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Series:	Sununu, John, Files
Subseries:	Issues Files

OA/ID Number:	29145
Folder ID Number:	29145-006

Folder Title:
Civil Rights 1990 (2 of 2) [5]

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

Particularity (Sununu-Kennedy Agreement, revised)

AMENDMENT 1-A

SEC. 4. 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 under this Title is established only when a complaining party demonstrates that a particular employment practice causes a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is justified by business necessity; provided, however, that an unlawful employment practice shall nonetheless be established if the complaining party demonstrates the availability of an alternative employment practice, comparable in cost and equally effective in measuring job performance or achieving the respondent's legitimate employment goals, that will reduce the disparate impact, and the respondent refuses to adopt such alternative.

"(2) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses an illegal drug as defined in Schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of the race, color, religion, sex, or national origin except where permitted by 42 U.S.C. 2000e-2(i)."

LEGISLATIVE HISTORY

Under this Act, a complaining party makes out a prima facie case of disparate impact when he or she identifies a particular employment practice and demonstrates that the practice has caused disparate impact because of race, color, religion, sex, or national origin.

In identifying the particular employment practice alleged to cause disparate impact, 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 demonstrated 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 n.2 (Hearing Record at).

It should also be noted that assuming compliance with all other Title VII procedures, if a plaintiff can make a reasonable good faith allegation that the elements of a decision-making process are not capable of separation for analysis, as described above, he or she may file a complaint and commence discovery on that basis, although this does not affect the plaintiff's burden in making out his or her prima facie case.

Particularity (Sununu-Kennedy Agreement) [keyed to S. 2104, as reported by the Labor & Human Resources Committee]

AMENDMENT 1-B

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

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

Legislative History

Under this Act, a complaining party makes out a prima facie case of disparate impact when he or she identifies a particular employment practice and demonstrates that the practice has caused disparate impact because of race, color, religion, sex, or national origin.

In identifying the particular employment practice alleged to cause disparate impact, 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 demonstrated 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. See letter of Charles Fried to Senator Edward M. Kennedy, March 21, 1990 at 4 n.2 (Hearing Record at).

It should also be noted that assuming compliance with all other Title VII procedures, if a plaintiff can make a reasonable good faith allegation that the elements of a decision-making process are not capable of separation for analysis, as described above, he or she may file a complaint and commence discovery on that basis, although this does not affect the plaintiff's burden in making out his or her prima facie case.

Definition of Business Necessity (Kassebaum-LaFalce)

AMENDMENT 2-A

"(n) The term 'required by business necessity' means that the challenged practice 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."

Definition of Business Necessity (Sept. 21 Sununu offer, revised)

AMENDMENT 2-B

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

"(1) in the case of employment practices primarily intended by the respondent to measure job performance (such as, but not limited to, tests, evaluations, or requirements of education, experience, knowledge, skill, ability, or physical characteristics), the practice has a manifest relationship to the employment in question; or

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

<u>Definition of Business Necessity</u> (Sununu-Kennedy Compromise)

AMENDMENT 2-C

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.

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

Definition of Business Necessity (Sununu-Kennedy Compromise, revised)

AMENDMENT 2-D

The term 'justified by business necessity' means:

(1) in the case of employment practices defended by the respondent as a measure of job performance, the practice must bear a manifest relationship to the employment in question.

(2) in the case of other employment practices that are not defended by the respondent as a measure of job performance, the respondent's employment goals are significantly served by -- even if they do not require -- the challenged practice.

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, performance evaluations, written records or note related to the practice or decision, testimony of individuals with knowledge of the practice or decision involved, other evidence relevant to the employment decision, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as is appropriate.

Definition of Business Necessity (Sununu-Kennedy Compromise, revised further)

AMENDMENT 2-E

The term 'justified by business necessity' means:

(1) in the case of employment practices defended as a measure job performance, the practice must bear a manifest relationship to the employment in question.

(2) in the case of other employment practices that are not defended as a measure job performance, the practice 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, performance evaluations, written records or note related to the practice or decision, testimony of individuals with knowledge of the practice or decision involved, other evidence relevant to the employment decision, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as is appropriate.

