.

Section 6. Overrules Martin v. Wilks by binding those with notice of a judgment and a reasonable opportunity to present objections, as well as those whose interests were adequately represented. Challenges would also be precluded if "reasonable efforts were made to provide notice to interested persons."

Section 7. Overrules Lorance v. AT&T Technologies, Inc. and extends the statute of limitations for filing a Title VII charge from 180 (or 300) days to 2 years.

Section 8. Would dramatically alter the remedial scheme of Title VII by authorizing the award of compensatory damages for all intentional violations of Title VII and punitive damages for some. This section is not prompted by any Supreme Court decision.

Administration Bill

Section 4. The Administration opposes any attempt to overrule Wards Cove. The Kennedy bill would drive employers to resort to quotas to ensure statistical balance because it would be extremely difficult to prove that a practice -- even if legitimate -- was "essential to effective job performance."

Section 5. The Administration opposes overruling Price Waterhouse. If an employer can prove that an improper motive did not cause an employment practice, it makes no sense to say that the practice violates Title VII.

Section 6. The Administration opposes overruling Martin v. Wilks, which rests on due process concerns and merely reaffirms that each person is entitled to a day in court. The effect of the bill will of course be to insulate many quota settlements from challenge.

Section 7. The Administration's bill also overrules Lorance. We do not have a provision enlarging the time for filing a Title VII charge.

Section 8. The Administration opposes this uncalled for revision of Title VII, in view of the availability of back pay awards for most major violations, and in light of the fact that Title VII has worked well for 25 years.

THE CHIEF OF STAFF
has seen

Section 9. Would (1) authorize awards of expert witness fees, (2) prohibit a court from entering a consent decree unless the parties attested that a fee waiver had not been compelled as part of the settlement, and (3) require that defendants pay attorney fees incurred in litigating challenges to relief granted against them.

Section 10. Would extend the statute of limitations for filing a Title VII charge against the federal government from 30 to 90 days and would authorize awards of interest against the United States.

Section 11. Requires broad construction of civil rights statutes.

Section 12. Amends Section 1981 to overturn Patterson v. McLean Credit Union.

Section 13. States that nothing in these amendments affects court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law.

Section 14. Severability.

Section 15. Application of Amendments and transition rules.

Section 12. The Administration's bill contains a similar amendment to 42 U.S.C. 1981 to overturn Patterson.

CIVIL RIGHTS

Koppel:

[TV COVERAGE of President Bush sitting with black leaders.]
At the White House today President Bush met with civil rights leaders who urged him to sign a new civil rights bill that's now working its way through Congress. It would provide additional protection to minorities and women against job discrimination. The White House indicated that the President is likely to sign the bill if it does not contain hiring quotas. (ABC-3)

Brokaw: President Bush has reservations about a new civil rights law before Congress, and civil rights leaders in turn are concerned about his reservations. At a time when there do seem to be more and more racial incidents around the country, they took their concerns to the source today.

NBC's Jim Miklaszewski:

[TV COVERAGE of President Bush sitting with black leaders.]
The relaxed mood at the start of today's meeting reflects a new relationship between the nation's black leaders and the White House. But these leaders warned that could all change if President Bush decides to veto a civil rights bill now pending in Congress. (Benjamin Hooks, NAACP: "The civil rights bill, in my judgement, will become a litmus test.")

The bill is intended to reverse the effect of a number of recent Supreme Court civil rights decisions. Those rulings made it more difficult for minorities and women to win discrimination lawsuits against employers. But White House Chief of Staff Sununu and other conservatives think the legislation goes too far -- that it would establish racial hiring quotas and put an unfair burden of proof on employers to prove they're not discriminating.

(Sen. Hatch: "The employer will no longer be able to choose his or her employees based upon the most qualified employee. They're just going to have to take people, and they're going to have to do it by quotas.")

Senate sponsors strongly disagree.

(Sen. Kennedy: "Effectively, the idea of quotas is a red herring. What we are attempting to do is to restore the law to what it was before.")

Unlike Ronald Reagan, George Bush has gone out of his way to publicly support civil rights and court blacks.

[TV COVERAGE of President Bush with a black leader in the Oval Office.]

Polls show he's the most popular Republican president among blacks in 30 years. But critics say his actions have not matched his words.

(Jesse Jackson: "It's not a good performance. It is basically superficial, sound bites and photo-ops.")

(Ralph Neas, Leadership Conference On Civil Rights: "Indeed, if you look at issues of race and sex discrimination, there is very little difference between the Meese Department of Justice under President Reagan and the Thornburgh Department of Justice under President Bush.")

Despite conservative pressures to kill the bill, the White House will now sit down with black leaders to try to hammer out a compromise. Officials here say the last thing the President wants to do now is to veto a civil rights bill. (NBC-3)

-more-

PHOTOCOPY
GB HANDWRITING

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Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Memo	From Jack Howard to Frederick McClure Re: Civil Rights Act Strategy (2 pp.)	2/13/90	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (2 of 2) [4]

Open on Expiration of PRA
 (Document Follows)
 By John (NLGB) on 6/28/05

Date Closed: 12/17/2004	OA/ID Number: 29145-005
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:
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AR Disposition Date:	MR Disposition Date:

RESTRICTION CODES

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PRM. Removed as a personal record misfile.

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MEMORANDUM FOR FRED MCCLURE

February 13, 1990

FROM: JACK HOWARD *JH*
THROUGH: NICK CALIO *NC*
SUBJECT: CIVIL RIGHTS ACT STRATEGY

THE CHIEF of STAFF
has seen

CURRENT STATUS

Last week Justice Department OLA and I hammered out a strategy for selling our response to the Civil Rights Act of 1990. The bill was introduced last Wednesday with 122 original cosponsors.

At this point, my understanding is that our legislative response, now in clearance, will focus on two of those decisions: *Patterson v. McLean Credit Union* and *Lorance v. AT&T Technologies*. However, there is some internal discussion about broadening that scope.

Whatever the outcome of that decision, it is important for our allies that we effectively and clearly draw the line. If we send fuzzy signals, it will become a Maginot Line and we'll be shortly overrun.

It is equally important that we be perceived as taking the initiative. My own experience from being on the receiving end of the White House strategy (or lack thereof) on Grove City and Fair Housing issues has been that there is no margin in delaying an Administration response. If there is going to be legislative response, then we had better weigh in early and aggressively.

ONGOING ACTIVITIES

1. Last Thursday, Don Ayr, Deputy Attorney General, briefed members and staff of the Education and Labor Committee on the strategy. The response was overwhelmingly positive, if for no other reason than the Members were happy that they weren't going to be caught in political "no-man's-land" between the White House and a demagogic civil rights community.

2. Joint hearings between Education and Labor and Judiciary start next Tuesday. At least one more set of hearings is being planned. Expectations are that the bill will be out of committee by the end of March. Up to this point, Justice has handled nearly all of the substantive judgements. I've been giving strategic advice like setting up briefings, trying to line up sponsors, etc.

POTENTIAL PROBLEMS

1. We have to get the bill out of clearance by at least the end of this week. It needs to be ready to be introduced next Tuesday

when the House reconvenes. At this point, Reps. Goodling and Gunderson may be the principal sponsors.

It is unclear how Rep. Sensenbrenner intends to proceed. Frankly, his role needs to be circumscribed. First, he is not convinced that we need to weigh in early with a bill. Second, his opinion is not well regarded by other Members. He has a history of leading his colleagues like lemmings off a cliff on issues like this. However, he will have to have some kind of role because he is ranking Republican on the Judiciary's Constitutional Rights subcommittee. So he is a problem that will have to be handled delicately. His staff is being kept abreast by Justice about both the substance of the bill and the strategy we intend to follow.