Consent Decrees (Kassebaum-LaFalce, revised)

AMENDMENT 3

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

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

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

"(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice specifically required by a litigated or consent judgment or order resolving a claim of employment discrimination under this Title may not be challenged by a person who, at the time of the entry of such judgment or order, was an applicant for employment with or an employee of the entity covered by such decree, whose interests would likely be affected by the consent decree, and who had

"(A) actual notice that such judgment or order would likely affect the interests of such person and that later challenge by such person would be barred; and

"(B) a reasonable opportunity to challenge such judgment or order;

"(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 a 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, is transparently invalid, violates the United States Constitution or Federal civil rights laws, or was entered by a court lacking subject matter jurisdiction.".

Rule of Construction

AMENDMENT 4-A

Strike sections 11 and 13 and insert in lieu thereof the following:

"SEC. 11. CONSTRUCTION.

Title XI of the Civil Rights Act of 1964 (42 U.S.C. 2000h et seq.) is amended by adding at the end thereof the following new section:

"Sec. 1107. RULE OF CONSTRUCTION FOR CIVIL RIGHTS LAWS.

"No Federal law shall be construed so as to require, permit, or result in the adoption or implementation of hiring, promotion, compensation, or termination quotas by an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs, or those Federal entities subject to the provisions of section 717 (or the heads thereof), on the basis of race, color, religion, sex, or national origin."

Strike section 2 and insert in lieu thereof the following:

"SEC. 2. FINDINGS AND PURPOSE.

"(a) FINDINGS.--Congress finds that additional protections and remedies under Federal law are needed to deter unlawful discrimination.

"(b) PURPOSE.--The purpose of this Act is to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence."

Rule of Construction

AMENDMENT 4-B

Strike sections 11 and 13.

Strike section 2 and insert in lieu thereof the following:

"SEC. 2. FINDINGS AND PURPOSE.

"(a) FINDINGS.--Congress finds that additional protections and remedies under Federal law are needed to deter unlawful discrimination.

"(b) PURPOSE.--The purpose of this Act is to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence."

Remedies (Kassebaum-LaFalce, revised)

AMENDMENT 5

SEC. 8. PROVIDING FOR ADDITIONAL EQUITABLE RELIEF IN CERTAIN CASES OF INTENTIONAL DISCRIMINATION.

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

(1) by designating the first sentence as paragraph (1);

(2) by designating the second and third sentences as paragraph (2);

(3) by designating the last sentence as paragraph (4); and

(4) by inserting after paragraph (2) (as so designated) the following new paragraph:

"(3) In fashioning remedies for an unlawful employment practice or group of practices caused by intentional discrimination, the court may, in the exercise of its equitable discretion, require the respondent to pay the complaining party an amount not to exceed a total of $100,000.00, if the court finds--

(A) that the unlawful employment practice or group of practices is of a type for which back pay cannot be awarded;

(B) that an additional equitable remedy beyond those otherwise available is needed to deter the respondent from engaging in such unlawful employment practices; and

(C) that such an award is otherwise justified by the equities, is consistent with the purposes of this Title, and is in the public interest."

Section 706 (42 U.S.C. 2000e-5) is further amended by adding at the end the following new subsection:

"(l) JUDICIAL DETERMINATION.--All issues in cases arising under this title shall be heard and determined by a judge, as specified in subsection 706(f); provided, however, that if the court determines that one or more of the claims presented may require relief under subsection 706(g)(3), and if the court holds that a jury trial with respect to issues of liability is constitutionally required on claims for such relief, then a jury may be empaneled to hear and determine such liability issues and no others.".

Legislative History

This provision is designed to redress an anomaly in current law. Title VII presently prohibits certain types of intentional discrimination in the terms and conditions of employment, but provides inadequate remedies for these unlawful employment practices. The clearest example of this problem is on-the-job sexual harassment affecting a term, condition, or privilege of employment, which the Supreme Court has recognized as actionable under Title VII. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). Such harassment, however, frequently will not be so intolerable that an employee subjected to it immediately leaves. In such circumstances, the only remedy the victim of harassment can obtain under Title VII's remedial scheme as presently drafted is declaratory and injunctive relief against continuation of the harassment.

Such a rule is plainly inequitable. It effectively tells employers that the only penalty they will incur for creating an environment so hostile to a woman employee that she is forced to sue to obtain relief is a directive to refrain in the future. As President Bush has noted, additional remedies for this situation are clearly appropriate and warranted.

At the same time, Title VII's existing framework, with its emphasis on conciliation and mediation, has served the country well as a tool for combatting discrimination during its 26 year history. It would be unwise to jettison it in favor of a tort-style approach including compensatory and punitive damages at a time when our tort system is widely recognized to be in crisis.

Section 8 strikes a reasonable balance between these concerns. For an unlawful employment practice or group of practices of a type for which back-pay cannot be awarded, such as the examples described above, it allows courts to award a remedy beyond declaratory and injunctive relief. This remedy consists of a monetary award not greater than a total of $100,000. Courts are directed to make it available where an additional equitable remedy is needed to deter the respondent from engaging in such practices and where such an award is justified by the equities, is consistent with the purposes of Title VII, and is in the public interest.

The fact that this remedy is only available for "unlawful employment practice[s] ... of a type for which back pay cannot be awarded" does not preclude courts from making awards under this section in the situation where, for example, a woman suffers sexual harassment that gives rise to a hostile environment claim under Meritor Savings Bank, tolerates the harassment for a year, but ultimately is forced to leave her job. In such a case, there would be two unlawful employment practices, the maintenance of the hostile environment and the constructive discharge. Accordingly, a court would have the authority to award her back pay for the period after she left her job and make an award under this section for the hostile environment claim.

This section allows a court to make an additional monetary award totalling $100,000 for "an unlawful employment practice or group of practices." This language is intended to make clear that where there are several closely related incidents that could arguably be subdivided into several unlawful employment practices, the award that can be obtained under this section for all of them combined is limited to $100,000. Otherwise, plaintiffs and their lawyers will have incentives to spend resources on hair-splitting litigation over how many unlawful employment practices have occurred. $100,000 is a large enough amount to be an adequate and effective deterrent to the type of conduct sought to be prevented by this section without lawyers' inventiveness being put to the task of circumventing the limitation it imposes.

The additional remedy this section creates is available only for unlawful employment practices "caused by intentional discrimination." Nobody has argued that Title VII's existing remedial scheme for disparate impact claims is inadequate. The availability of this new remedy (and its limitation to claims based on intentional discrimination) would of course also apply to claims brought under the Americans with Disabilities Act, on account of that Act's section 107, which incorporates section 706 of Title VII by reference.

As new subsection 706 (l) makes clear, it is the intention of the Congress that both liability and remedies under section 706, including the new remedy this section creates, continue to be decided by a judge. Because of the equitable nature of the relief to be awarded, the Supreme Court should find this consistent with the Seventh Amendment. See Local No. 391 v. Terry, 110 S. Ct. 1339 (1990); Tull v. United States, 107 S. Ct. 1831 (1987). This provision is important in maintaining to the greatest extent possible the current structure of Title VII's remedies provisions and preventing it from being replaced with a tort-like approach. Because the question of constitutionality is not entirely free from doubt, however, subsection (l) also provides that should a court hold that a jury trial with respect to issues of liability is constitutionally required, it may empanel a jury to hear those issues and no others. This assures that the additional relief this scheme makes available will not become a dead letter should a court find that the Seventh Amendment requires a jury trial on liability.

Finally, it should be noted that this provision is exclusively remedial. It is not intended to recognize or create any new causes of action under Title VII. Rather, it is merely intended to assure that as to those unlawful employment practices that Title VII already prohibits, the remedial scheme it establishes is adequate and appropriate.

Price Waterhouse (preferred solution)

AMENDMENT 6-A

Strike section 5.

Price Waterhouse (Kassebaum-LaFalce, revised by new conference report)

AMENDMENT 6-B

Strike "MOTIVATING" at page 8, line 9 and insert in lieu thereof "CONTRIBUTING".

Strike "motivating" at page 8, line 12 and insert in lieu thereof "major contributing".

Other litigation bonanza provisions

AMENDMENT 7

Strike section 7(a) and make conforming changes.

Strike sections 9 and 10 and insert in lieu thereof the following:

"SEC. 9. ALLOWING THE AWARD OF EXPERT FEES.

"Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended by inserting "(including expert fees)" after "attorney's fee"."

Strike section 15 and insert in lieu thereof the following:

"SEC. 15. EFFECTIVE DATE.

"This Act and the amendments made by this Act shall take effect upon enactment."

In section 12, strike "contractual relationship" and insert in lieu thereof "contract".

Fundamental Fairness

AMENDMENT 8

Strike section 16 and insert in lieu thereof the following:

SEC. 11. PROVIDING CIVIL RIGHTS PROTECTIONS TO CONGRESSIONAL EMPLOYEES.