--Education and Labor Committee Republicans want to play a very aggressive advocacy role for our bill during the hearings. Having a bill introduced or ready to be introduced gives them something concrete to rally around. Justice Department is writing opening statements and key questions for witnesses. Republicans are limited to inviting only two witnesses, in contrast to the Majority's 20, so our two have to be really strong.

--As further preparation for the hearings, we are arranging a briefing for Monday (19th) for committee members. They will be briefed in depth and in layman's terms about the positive aspects of our bill. One of the problems we have is that few of the Education and Labor Republicans are lawyers. Second, even those who are lawyers are not used to handling civil rights issues in any kind of depth, since most of them go exclusively through the Judiciary Committee. I hope the briefings will alleviate some of that.

2. Shots are already being fired across our bow from the business community and some staff. Neither is convinced that weighing in early is the best course of action. They seem to prefer waiting to see how things crystallize. Since there is no bill, it is unclear to what extent they have substantive problems with it, although we will figure that out shortly.

3. There is a cross-cutting issue between this and the ADA bill. Principally it involves the compensatory and punitive damages that were taken out of the ADA bill during the Senate negotiations. We gave away the store, I have been told, on the rest of the bill in exchange for getting compensatory and punitive damages taken out.

HR 4000 contains language which has the effect of reinstating those damages. Not only does this appear to break faith with the agreement negotiated in the Senate, it complicates extraordinarily passage of the ADA bill in the House, if that's possible.

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
04. Memo	From Roger Porter to John Sununu Re: Civil Rights Developments (2 pp.)	5/30/90	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (2 of 2) [4]

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

Date Closed: 12/17/2004	OA/ID Number: 29145-005
FOIA/SYS Case #: 1998-0004-F[1]	Appeal Case #:
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THE WHITE HOUSE
WASHINGTON

May 30, 1990

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: ROGER B. PORTER *RBP*
SUBJECT: Civil Rights Developments

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

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

Our discussion focused on the following:

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

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

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

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

5. Our discussion of remedies concluded that:

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

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

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

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

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

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

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



EDITORIAL

*"First the blade,
then the ear,
then the full grain
in the ear"®*

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Wrong Road to Rights

THE proposed Civil Rights Act of 1990, in its present form, is an attempt to push civil rights law — once so nobly focused on ending race discrimination in the United States — deeper into the thicket of race and gender preferences.

The bill seeks to attack bias in the workplace by making it easier for workers to sue employers for discrimination in hiring or promotion. In particular, it aims to reverse several recent Supreme Court decisions widely seen to vitiate the ability of minority and female workers to contest unfairness.

The bill has some worthy elements. It would permit workers to challenge bias in promotions under a statute the Supreme Court said applies only to hiring, and it reconfirms that civil rights laws are to be generously interpreted, to give them, as we've argued before, a "broad sweep."

But the key provision of the act is troubling. It would let a plaintiff, without any proof of intentional discrimination by an employer, show with statistics that the plaintiff's group is underrepresented in the employer's work force. The "disparate impact" of the employer's hiring practices being thus shown, the employer would bear the burden of proving that every one of his hiring criteria is "substantially and demonstrably related to effective job performance."

This would be an extremely hard test for even the most fair-minded employer to pass. The easiest way to avoid defending such a lawsuit would be to establish hire-by-the-numbers quotas that ensure "proportional" representation of all groups.

Employment discrimination in the US should be eradicated. And there is an important role for constructive affirmative action programs by business, labor, schools, and government. The objective of such programs should be to elevate the work capabilities and broaden the employment opportunities of people who have been disadvantaged by discrimination, poverty, or cultural forces.

The objective of affirmative action should not, however, be to guarantee to selected groups "proportional" representation in the work force. That approach is likely to be both impractical and unfair. In practice, many US employers are coming to see that diversity in their work force is of value in itself, and they are making extra efforts to hire among groups underrepresented in the past. This is a necessity in a society where the ethnic makeup — and hence the pool of workers — become more diverse by the day.

But even with good intentions, the US must beware proceeding down a road where the best remedy for race and gender bias is seen to be race- and gender-conscious programs.

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THE WHITE HOUSE
WASHINGTON

Date: 6-12-90

FOR: *Gov. Sumner*

FROM: ANDREW H. CARD, Jr. *Andy*

- ☐ Action
- ☐ Your Comment
- ☐ Let's Talk
- ☒ FYI

*re. Status of Civil Rights
negotiations.*

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
05. Memo	From Frederick Nelson to C. Boyden Gray Re: Civil Rights Meeting (3 pp.)	6/12/90	P- 5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (2 of 2) [4]

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 (Document Follows)
 By YJ (NLGB) on 6/24/05

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THE WHITE HOUSE

WASHINGTON

June 12, 1990

MEMORANDUM FOR C. BOYDEN GRAY

FROM: FREDERICK D. NELSON

SUBJECT: Civil Rights Meeting

As you know, John Dunne and I met with Jeff Blatner of Senator Kennedy's staff this afternoon regarding Kennedy-Hawkins. In a nutshell, we outlined rather specific solutions to the most significant problems in the Kennedy-Hawkins legislation. Blatner, arguing on some points more than others, said that he would consult with the governing outside coalition and would convey the group's reactions in a call to Dunne on Tuesday morning.

Beyond making clear that he lacks negotiating authority, Blatner made the following procedural points:

- o The Senate will consider Kennedy-Hawkins prior to the July 4th recess and debate probably will coincide with the Mandela visit.

- o The bill's proponents will be more flexible if the Administration will agree to oppose any amendments to a fully negotiated settlement.

- o The bill's backers will insist upon a full description of all the Administration's proposed changes before agreeing to any.

Dunne suggested that we focus today's session on Wards Cove, Wilks, and damages, and asked that I explain our position in these areas. A brief synopsis follows.

Wards Cove

We noted that our three concerns--causality, burden of proof, and definition of the business justification standard--are interrelated and must be evaluated as a package.

- o On the causality point, Blatner seemed somewhat intrigued by our concession that a combination of employment practices can be claimed to cause the exclusion so long as each practice is proven to contribute to the exclusion. We essentially gave him our language on this score (which, while not relieving a plaintiff of the need to establish a causal nexus between the questioned practices and the impact, would not require plaintiff to quantify how much impact a particular practice had).

o Blatner seemed less receptive to our position that the business justification standard should not impose liability where the employer is pursuing "legitimate business purposes." Any acceptable standard, he said, must require (1) a close relationship between the challenged practice and effective job performance and (2) "real" evidence beyond the employer's experience that the practice promotes job performance. Although unwilling to limit disparate impact analysis to employment practices such as hiring and firing linked to individual "job performance" (for example, he wanted to cover plant closings too), he seemed unmoved by the argument that other justifications therefore had to be permitted. We gave him the "reasonably related to job performance or other legitimate business purpose" language, and he wrote it down.

o Blatner said he "knew" that we had no problem in placing the burden of proof on the employer. While observing again that the three Wards Cove issues are interrelated (and thus signaling some give here should we be successful in the other two areas), we did not concede the burden point. Instead we told him of our concept that an employer confronted with a prima facie case must offer evidence sufficient by itself to prove a business justification, but that the burden would stay on plaintiff to disprove such an explanation. Blatner said he would examine whether this heightened burden on the employer to back up its explanation goes beyond Wards Cove.

Wilks

Blatner and Dunne disagreed over the constitutionality of this section's provisions (B) and (C) barring challenge to a consent decree even where the victim was not given notice and a chance to challenge the proposed settlement where "reasonable" attempts at notice were made or where the victim's interests are deemed similar to those of someone else who did object. Dunne stated that we could live with the latter bar if the victim was in "privity of interest" with a party who had challenged the decree. No further progress was made on parts (B) and (C).

On part (A), Blatner:

o agreed that actual notice is required;

o agreed that the bar on subsequent challenge should apply to practices specifically required by the decree;

o indicated that we probably could not convince bill proponents to agree that the notice must warn that later challenge would be barred (while noting that Kennedy and the ACLU, left to their own devices, might be sympathetic to such an approach); and

o noted our view that such a bar should apply only to those who were company employees or applicants at the time of the decree.

Damages

Here we indicated a willingness to expand remedies for harassment. Blatner made the rather contradictory statements that (1) religious and sexual discrimination should result in damages on par with those available for race and sex discrimination (i.e. compensatory and punitive damages across the board), and (2) the real "needs" in this area are to expand damages for harassment and discriminatory working conditions, and for other dignitary affronts not compensated by back pay (such as hearing a job rejection coupled with a religious slur). He further hinted that there might be room for compromise on damages were we to agree to fight off all amendments to an Administration-Kennedy package.

Price-Waterhouse

Here Blatner gave some ground by saying that the improper motivating factor has to "contribute to the causation" of the employment result complained of. I told him that we would consider the phrase "causal factor" and suggested "major contributing factor" as a replacement for "motivating factor." Blatner added that a plaintiff must be able to gain an injunction against proven bias motivating some future decision.

* * * * *

Dunne and I said that other problems remained (such as retroactivity and the liberal rule of construction), but that we assumed those matters could be resolved once Wards Cove, Wilks, etc. were put to rest.

Blatner said he would check with the groups and get back with their reactions on Tuesday, at which time he would like our position on the rest of the bill.

JAMELEDDINE CHICHTI
CONSEILLER AUPRÈS DU
PRÉSIDENT DE LA RÉPUBLIQUE

TÉL : 270.054
742.311

[] = deletion
underline = addition

Annotated Kennedy/Hawkins
May 21, 1990

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1990".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS. -- Congress finds that --

(1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and

(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.

(b) PURPOSES. -- The purposes of this Act are --

(1) to respond to the Supreme Court's recent decisions by restoring the civil rights protections that

were dramatically limited by those decisions; and

(2) to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

SEC. 3. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new subsections:

"(1) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'group of employment practices' means a combination of employment practices that produces one or more decisions with respect to employment, employment referral, or admission to a labor organization, apprenticeship or other training or retraining program.

"(o) The term 'justified [required] by business necessity' means that the challenged practice or group of practices is reasonably related to a legitimate business interest or to effective job performance. [bears a substantial and demonstrable relationship to effective job performance.]

"(p) The term 'respondent' means an employer,

employment agency, labor organization, joint labor-management committee, controlling apprenticeship or other training or retraining, including on-the-job training programs, or those Federal entities subject to the provisions of section 717 (or the heads thereof)."

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

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

"(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES. --

"(1) An unlawful employment practice based on disparate impact is established under this section when --

"(A) a complaining party demonstrates by statistical evidence of a kind and degree sufficiently substantial to prove that a particular employment practice has caused the exclusion of applicants for jobs or promotions because of their race, color, religion, sex, or national origin, [that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin,] and the respondent fails to demonstrate [by objective evidence] that such practice is justified [required] by business

necessity; or

"(B) a complaining party demonstrates by statistical evidence of a kind and degree sufficiently substantial to prove that a combination of two or more employment practices has caused the exclusion of applicants for jobs or promotion because of their race, color, religion, sex, or national origin, that each employment practice has contributed to the exclusion, and the respondent fails to demonstrate that the practices are justified by business necessity. [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) 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; and

["(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not

be required to demonstrate that such practice is required by business necessity.]

["(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.]

"(2) [(3)] Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses an illegal drug as defined in Schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use of possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of the race, color, religion, sex, or national origin."

SEC. 5. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE

ESTABLISHMENT OF QUOTAS BASED ON RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN.

Section 703(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding the following new paragraph;

(3) to establish a quota system for recruitment, hiring or promotion based on race, color, religion, sex or national origin.

SEC. 6 [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 MOTIVATING 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 major contributing [motivating] factor for any employment practice, even though such practice was also motivated by other factors."

(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".

SEC. 7 [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 6[5]) is further amended by adding at the end thereof the following new subsection:

"(m) FINALITY OF LITIGATED OR CONSENT JUDGMENTS OF ORDERS.--

"(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice specifically required by [that implements] 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 right laws by a person who, prior to the entry of such judgment or order, was an applicant or an employee and who had [laws --

["(A) by a person who, prior to the entry of such judgment or order, had --]

"(1) actual notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person; and

"(1i) a reasonable opportunity to present objections to such judgment or order;

provided, however, that this sub-section shall not apply to a person seeking to challenge a litigated or consent judgment or order that requires or establishes a quota on the basis of race, color, religion, sex or national origin.

["(B) by a person with respect to whom the

requirements of subparagraph (A) are not satisfied, if the court determines that the interest of such person were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order; or

["(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons consistent with the constitutional requirements of due process of law.

[A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.]

"(2) Nothing in this subsection shall be construed to --

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure;

"(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of group on whose behalf relief was sought in such action by the Federal government; or

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction.

"(3) Any action, not precluded under this subsection, that challenges an employment practice that implements a litigated or consent judgment or order of the type referred to in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code."

SEC. 8 [7]. STATUTE OF LIMITATIONS; APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.

(a) STATUTE OF LIMITATIONS. -- Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended --

Withdrawal/Redaction Sheet

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
06. Memo	From Roger Porter to POTUS Re Civil Rights (4 pp.)	5/20/90	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (2 of 2) [4]

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

Date Closed: 12/17/2004	OA/ID Number: 29145-005
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:
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Presidential Records Act - [44 U.S.C. 2204(a)]

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 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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 (b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
 (b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE

WASHINGTON

May 20, 1990

MEMORANDUM FOR THE PRESIDENT

FROM: ROGER B. PORTER *RBP*
SUBJECT: Civil Rights

On Tuesday, May 8, at your meeting with the GOP Congressional Leadership, Senator Chafee expressed concern over the Administration's position on the civil rights bill and urged that the White House take the leadership in reviewing our position. You agreed and asked me and Boyden Gray to see that it was done.

Since then activity has proceeded on several fronts:

1. You and Governor Sununu have held a series of meetings with representatives from business, labor, civil rights organizations, hispanics, and women and other minority groups.

2. I have convened a series of interagency meetings involving the Attorney General and John Dunne (Justice), Boyden and several excellent attorneys from his staff, Jim Cicconi, David Fortney (Labor), and Marianne McGettigan.

3. Governor Sununu, Boyden, and I have held two meetings with Republicans in the House and the Senate about the issue.

Expectations

What these meetings have produced is both a set of expectations and some room for maneuver. The expectations are both general and specific:

1. There is clearly an expectation, reinforced by your Rose Garden remarks on Thursday, that you want to sign a civil rights bill if it can be crafted without resulting in quotas.

2. Specifically, many of those who attended the five sessions last week left with the impression that officials from the White House and the Department of Justice would sit down with them to try to come up with acceptable language.

3. Similarly, Republicans in both the House (McCollum indicated he would happily serve as the point of contact) and the Senate (Gorton and Kassebaum will play major roles) are expecting to discuss specific language with us.