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended--

(1) by striking "in the Library of Congress" from subsection 717(a) and inserting in lieu thereof:

> "and in the Congress of the United States or its parts or offices or the offices of any of its Members".

(2) by striking the last sentence of subsection 717(b) and inserting in lieu thereof:

> "With respect to the Congress of the United States, its parts and offices, and the offices of its Members, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised in each House of Congress as determined by the House of Congress, and in offices not within a House of Congress as determined by the Congress."

THE WHITE HOUSE

WASHINGTON

October 16, 1990

MEMORANDUM FOR C. BOYDEN GRAY

FROM: NELSON LUND

SUBJECT: Rudman Letter on Civil Rights

Attached is a draft response to Sen. Rudman.

Attachment

Sununu

Darman

Education

THE WHITE HOUSE

WASHINGTON

October 16, 1990

Dear Senator Rudman:

I appreciate the letter you sent me yesterday, and wanted to get back to you quickly.

Although I was taken aback at the thought that the Attorney General and I are "academic attorneys who have never practiced law," I am enclosing letters to Senator Dole from several prominent practitioners of employment discrimination law. Each of these practitioners regards the conference report as highly unsatisfactory. I am also enclosing letters showing that professional industrial psychologists are united in their opposition to critical parts of this bill.

I fully concur with the Attorney General's letter of October 12. In an effort to explain the reasoning underlying his conclusions more fully, I would offer the following observations and responses to your questions.

1. <u>"Particularity"</u>

You ask first about the provision in the bill dealing with the long-standing requirement that a disparate impact plaintiff specify the employment practice he claims has caused the disparity. I take it that you agree this requirement should not be eviscerated, but that you wonder whether S. 2104 really changes it. It does.

Under Section 4, a plaintiff could base his case on an entire "group of employment practices." This "group" is very broadly defined in Section 3 as any "combination of employment practices that produces one or more decisions with respect to employment."

That definition provides no limitation whatsoever: <u>all</u> practices that combine to produce, say, a hiring decision -- for example, use of a high school graduation requirement, plus an interview, plus job references, plus a requirement of a clean criminal record -- all could be lumped together as a single "group," with the employer forced to defend <u>every</u> practice as justified by "business necessity."

Section 4 goes out of its way to emphasize the accuracy of this reading. Subsection (k)(1)(B)(i) states that "except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party <u>shall not</u> be required to demonstrate which specific practice or practices within the group results in such disparate impact" (emphasis added).

Clause (iii) then seems to state the opposite, but on careful reading (necessitated by the scheme's multiple antecedent references) takes away what it seems to give. Particularity is not required where the defendant has "failed to keep such records." Which records? Those that are "necessary to make this showing." Which showing? The only possible reference here is to the demonstration of specifically which "practice or practices are responsible for the disparate impact."

Thus, the bill requires any employer with an unbalanced workforce to keep and be able to point to records showing that one of her practices could have been challenged as "responsible for" the disparate impact. This is not a mere recordkeeping requirement: it is a shift from the plaintiff to the defendant of the obligation to make the plaintiff's <u>prima facie</u> case, disguised as a recordkeeping requirement. An employer who cannot do so faces the prospect of defending <u>all</u> her employment practices under the business necessity test.

This concealed obligation presents not only all the record-keeping burdens one would imagine, but also creates a classic Catch-22: if an imbalance in the employer's workforce is caused by something other than the employer's practices (housing patterns, for example), so that the employer could not possibly have kept records showing which of her practices was responsible for the imbalance, a prima facie case will be deemed to have been established because the group of practices "results in" a disparate impact. This Catch-22 might be avoided if the term "results in" in subsection (k)(1)(B)(i) were changed to "causes," but the proponents of the bill adamantly refused our repeated requests to use the word "causes" in this section of the bill.

I can understand why you would think this a surprising result. But in fact it is precisely what the previous version of the bill required in somewhat more straightforward terms. The bill as reported out of the first conference stated that the complaining party was obliged to identify the practice only "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 specific practice or practices contributed to the disparate impact." I can also assure you that the proponents of the bill have unbendingly insisted on this point throughout the negotiations. The new language retains this (admittedly curious) result.

I must also point out that the notion of allowing plaintiffs to attack a "group of practices" without showing that each member of the group has caused a disparate impact has absolutely no basis in Supreme Court precedent. During the lengthy negotiations earlier this year, we asked repeatedly for an explanation of why this legal innovation was necessary. The nearest thing to an answer we got was an allusion to the Sledge case, in which the defendant's personnel officers reported having no idea of the basis on which they made their employment decisions.