These sessions have also produced some room for maneuver. While the labor union representatives were remarkably rigid, the black, hispanic, and women's organization leaders expressed a willingness to consider changes in the Kennedy-Hawkins bill to alleviate our concerns that the bill could lead to a defacto quota system, and that it could encourage unnecessary additional litigation.

Recommended Changes in Kennedy-Hawkins

The goal of the internal meetings I convened was to produce agreement within the Administration on our top priorities with respect to the legislation, and what specific changes we should seek in the Kennedy-Hawkins bill.

We have made good progress and have reached agreement on specific language changes for the major issues in the legislation. A copy of the Kennedy-Hawkins bill with our recommended deletions and additions is attached.

1. Quotas and the Wards Cove Decision

Kennedy and Hawkins contend that their bill would not result in quotas, a claim made by several others during the sessions last week. Yet, there is still a strong sense in many quarters that the legislation as currently drafted would result in employers "hiring by the numbers" to avoid the threat of discrimination suits.

Our highest priority in this part of the bill must be to create conditions whereby employers will focus on relevant skills and qualifications rather than concentrate on the statistical makeup of their workforce.

The debate over the Wards Cove decision revolves around three issues:

- (a) What the plaintiff must identify in bringing a suit;
- (b) What the employer must show to avoid liability; and
- (c) Who bears the burden of demonstrating what.

Kennedy-Hawkins merely requires the plaintiff to show that the employer's hiring practices have produced a statistical imbalance. (He or she has hired too few minorities, women, etc.)

We recommend that, in addition, the plaintiff must identify a particular practice, or group of practices, that caused the disparate impact because of the race, religion, sex, or

national origin of those who are underrepresented.

Kennedy-Hawkins originally stipulated that an employer's employment practices must be required by "business necessity." Business necessity was defined as "essential to effective job performance."

We recommend that what an employer must show is that the specific practice in question is justified by business necessity. And we would define business necessity as "reasonably related to a legitimate business interest or to effective job performance." We believe this restores the law to what it was before Wards Cove, while Kennedy's language would go well beyond anything that has previously been required.

Kennedy-Hawkins shifts the burden of proof to an employer simply by showing that he has a statistical imbalance in his workforce.

We recommend that employers not have to show anything until after a plaintiff has identified a specific practice and has demonstrated how it caused the imbalance. At this point the employer would be required to justify his business practice under the standard outlined above.

2. Remedies

Under current law, blacks and hispanics have more remedies available to them for intentional discrimination than women and other minorities. No one is proposing reducing remedies for racial discrimination. The question is to what extent we should expand remedies for women, and others, to bring them closer to those for blacks.

Kennedy-Hawkins proposes permitting compensatory and punitive damages in all cases of intentional employment discrimination under Title VII. Many in the business community fear that permitting compensatory and punitive damages will encourage less conciliation and more litigation. Moreover, this will be more complicated litigation since compensatory and punitive damage cases involve jury trials.

Our priorities are: (1) To restrict the availability of punitive damages; (2) To limit new remedies to on-the-job harassment cases; (3) To put caps on the amount of an award; and (4) to prevent a plaintiff from seeking multiple recoveries for the same alleged discrimination.

We recommend permitting women who have suffered on-the-job harassment to recover compensatory damages and punitive damages

to the extent permitted under state law. This gets us out of the awkward position of failing to recognize the anomaly in remedies available to women and blacks. This is a crucial issue for Senators Kassebaum and Chafee among others.

Before going too far on this we will need further consultations on the Hill and with the business community since this terrain is a slippery slope indeed.

3. Consent Decrees

Many employment discrimination disputes are settled by consent decrees. Parties to the decree understandably want finality, at some point. Those who were not a party to the decree want the right to challenge it when it applies to them.

Kennedy-Hawkins prohibits suits by persons who had "notice" of the decree and then includes a very generous definition of "notice."

We recommend limiting the prohibition on challenging such decrees to those who had actual notice and who were applicants or employees at the time of the decree. This prohibition would not apply to any decree that requires a quota.

Next Steps

Two things are needed immediately. First, you and Governor Sununu need to review and approve these recommended positions before we discuss them with others.

Second, we need to quickly and carefully undertake a series of sessions with Members of Congress and with representatives of those we met with last week -- the business and civil rights communities.

It is crucial that these consultations be extremely well coordinated. We cannot afford to have one group told one thing and another group told another. Conflicting signals will not only damage your credibility, but will weaken our negotiating position.

Attachment

cc: Governor Sununu
C. Boyden Gray

THE WHITE HOUSE
WASHINGTON

June 4, 1990

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: JAMES W. CICCONI *Jim*
SUBJECT: Telephone Calls on Civil Rights Legislation

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

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

Calls for Chief of Staff:

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

Representative Bob Michel
Representative Henry Hyde
Representative Bill McCollum

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

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

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

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

TALKING POINTS FOR CIVIL RIGHTS
PHONE CALLS

- The purpose of my call is to hear your thoughts on where the bill stands.
 - o Does it still have momentum, or is that decreasing?
 - o What level of support is there for the President's position among Republicans?
 - o If there are no changes in the bill, what level of support could the President expect on the floor? On an override vote?

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

- If, however, the bill's proponents are willing to consider language changes, it is still possible the quota problem can be solved.
 - o Lawyers at Justice and the White House have looked at the language closely, and feel that the key areas that need to be changed are those relating to:
 - 1. broadening the definition of "business necessity" (going beyond the change secured by Danforth); and
 - 2. requiring a causal link be shown between a specific business practice and a discriminatory effect before shifting the burden to an employer to show business necessity.
 - o If the above problems are addressed in full, our lawyers feel the burden of proof question is much less of a problem. More importantly, we feel it would solve the potential quota problem.
 - o There are, of course, other problems with the bill that will also need to be solved,

including consent decrees; remedies; and discriminatory motives which had no affect on a business decision.

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

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

WARD'S COVE ISSUES

1. Group of Employment Practices -- Staff Compromise tentatively agreed to on Monday, June 25:

Permit complaining party to bring a case based on the disparate impact of a group of practices. But where the court finds, from records or other information of the employer reasonably available through discovery or otherwise, that the employee can identify which practices contributed to the disparate impact, the employee would be required to identify specific practices.

2. Relationship of a Practice to Job Performance:

Reported Bill: Practice must be "essential" to effective job performance"

Danforth: Practice must be "substantially and demonstrably related to effective job performance"

Administration: Practice must be "reasonably related to legitimate employer objective"

3. Burden of Proof:

Griggs Case: Burden is on employer

Ward's Cove Case: Burden is on employee

4. "Job Performance Plus":

Issue: Can employer justify a practice by considerations not related to effective job performance?

Reported Bill: Practices can be justified only by showing they are related to "effective job performance."

Administration: Practices can also be justified by showing they are related to "any legitimate employer objective."