When we read the case, Sledge v. J.P. Stevens & Co., 52 EPD para. 39,537 (E.D.N.C. Nov. 30, 1989), we discovered that the plaintiffs had prevailed in this case after Wards Cove. Sledge 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."

Accordingly, we offered to codify the analysis used in this case, and this was part of the agreement reached by Gov. Sununu with Sen. Kennedy. We have never been told why this approach is inadequate. This is the alternative we propose to use in place of conference report's attempt to relieve disparate impact plaintiffs of the fundamental obligation to identify the act of the defendant that caused the plaintiff to be injured.

2. Definition of "Business Necessity"

Your main point on the definition of business necessity is that we should be satisfied with a codification of Griggs. We agree. We would happily accept the definition adopted in Griggs: that the practice has a "manifest relationship to the employment in question."

Unfortunately, proponents of the bill have stubbornly rejected Griggs, as well as every other formulation that could fairly be considered consistent with Griggs. They have, for example, rejected the definition in the 1979 Beazer opinion (written by Justice Stevens); the formulation used by Justice O'Connor in Watson; and the definition offered by Justice White in Wards Cove. We could accept any of these.

We could also accept the statement by Justice Stevens in his dissent in Wards Cove: "The opinion in Griggs made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose." We could accept the definition in Sen. Kassebaum's proposed substitute. And we could and did accept the compromise definition worked out by Gov. Sununu and Sen. Kennedy on July 12 (copy attached). We stand ready to return to this compromise, and have never understood why Sen. Kennedy will not do so.

What we cannot accept is a definition, like the one in the conference report, that forces employers to defend any employment practice "involving selection" by showing a "significant relationship to successful performance of the job." Such a narrow requirement denies that there can be legitimate and desirable selection practices aimed at objectives other than successful job performance.

Put concretely, we cannot understand why an employer should be forbidden to refuse employment to convicted thieves, as a means of reducing "inventory shrinkage," although such persons were capable of "successful performance of the job."

Contrary to the Leadership Conference's claims, by the way, we have never maintained that discrimination is acceptable if the community or a firm's customers support it. As the Leadership Conference knows full well, that is intentional discrimination - which would give rise to a disparate treatment claim, not a disparate impact claim - and it would never be defensible as "legitimate community relationship efforts." The Leadership Conference's statements on this point (which were made to the press, but were never made to us directly) are as irresponsible, outrageous and incredible as the claim, which they have also made, that "Daniel Webster College is the Bob Jones University of the North."

The bill's refusal to recognize legitimate business objectives as a basis for defending selection practices is in fact inconsistent with Griggs and pre-Wards Cove law. The bill's later statement that the definition of business necessity is intended to codify Griggs cannot alter this inconsistency between the statutory text and the language of Griggs or the almost two decades of Supreme Court precedent interpreting Griggs.

Moreover, the bill also states that it is designed to overrule Wards Cove's "treatment of business necessity as a defense" (as opposed to overruling it on the burden of proof issue in which the Administration has been willing to acquiesce). But part of that treatment of business necessity was the Court's statement that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils," including quotas. Rather, the court said (citing Watson and Beazer as well as Griggs) that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." Does overruling this standard in the course of overruling "the treatment of business necessity" have the effect of returning the bill's definition of business necessity to the uniformly derided "essentiality" standard of the bill's original incarnation?

In truth, proponents of the bill do not argue that the many definitions of business necessity that we could accept are inconsistent with Griggs or pre-Wards Cove law. Rather, their only argument is that in the future, courts will allow employers to abuse the flexibility in the Griggs definition to adopt arbitrary selection criteria. But when we ask for examples of such abuse, either before or after Wards Cove, we are simply told that the "new" Supreme Court might allow it to happen. Such speculative fears are clearly an insufficient reason for denying the employers of this country the ability to use employment practices that serve, in the words of the Wards Cove dissent, "a valid business purpose."

3. "Anti-Quota" Language

The two portions of the bill discussed above create powerful incentives for employers to adopt quotas rather than risk complex litigation with the odds stacked against them. (Of course, disparate impact litigation cannot even be initiated where an employer's numbers are in balance.) Section 13 does not solve the quota problem.