*Walker -
make non-sensible*

*significantly
and
clearly*
*job performance
job effectiveness
related objectives*

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 statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

LEGISLATIVE HISTORY

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

DRAFT/SUBJECT TO REVIEW AND REVISION

DRAFT
7/9/90 5:00 pm

Dear Ted:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

John H. Sununu

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

(1) An unlawful employment practice based on disparate impact is established ~~under this section~~ **only** when--

(A) a complaining party demonstrates that an employment practice ~~results in~~ **produces** 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** **justified** by business necessity; or

(B) a complaining party demonstrates that a group of **interrelated** employment practices ~~results in~~ **produces** a disparate impact on the basis of race, color, religion, sex, or national origin, **and that each employment practice in the group contributes to such disparate impact, and unless the** respondent ~~fails to demonstrate~~ that such group of employment practices, **either individually or as a group, are** **is required** **justified** by business necessity, **except provided** that--

(i) if a complaining party demonstrates that a group of **interrelated** employment practices ~~results in~~ **produces** a disparate impact, **and that each employment practice in the group contributes to such disparate impact,** such party shall not be required to demonstrate **which that a specific practice or practices within the group results in produces** such disparate impact;

(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices ~~does not contribute to the disparate impact~~ **is justified by business necessity,** the ~~respondent~~ **complaining party** shall not be required to demonstrate that ~~such practice is required by~~

~~business necessity the remaining employment practices in the group would produce a disparate impact; and~~

(iii) if the court finds that the complaining party can identify, from records or other information ~~of the respondent reasonably available (through discovery or otherwise), which a specific employment practice or practices, if any, contributed to the that produces a disparate impact, the complaining party, shall be required to proceed under subsection (A) rather than under this subsection with respect to that practice. the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact, and (B) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact; and if the court finds that the complaining party cannot so identify which practice or practices, if any, contributed to the disparate impact, the complaining party shall be required, as set forth in subsection (k)(1)(B), to demonstrate that a group of employment practices results in a disparate impact, and the respondent shall be required to demonstrate that such group of employment practices are required by business necessity.~~

Proposed Legislative History
(Wards Cove -- Particularity)

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

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

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

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

EDWARD M. KENNEDY
MASSACHUSETTS

United States Senate

WASHINGTON, DC 20510-2101

June 29, 1990

THE CHIEF of STAFF
has seen

Governor John H. Sununu
Chief of Staff to the President
The White House
Washington, D.C. 20500

Dear John:

It was good to talk with you this morning, and I'm grateful for all the time you have spent with me on the civil rights bill.

As I mentioned, I continue to believe that we can work out an agreement on all the issues, so that the bill will truly be a bipartisan effort that merits the strong support of the President.

After our talk on Wednesday night, I called together the civil rights groups and invited all of the Republican cosponsors of the bill to discuss your concerns. As I mentioned to you, Senators Jeffords, Specter, Durenberger, Hatfield and Packwood all were able to attend. I'm sure that I didn't state your concerns as well as you had; but we did spend almost two hours discussing the issues, and we tried to address the kinds of examples you had raised with me.

I am sending along a specific proposal, which I reviewed in very careful detail with the Republican cosponsors, to respond to the points you raised on Wards Cove. It addresses your main concern about groups of employment practices -- we spell out what happens when a plaintiff cannot identify which specific practices contribute to a disparate impact. I think our proposal addresses the kind of case you were involved in as Governor -- when a malicious plaintiff files a suit challenging everything in sight.

But there is concern with substituting "causes" for "results in," because it could be interpreted to require victims of discrimination to explain why a particular test had a disparate impact on minorities or women. To take the example we talked about on Wednesday -- where a standardized test for a local fire department results in the exclusion of significant numbers of qualified black applicants -- it would be unfair to require the

Governor John H. Sununu
June 29, 1990
Page 2

plaintiffs to prove that the poor test performance was caused by the test, rather than the city's school system. Griggs permitted victims of discrimination to challenge tests that result in disparate impact, without having to investigate possible antecedent causes.

To respond to your comments about "job performance plus," we will make it clear that employers may justify employment practices that do not involve employee selection if those practices are substantially and demonstrably related to an overarching or compelling or essential business objective. (You choose the term you like.) And we will accept your suggestion to tie selection practices to "successful" job performance, rather than "effective" job performance.

But on the issue of "substantially" versus "significantly," we must stay with "substantially" -- the term we worked out with Jack Danforth -- because we think it fairly describes one of the two key aspects of business necessity under Griggs. We need also to stay with the word "demonstrably," which is in Griggs itself, and which we also worked out with Jack.

I promised Arlen Specter that I would pass along his suggestion that Congress simply pass a law saying that Wards Cove was overruled, and that Griggs is the law, as set forth in Justice Stevens' dissent in Wards Cove.

On damages, we remain strongly committed to the concept of parity of remedies for all forms of intentional discrimination. But I look forward to hearing the details of the proposal you referred to on Wednesday night. And I have asked the people on our side to reflect on how we might accommodate your concerns, which are shared by other Republicans, about punitive damages. I have asked the civil rights groups to be forthcoming on this issue, but we do need to hear what the Administration is prepared to accept.

The Majority Leader has indicated that the Senate will take up the bill on Tuesday, July 10th, when we return from the July 4th recess. I hope that we can reach an agreement on all issues before then, so that President Bush can endorse a package that we can all take to the floor.

Again, my thanks for all the time you have spent on the bill, and I look forward to our future discussions.

I also hope that your golf game in Kennebunkport fares better than in Bermuda -- at least you won't be distracted by Kennedy faces in the gallery.

Governor John H. Sununu
June 29, 1990
Page 3

With warm regards.

As ever,

A handwritten signature in black ink, appearing to be 'J. Sununu', written in a cursive style.

P.S. Chris Dodd mentioned that you are still chuckling about our discussion of "causes" and "results."

Group of Employment Practices

"(iii) if the the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which practice or practices, if any, contributed to the disparate impact, (A) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact, and (B) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact; and if the court finds that the complaining party cannot so identify which practice or practices, if any, contributed to the disparate impact, the complaining party shall be required, as set forth in subsection (k)(1)(B), to demonstrate that a group of employment practices results in a disparate impact, and the respondent shall be required to demonstrate that such group of employment practices are required by business necessity."

Business Necessity

"Business necessity means, in the case of employment practices involving selection (e.g. hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), substantially and demonstrably related to successful job performance, or, in the case of employment practices not involving selection, means substantially and demonstrably related to a compelling/overarching/essential objective of the respondent."

THE SUPREME COURT CASES

1. WARDS COVE - TITLE VII CASE

KENNEDY BILL OVERTURNS WARDS COVE IN THE FOLLOWING WAY:

- o WOULD ALLOW A TITLE VII PLAINTIFF TO CHALLENGE ALL OF AN EMPLOYER'S EMPLOYMENT PRACTICES SIMPLY ON THE BASIS OF A STATISTICAL IMBALANCE OF CERTAIN RACIAL AND ETHNIC GROUPS IN THE EMPLOYER'S WORKFORCE.
 - o WOULD NOT REQUIRE THE EMPLOYEE TO IDENTIFY THE SPECIFIC EMPLOYMENT PRACTICE THAT CAUSES THE STATISTICAL IMBALANCE, OR "DISPARATE IMPACT."
 - o AFTER A DISPARATE IMPACT HAS BEEN ALLEGED, THE BILL WOULD REQUIRE AN EMPLOYER TO PROVE THAT EACH OF ITS EMPLOYMENT PRACTICES "BEARS A SUBSTANTIAL AND DEMONSTRABLE RELATIONSHIP TO EFFECTIVE JOB PERFORMANCE."
- THIS IS THE SO-CALLED "QUOTA" LANGUAGE.
-

2. MARTIN V. WILKS - "REVERSE DISCRIMINATION" CASE

- o **BACKGROUND:** IN 1974, A GROUP OF BLACK PLAINTIFFS FILED A TITLE VII SUIT AGAINST THE CITY OF BIRMINGHAM. AS A RESULT OF THE SUIT, THE CITY OF BIRMINGHAM AND THE BLACK PLAINTIFFS ENTERED INTO A COURT-APPROVED CONSENT DECREE SETTING OUT LONG-TERM AND INTERIM GOALS FOR HIRING AND PROMOTING BLACK FIREFIGHTERS.

A GROUP OF WHITE FIREFIGHTERS SUBSEQUENTLY FILED SUIT, ALLEGING THAT THEY HAD BEEN DENIED PROMOTIONS IN FAVOR OF LESS-QUALIFIED APPLICANTS.

RULING: THE COURT RULED THAT THE CONSENT DECREE WAS OPEN TO LEGAL CHALLENGE BY THOSE WHITE FIREFIGHTERS WHO WERE NOT PARTIES TO THE ORIGINAL TITLE VII SUIT.
- o KENNEDY BILL OVERTURNS MARTIN V. WILKS BY PRECLUDING INDIVIDUALS FROM CHALLENGING CONSENT DECREE IF THEY:
 - a) HAD NOTICE OF CONSENT DECREE FROM ANY SOURCE AND REASONABLE OPPORTUNITY TO PRESENT OBJECTIONS, OR
 - b) WERE ADEQUATELY REPRESENTED BY ANOTHER PERSON WHO CHALLENGED CONSENT DECREE.

SUMMARY SHEET - REMEDIES

CURRENT LAW

TITLE VII

- o PROHIBITS EMPLOYMENT DISCRIMINATION ON BASIS OF RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN.
- o COVERS ALL EMPLOYMENT ACTIONS, INCLUDING HIRING, PROMOTION, DISCIPLINE, DISCHARGE, AND TERMS AND CONDITIONS.
- o REMEDIES: INJUNCTIVE RELIEF, BACK-PAY (UP TO 2 YEARS)
- o COVERAGE: BUSINESSES WITH 15 OR MORE EMPLOYEES.

SECTION 1981

- o PROHIBITS RACIAL DISCRIMINATION IN THE MAKING OF A CONTRACT.
- o EXTENDS BEYOND EMPLOYMENT CONTRACTS.
- o REMEDIES: PUNITIVE DAMAGES, COMPENSATORY DAMAGES (PAIN AND SUFFERING), JURY TRIALS.
- o COVERAGE: EVERY EMPLOYER.

KENNEDY BILL

TITLE VII

- o ADDS COMPENSATORY DAMAGES FOR INTENTIONAL VIOLATIONS.
- o ADDS PUNITIVE DAMAGES FOR ACTS INVOLVING MALICE OR ILL-WILL.
- o ADDS JURY TRIALS.
- o EXTENDS STATUTE OF LIMITATIONS FROM 180 DAYS TO 2 YEARS.

SECTION 1981

- o EXTENDS COVERAGE TO RACIAL HARASSMENT ON-THE-JOB.

A.D.A

- o REMEDIES AVAILABLE UNDER ADA'S EMPLOYMENT SECTION ARE LINKED TO REMEDIES AVAILABLE UNDER TITLE VII.

ADMINISTRATION

WILLING TO EXTEND SECTION 1981 TO COVER RACIAL HARASSMENT ON-THE-JOB.

WILLING TO CREATE STRONG FEDERAL REMEDY FOR SEXUAL HARASSMENT ON-THE-JOB (? - WHERE DOES REMEDY BELONG - SECTION 1981, TITLE VII, OR SEPARATE STATUTE?)

07/09/90

01:11

202 382 5605

US EPA/OPPE/OPA

0002

International Energy Administration

General Report

73

Table B4
TFC/GDP Ratios for all IEA Countries¹

	1973	1979	1985	1986	1987	Average Ann. Growth Rates (%) 1973-87
Canada	0.55	0.51	0.45	0.41	0.41	-2.1
United States	0.45	0.40	0.32	0.31	0.31	-2.5
North America	0.45	0.41	0.33	0.32	0.32	-2.1
Australia	0.35	0.35	0.32	0.32	0.32	-0.8
Japan	0.30	0.25	0.19	0.19	0.19	-2.3
New Zealand	0.23	0.25	0.37	0.36	0.40	1.4
Pacific	0.30	0.26	0.21	0.20	0.20	-2.9
Austria	0.58	0.54	0.51	0.51	0.51	-1.0
Belgium	0.53	0.52	0.41	0.41	0.40	-2.6
Denmark	0.36	0.33	0.25	0.25	0.25	-2.2
Germany	0.39	0.37	0.32	0.31	0.31	-1.7
Greece	0.38	0.38	0.39	0.37	0.40	0.4
Ireland	0.44	0.43	0.38	0.39	0.36	-1.1
Italy	0.32	0.39	0.25	0.24	0.23	-1.8
Luxembourg	1.46	1.19	0.86	0.81	0.79	-4.5
Netherlands	0.50	0.48	0.41	0.41	0.41	-1.3
Norway	0.39	0.36	0.31	0.30	0.31	-1.6
Portugal	0.39	0.43	0.45	0.45	0.46	1.2
Spain	0.31	0.33	0.30	0.30	0.29	-0.6
Sweden	0.44	0.41	0.34	0.34	0.33	-1.9
Switzerland	0.21	0.21	0.21	0.20	0.20	-0.3
Turkey	0.65	0.62	0.61	0.69	0.51	-0.4
United Kingdom	0.40	0.36	0.31	0.31	0.30	-1.9
Europe	0.38	0.36	0.31	0.31	0.31	-1.5
IEA Total	0.41	0.37	0.30	0.30	0.30	-2.3

¹ Measured in toe per \$1 000 of GDP at 1985 prices and exchange rates; Interdecades reflect the combined effects of efficiency improvements, structural changes and fuel substitution.

Sources: Energy Balances of OECD Countries;
OECD Main Economic Indicators.

TFC = Total fuel consumption
toe = tons of oil equivalent

Since 1973, we've dropped total fuel
consumption / GDP by 2.5% a year.

FRG has dropped total fuel consumption / GDP
by 1.7% a year.

DJS Version:

1. BUSINESS NECESSITY

(1) The term required by business necessity means (1) 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 demonstrable relationship to successful performance of the job.

[Coleman version: Significant and demonstrable relationship]

DJS Version:

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

[Coleman version: A significant and demonstrable relationship to a necessary business objective]

(3) The defendant may offer as evidence, statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the Court shall give such weight if any to such evidence as it deems appropriate. Nothing in this subsection shall be construed to alter the application of the Uniform Guidelines on Employee Selection.

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in Griggs and to overrule Ward's Cove in its entirety."

*reflect to
the state
of law prior to W.C.*

*the Court may consider
as evidence*

*The defendant's demonstration
of the relationship may be
contained in evidence*

*are not limited to
primarily*

*by implied
judicial
notice*

EDWARD M. KENNEDY
MASSACHUSETTS

United States Senate

WASHINGTON, DC 20510-2101

June 29, 1990

Governor John H. Sununu
Chief of Staff to the President
The White House
Washington, D.C. 20500

Dear John:

It was good to talk with you this morning, and I'm grateful for all the time you have spent with me on the civil rights bill.

As I mentioned, I continue to believe that we can work out an agreement on all the issues, so that the bill will truly be a bipartisan effort that merits the strong support of the President.

After our talk on Wednesday night, I called together the civil rights groups and invited all of of the Republican cosponsors of the bill to discuss your concerns. As I mentioned to you, Senators Jeffords, Specter, Durenberger, Hatfield and Packwood all were able to attend. I'm sure that I didn't state your concerns as well as you had; but we did spend almost two hours discussing the issues, and we tried to address the kinds of examples you had raised with me.

I am sending along a specific proposal, which I reviewed in very careful detail with the Republican cosponsors, to respond to the points you raised on Wards Cove. It addresses your main concern about groups of employment practices -- we spell out what happens when a plaintiff cannot identify which specific practices contribute to a disparate impact. I think our proposal addresses the kind of case you were involved in as Governor -- when a malicious plaintiff files a suit challenging everything in sight.