As the Attorney General has pointed out, the problem with the bill is not that its terms themselves "require" or "encourage" quotas, but rather that the new disparate impact rules it establishes would induce employers to use quotas as a means of escaping costly litigation under this bill in the first instance. Quotas provide an absolute defense against disparate impact claims; when other defenses are not available even to justify reasonable practices that significantly serve legitimate employment goals, quotas are inevitable.

Section 13 also creates an exception to the anti-quota language for "court-ordered remedies, affirmative action, [and] conciliation agreements that are otherwise in accordance with the law." The purpose of this provision is obviously to shield, inter alia, quotas adopted by employers on their own initiative, whose legal status is subject to debate under Weber and Johnson, from any implication that section 13 affects them. Otherwise no exception would be necessary. Such "voluntary" quotas (for "voluntary," read "adopted in order to avoid litigation under Kennedy-Hawkins") are, of course, precisely the kind of quotas we believe this bill will promote.

4. Other Provisions

The Justice Department has always opposed penalizing "bad thoughts" in the absence of any harm to a victim. As you note, the Administration is amenable to substituting "contributing" for "motivating" in section 5.

With regard to the section 8 damages provision, the President has said that he would like to see tougher harassment sanctions created so long as they do not produce a lawyer's bonanza. Shifting the focus of Title VII law away from the conciliation and mediation system that has worked for a quarter of a century, and adopting instead a jury trial system offering unlimited awards for emotional distress, pain and suffering, and the like seems unwise. I know that you are well versed in the problems of our general tort law systems, and will understand why

SUNUNU-KENNEDY COMPROMISE OF JULY 12

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."

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

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

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

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

the Administration is reluctant to replicate those flaws in the civil rights area. The proposal suggested by Senator Kassebaum seems far preferable.

I agree with you, of course, that the unfair consent decree provisions of S. 2104 closing our courts to quota victims are not desirable. I also agree that the bill's blatantly pro-lawyer attorney fee provisions are not good. In addition, as you know, the Administration has expressed concern over the bill's inequitable retroactivity clauses, along with other problems.

As you know, the President very much hopes that these problems can be overcome and that he will be presented with a bill that he can sign -- a bill that, unlike S. 2104, is not a quota bill. The President would sign, for example, the compromise measure advanced in the Senate by Senators Kassebaum and Gorton, and we hope that such a bill could be agreed to by all parties.

If you would like to discuss this matter further, I am at your disposal.

Yours truly,

C. Boyden Gray
Counsel to the President

Enclosures

The Honorable Warren B. Rudman
United States Senate
Washington, D.C. 20510

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October 10, 1990

OUR FILE NO:
09071.00001

VIA MESSENGER

Senator Robert Dole
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Office of the Republican Leader
United States Capitol
Room S 230
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Re: Civil Rights Act of 1990

Dear Senator Dole:

Thank you for sending me proposed alternative language on the Civil Rights Act of 1990. I have reviewed that language carefully, and it raises several serious concerns. I have addressed the most important of these below. I am troubled by other provisions and omissions in this language, and would be pleased to explore those with you or your staff at your convenience.

1. Remedies. My major concern about the Civil Rights Act of 1990 lies in its potential to spur litigation and reduce the level of settlement in Title VII cases.[1] My views are set forth in detail in the attached article from the editorial page of the *Washington Post*.

The proposed alternative language (like the bills as passed) does not deal meaningfully with this problem.

1/ These comments apply equally to the new Americans with Disabilities Act, which will be enforced under Title VII procedures. With 43,000,000 disabled citizens who may become potential plaintiffs in ADA litigation, enforcement issues assume even greater importance.

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Under the alternative language, large damage awards and jury trials would remain available, and their potential to disrupt Title VII's remedial scheme would remain undiminished. I suspect that omission of any provision on remedies in the proposal is due to the belief that the cap placed on punitive damages in the bills as passed resolves the litigation problem. That simply is not the case.

The cap placed in the bills limits recovery of punitive damages only. It does not affect the ability of plaintiffs, in every individual Title VII case, to recover compensatory (pain and suffering) damages. Thus, one of the major problems I envision in Title VII litigation -- the routine introduction of psychiatric or other expert testimony attempting to quantify pain and suffering and thus support a large jury verdict -- remains undiminished. Indeed, because the cap on punitive damages is $150,000 or the amount of compensatory damages plus back pay, whichever is greater, there is a premium placed on proof of compensatory damages and the role of the psychiatrist in Title VII litigation would be highlighted.