But there is concern with substituting "causes" for "results in," because it could be interpreted to require victims of discrimination to explain why a particular test had a disparate impact on minorities or women. To take the example we talked about on Wednesday -- where a standardized test for a local fire department results in the exclusion of significant numbers of qualified black applicants -- it would be unfair to require the

Governor John H. Sununu
June 29, 1990
Page 2

plaintiffs to prove that the poor test performance was caused by the test, rather than the city's school system. Griggs permitted victims of discrimination to challenge tests that result in disparate impact, without having to investigate possible antecedent causes.

To respond to your comments about "job performance plus," we will make it clear that employers may justify employment practices that do not involve employee selection if those practices are substantially and demonstrably related to an overarching or compelling or essential business objective. (You choose the term you like.) And we will accept your suggestion to tie selection practices to "successful" job performance, rather than "effective" job performance.

But on the issue of "substantially" versus "significantly," we must stay with "substantially" -- the term we worked out with Jack Danforth -- because we think it fairly describes one of the two key aspects of business necessity under Griggs. We need also to stay with the word "demonstrably," which is in Griggs itself, and which we also worked out with Jack.

I promised Arlen Specter that I would pass along his suggestion that Congress simply pass a law saying that Wards Cove was overruled, and that Griggs is the law, as set forth in Justice Stevens' dissent in Wards Cove.

On damages, we remain strongly committed to the concept of parity of remedies for all forms of intentional discrimination. But I look forward to hearing the details of the proposal you referred to on Wednesday night. And I have asked the people on our side to reflect on how we might accommodate your concerns, which are shared by other Republicans, about punitive damages. I have asked the civil rights groups to be forthcoming on this issue, but we do need to hear what the Administration is prepared to accept.

The Majority Leader has indicated that the Senate will take up the bill on Tuesday, July 10th, when we return from the July 4th recess. I hope that we can reach an agreement on all issues before then, so that President Bush can endorse a package that we can all take to the floor.

Again, my thanks for all the time you have spent on the bill, and I look forward to our future discussions.

I also hope that your golf game in Kennebunkport fares better than in Bermuda -- at least you won't be distracted by Kennedy faces in the gallery.

Governor John H. Sununu
June 29, 1990
Page 3

With warm regards.

As ever,

A handwritten signature in black ink, appearing to be "R. Orr", written in a cursive style.

P.S. Chris Dodd mentioned that you are still chuckling about our discussion of "causes" and "results."

Group of Employment Practices

"(iii) if the the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which practice or practices, if any, contributed to the disparate impact, (A) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact, and (B) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact; and if the court finds that the complaining party cannot so identify which practice or practices, if any, contributed to the disparate impact, the complaining party shall be required, as set forth in subsection (k)(1)(B), to demonstrate that a group of employment practices results in a disparate impact, and the respondent shall be required to demonstrate that such group of employment practices are required by business necessity."

Business Necessity

"Business necessity means, in the case of employment practices involving selection (e.g. hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), substantially and demonstrably related to successful job performance, or, in the case of employment practices not involving selection, means substantially and demonstrably related to a compelling/overarching/essential objective of the respondent."

THE WHITE HOUSE
WASHINGTON

THE CHIEF of STAFF
has seen

July 13, 1990

MEMORANDUM FOR JOHN H. SUNUNU

FROM: FREDERICK D. McCLURE 
SUBJECT: Floor Consideration of Civil Rights Bill in Senate

At the conclusion of today's Senate session, Senate Majority Leader Mitchell indicated that a cloture petition would be filed today on the civil rights legislation. Under a unanimous consent agreement, the vote on the cloture petition will occur at 2:15 p.m. Tuesday, July 17.

Should an agreement on the legislation be reached before the time for the vote, he noted that the cloture petition vote would be vitiated. During his comments, he specifically noted the intense nature of the on-going negotiations.

THE WHITE HOUSE

WASHINGTON

JULY 11, 1990

THE CHIEF of STAFF
has seen

MEMORANDUM FOR GOVERNOR SUNUNU

THROUGH:

BOBBIE KILBERG **BK**

FROM:

SHIREE SANCHEZ *Shiree*

JOE WATKINS *JD*

SARAH DECAMP *SD*

JEFF VOGT *JV*

SUBJECT:

DISSEMINATION OF YOUR LETTER SENT TO SENATOR
KENNEDY ON THE CIVIL RIGHTS LEGISLATION

We are writing you directly as David Demarest will not return from Houston until this evening.

After consulting with Andy Card yesterday, we faxed your letter to Senator Kennedy on the civil rights legislation to the attendees in the three civil rights meetings that the President held in May and to selected business association and labor leaders. We have attached lists of these attendees for your information.

cc: David Demarest
Andy Card

THE WHITE HOUSE

WASHINGTON

CIVIL RIGHTS LEGISLATION
ATTENDEES TO MEETING WITH BLACK LEADERS

Julius Chambers
Director Counsel (President)
NAACP Legal Defense Fund

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

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

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

Benjamin Hooks
Executive Director
NAACP

Dorothy Height
President
National Council of Negro Women

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

Eddie Williams
President
Joint Center for Political Studies

Ramona Edelin
President
National Urban Coalition

Keith Butler
Detroit City Councilman

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

Robert Woodson
President
National Center for Neighborhood Enterprise

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

Joshua Smith
Chairman, Commission on Minority Business Development

OBSERVER

Connie Newman
Director, Office of Personnel Management

OTHERS WHO RECEIVED FAX

Shelby Steele
Professor
San Jose State University

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

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

1. Mr. Fred Alvarez, Former Assistant Secretary
Department of Labor for Employment Standards
Partner, Pillsbury, Madison, & Sutro / San Francisco, CA
2. Emilio Bermiss, Chairman
National Puerto Rican Forum
3. Ms. Esther Buckley, Commissioner
Civil Rights Commission
4. Mr. Mario Diaz, Chairman
G.I. Forum of the United States
5. Ms. Patricia Diaz Dennis, Partner
Jones, Day, Reavis, & Poague
6. Mr. Marcelo Fernandez, Board Member
Cuban American National Council
7. Mr. Ruben Franco, President
Puerto Rican Legal Defense & Education Fund
8. Mr. Tony Gallegos, Commissioner
Equal Employment Opportunity Commission
9. Mr. Willie Gonzalez, Executive Director
Civil Rights Commission
10. Ms. Regina Montoya, Partner
Akin, Gump, Strauss, Hauer, & Feld / Dallas, TX.
11. Mario Moreno, Washington, D.C. Counsel
Mexican & American Legal Defense & Education Fund
12. Louis Nunez, President
National Puerto Rico Coalition
13. Harry Pacheon, President
National Association of Latino Elected Officials
14. Jess Quintero, Vice President / Eastern Region
League of United Latin American Citizens
15. Mr. Joe Ramirez, Vice President, & Deputy General Counsel
Labor and Employment Relations, AT&T
16. Mr. Jaime Ramon, General Counsel
Office of Personnel Management

17. Raul Yzaguirre, President
National Council of La Raza

THE WHITE HOUSE

WASHINGTON

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

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

Susan Bracken
Executive Director
Eagle Forum

Anne Bryant
Executive Director
American Association of University Women

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

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

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

Judy Golub
Associate Washington Representative
American Jewish Committee

Marcia Greenberger
Managing Attorney
National Women's Law Center

Pat Harrison
President
National Women's Economic Alliance

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

Paul Igasaki
Executive Director
Japanese American Citizens League

Evan Kemp
Chairman
Equal Employment Opportunity Commission

Judy Lichtman
President
Women's Legal Defense Fund

Mark Liedel
Director of Special Projects
Heritage Foundation

Jordan Lorence
Litigation Director
Concerned Women for America

Ricky Silberman
Vice Chairman
Equal Employment Opportunity Commission

Carey Stacy
President
National Association of Women Business Owners

S.B. Woo
President
Organization of Chinese Americans

David Zwiebel
Director of Government Affairs and General Counsel
Agudath Israel

THE WHITE HOUSE

WASHINGTON

Business/Labor Fax list for Governor Sununu's Kennedy Letter

Jerry Jasinowski, President
Mike Barody, Senior Vice President
National Association of Manufacturers