Moreover, the cap placed on punitive damages hardly will diminish the amount of damages that can be recovered in Title VII litigation. A jury convinced that an employer committed serious wrongs easily could evade the punitive damages cap by awarding a large sum for pain and suffering, and then awarding a matching amount in punitive damages. Juries are notorious for allocating relief between compensatory and punitive damages in just such mysterious ways. The possibility for multi-million dollar liability remains undiminished under the bills as passed and under the proposed alternative language.

I am firmly convinced that the basic Title VII remedial structure -- administrative conciliation, restorative relief rather than damages and bench rather than jury trials -- remains appropriate for the vast majority of Title VII cases. There may be situations where some variance from this scheme is called for; for example, in harassment cases where there is no economic remedy available under current law. If Congress wishes to supplement existing remedies in these areas, it should do so specifically. It should not turn Title VII into a national tort law, at a time when tort law has shown itself so troublesome in so many areas of our society.

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2. Definition of business necessity. An appropriate definition of "business necessity" is central to this legislation. An unduly strict definition of business necessity would lead employers to abandon attempts to use merit-related selection criteria, because the standards for their justification would be too stringent. There seems to be general agreement, reflected in language in the bills as passed and in the alternative proposal, that the business necessity standard initially enunciated in Griggs v. Duke Power Company, 401 U.S. 424 (1971), and developed by the federal courts during the 19 years since the Griggs decision, represents an appropriate accommodation of the competing interests involved.

Unfortunately, I do not believe either the alternative language that you sent to me, or the language in the bills as passed, effectively restores the Griggs standard. Section 3(o) of the alternative language continues to distinguish between employment practices involving selection and other employment practices, creating two different business necessity standards. I never have understood the need for two business necessity standards; the Court's decision in Griggs created only one standard. Two standards surely will lead to uncertainty and increased litigation, especially concerning what definition applies in any given case. For example, does a discharge fall within the clause for "selection practices" (Section 1(A)) or does it fall under paragraph 1(B)? Should some discharges (for example, discharges occasioned by theft) be treated differently than discharges based upon poor performance? Deciding what types of practices fall outside of the job performance criteria discussed in Section 1(A) needlessly will occupy the courts and employment lawyers for many years.

The Griggs test was clear and simple. The Court held that where an employment practice is shown to have a disparate impact upon the employment opportunities of a protected group, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S., at 432. That concept has been elucidated by the federal courts during the past twenty years, and until the controversy over Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989), no one (in my memory) in the civil rights community argued that Griggs was not stringent enough. A

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return to Griggs would embody a very simple definition of business necessity:

> "1. The term 'required by business necessity' shall mean having a manifest relationship to the employment in question."

That definition is consistent with the paragraph of the proposed language, and of the bills, stating that the intent of the bill is to restore the Griggs standard and overturn Wards Cove.

Even if there was a need to create two business necessity standards, the proposed alternative language raises serious problems. For example, requiring a showing that the practice or practices "must bear a significant relationship to successful performance of the job", as in Section 1(A), could be construed to penalize employers who attempt to set their standards for "optimal" rather than "successful" performance. The Supreme Court in Griggs stated that "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins", 401 U.S., at 436, a proposition that remains equally vital today. Moreover, "successful job performance" does not seem to take into account concepts such as absenteeism, tardiness, accident rates or misconduct, which may not involve "job performance" but which are related directly to business needs and should be acceptable measures for employment criteria. Finally, by concentrating solely on "job performance", the proposed definition seems to exclude consideration of financial and safety concerns applied by many courts in business necessity cases. In transportation cases particularly, the courts have held that the risk to public safety justifies a somewhat less stringent approach to business necessity.

Others commenting on this language (including Division 14 of the American Psychological Association, a professional group composed of experts who deal with test validation and selection criteria for a living) have pointed out that use of the term "significant" may cause problems if it is understood to impose a requirement that employers establish the relationship between the test and the job by measures of statistical significance. This view is set forth in a recent letter from the President of Division 14, Dr. Frank Landy, to Rep. Augustus Hawkins, which I attach for your review.

I also commend to you the proposed definition of business necessity endorsed by Division 14, which states:

> "The term 'required for business necessity' means shown to be (1) predictive of or significantly correlated with work behavior(s) comprising or relevant to the job or job family for which the procedure or combination of procedures is in use, or (2) representative of one or more important components of the job, or (3) otherwise manifestly and demonstrably job related."