Richard Leshner, President
Dick Breault, Vice President
Chamber of Commerce

Kirk Fordice, President
Bert Beatty, Executive Vice President
Associated General Contractors

John Galles, Executive Vice President
Nation Small Business United

John Motley, Vice President
National Federation of Independent Business

John Satagaj, President
Small Business Legislative Council

Susan Meisinger, Vice President
Society of Human Resource Managers

Mary Tavenner, Legislative Director
Alan Kranowitz, Senior Vice President
National Association of Wholesaler-Distributors

Sam Maury, Executive Director
Business Roundtable

Labor Groups:

Lane Kirkland, President
AFL-CIO

Gene DeFries, President
MEBA

William McCarthy, President
International Teamsters

THE WHITE HOUSE

WASHINGTON

JULY 11, 1990

THE CHIEF of STAFF
has seen

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: JEFF VOGT *JW* ASSISTANT DIRECTOR, PUBLIC LIAISON

SUBJECT: NATIONAL SMALL BUSINESS UNITED (NSBU) RESPONSE TO
YOUR KENNEDY LETTER

The attached letter from NSBU is in response to your letter to Senator Kennedy regarding the civil rights legislation negotiations.

National Small Business United strongly supports the Administration's adherence to the Griggs language. Moreover, they suggest support for the compensatory damage language, but find the punitive damages section unacceptable.

NSBU is active on the Hill supporting our position and is, in particular, honing in on Senators Johnson, Bumpers and other southern Democrats.

cc: David Demarest
Bobbie Kilberg



NATIONAL SMALL BUSINESS UNITED

"Serving America's small businesses since 1937"

July 10, 1990

Jeff:

I have just completed reading the letter from the Governor to Senator Kennedy. I am impressed by his efforts to accommodate the Senator and how he still clings to the language from the Griggs case. As you may remember, NSBU suggested that the Griggs language be used and we will support your efforts on this as we continue to work towards a civil rights bill.

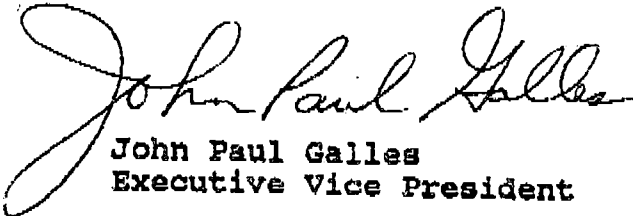
I also think that the Governor's letter addresses our concern about burden of proof. We will support you on that as well.

Two remaining issues exist from our original letter. One has to do with the penalties provision. We could support compensatory, but we cannot accept punitive. Punitive damages place businesses at risk as well as the jobs of others. The other issue has to do with retroactivity. We are concerned that businesses may have to reconstruct records which they might not have needed until this bill. Although, the likelihood is reduced by language which may be drawn from Griggs.

This is an excellent effort and should be continued. We applaud your work and will do what we can to support you and these revisions.

Please let me know how these other issues are to be resolved.

Thanks.



John Paul Galles
Executive Vice President

154928



A tax-exempt public policy research institute

June 29, 1990

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

Dear Governor:

I am writing to express my strong support for the policy outlined by the President in his May 17 Rose Garden speech on civil rights.

While the President indicated that he wants to sign a civil rights bill, he also stated quite clearly that he will not "sign a bill whose unintended consequences are quotas." John, I believe it is vital that the President not embrace legislation that violates this principle, particularly in light of the recent clamor and confusion over the President's position on taxes. As such, any bill the President signs must be entirely free of provisions that would tend to promote quotas.

In listening to the current debate over whether the "Civil Rights Act of 1990" (or "Kennedy-Hawkins") would tend to promote quotas, it is important to keep in mind that the term "quotas" is being used as a short-hand term for all forms of race-conscious decisionmaking, including "goals" and "timetables," and for the danger of forcing employers to abandon perfectly legitimate tests, selection devices or hiring practices simply because they happen to produce statistical disparities between the employer's work force and the general population. Two sections of the Kennedy-Hawkins bill would tend to promote quotas -- Section 4, which would overturn the Supreme Court's decision in Wards Cove Packing Co. v. Atonio, and Section 6, which would overturn the Supreme Court's decision in Martin v. Wilks.

Any legislative change which would alter the standards of disparate impact litigation from those set out in Wards Cove will increase the expected costs of litigation to employers and thereby create pressures for employers to avoid litigation in the first place by getting their workforce numbers to come out right.

Edwin J. Feulner, Jr., President
Herbert B. Berkowitz, Vice President
Peter E. S. Pover, Vice President

Phillip N. Truluck, Executive Vice President
M. D. B. Carlisle, Vice President
Terrence Scanlon, Vice President and Treasurer

Burton Yale Pines, Senior Vice President
Charles L. Heatherly, Vice President
Bernard Lomas, Counselor

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Lewis E. Lehrman

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Thomas A. Roe
Richard M. Scaife
Hon. William E. Simon
Jay Van Andel

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

Therefore, in the course of your negotiations on the quota issue in particular, I believe that the following points must each be addressed, as Kennedy-Hawkins will still be a quota bill if it includes any of these provisions:

- * It will still be a quota bill as long as it would relieve plaintiffs in disparate impact cases of any need to identify the specific employment practices that allegedly produce a disparate impact.
- * It will still be a quota bill as long as it would shift the burden of proof in disparate impact cases from plaintiffs to defendants.
- * It will still be a quota bill as long as it would the raise standard of job-relatedness in disparate impact cases from that set out in Wards Cove (namely, whether a challenged practice serves the legitimate employment goals of the employer in a significant way).
- * It will still be a quota bill as long as it defines its standard of job-relatedness for disparate impact cases in terms of "effective job performance," thereby artificially precluding consideration of other nondiscriminatory factors that can legitimately bear on employment-related decisions.
- * It will still be a quota bill as long as it would require defendants in disparate impact cases to meet their rebuttal burden, however defined, solely by means of "objective evidence."

Although the debate over whether Kennedy-Hawkins would tend to promote quotas has focused principally on Section 4 and Wards Cove, Section 6, which deals with Martin v. Wilks, supports quotas every bit as much as Section 4. Any bill that curtails the rights of individuals to challenge consent decrees or court orders that call for quotas or other race-conscious "remedies" is a quota bill. Therefore, even if Section 4 is removed entirely, the Kennedy-Hawkins bill will still be a quota bill if any of the following is the case:

- * It will still be a quota bill as long as it would bind by an earlier judgment or order anyone who had notice of the proposed judgment or order and an opportunity to present objections before its entry.

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

- * It will still be a quota bill as long as it would bind by an earlier judgment or order anyone whose interests are deemed to have been adequately represented by a participant in the original litigation.

- * It will still be a quota bill as long as it would preclude subsequent challenges to an earlier judgment or order whenever "reasonable" efforts were made to provide notice to anyone whose interests might be affected.

Because it is these details that will determine whether a civil rights bill promotes quotas, in opposition to the President's position, I hope that the Administration will apply each of these tests to any compromise proposal.

Sincerely,



Edwin J. Feulner
President