I believe this language tracks the Griggs principle fairly closely, and embodies standards currently accepted by the professional community most familiar with this area. It also solves the difficult problem of justification of subjective employment criteria, which I believe led the Supreme Court to rule as it did in Wards Cove. I also cannot help but believe that this language would be acceptable to civil rights groups who in fact wish to see a restoration of Griggs.

The other basic problem I see with the business necessity section of the proposed compromise, and of the language contained in the bills themselves, lies in Section 2's specification of the types of evidence that a court may consider. I can recall no other statute in which Congress has attempted to instruct the federal courts on admission of evidence. In particular, I disagree with a requirement that an employer produce "demonstrable evidence" of business necessity. If Congress believes that the courts are likely to accept "unsubstantiated opinion and hearsay" as proof of business necessity (a fear that I believe has no basis under the Federal Rules of Evidence), Congress ought to say that and no more. Must an employer produce charts or other documents under the "demonstrable evidence" language? A "demonstrable evidence" requirement seems to command that a federal court to accept only a portion of the evidence that may be relevant to the issue before it, and illustrates the problems that undoubtedly will arise when Congress begins telling the federal courts what types of evidence they may receive and consider in any given case.

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3. Particularity. Closely tied to the business necessity definition is the issue of proving which practice causes the disparate impact. In Wards Cove, the Supreme Court held that a plaintiff was required to demonstrate which employment practice caused the adverse impact, thus shifting the burden to the employer to validate that practice. Allowing the plaintiff to establish his or her prima facie case merely by showing that the employer's practices, taken as a whole, create an adverse impact would be a significant incentive for employers to abandon merit-based hiring and merely ensure that their work forces are racially and gender balanced.

The bills as passed seem to reflect an understanding of this problem. S.2104 as passed requires that a plaintiff demonstrate which specific practice or practices contributed to the disparate impact if the court finds that this information can be identified from records or other information available through discovery or otherwise.

The alternative language on this issue wisely builds on this concept by requiring that the plaintiff demonstrate "which specific practice or practices are responsible for the disparate impact..." Further, the alternative language clearly states that plaintiffs bear this burden in all cases, a proposition that S.2104 endorses in recondite fashion. The intent of the alternative language appears to be that this requirement holds true in all cases except where the employer has impeded access to information necessary for the plaintiff to meet this burden.

While this approach makes sense and is an improvement over the bills, I believe the proposed language is unwise in two respects. First, I am troubled by the proposition that the plaintiff may avoid his or her burden where an employer fails to keep records necessary to enable plaintiff to demonstrate adverse impact. There is no existing requirement that employers keep any such records. If an employer must keep records on this issue, and the plaintiff may obtain such records through discovery, why place the burden on the plaintiff in the first place? Moreover, this language seems to assume that proof of impact can be generated only through employer records, which simply is not true. While proof of impact in the individual workplace is preferable, statistical showings of adverse impact that do not depend upon employer records are routinely made and accepted under Title VII.

Second, I believe it is unnecessary to specify particular acts of employer misconduct, as in subsection (a) (destruction, concealment or refusal to produce necessary records). Such misconduct normally warrants severe sanctions under existing law, including issue preclusion where appropriate. Rather than go into such detail, I suggest that this paragraph be rephrased to read:

> (iii) the complaining party shall be required to demonstrate which specific practice or practices are responsible for the disparate impact in all cases, unless the court finds that the employer has wilfully impeded the complaining party's access to information necessary to make this showing.

4. Price Waterhouse. The proposed language is a substantial improvement over the bills in this area. The restoration of "motivating" factor language reflects the general rules applied in mixed motive cases, and is taken from the heart of the Price Waterhouse opinion itself.

My concern with this clause lies in its potential to spur reverse discrimination lawsuits. Almost by definition, employers engaged in lawful affirmative action regularly consider the race or sex of applicants or employees in their decisions. This does not mean they are engaged in quota hiring or promotion; rather, they consider race or sex as part of their decisional process. As I understand the motivating factor analysis created by the proposal, such consideration would be a violation of Title VII.

Proponents of the Civil Rights Act of 1990 have told me that they assume the courts will follow existing law and not find an employer liable for action taken pursuant to a lawful affirmative action program. I believe it is wrong to leave such an important proposition implicit in this bill. The federal government cannot in good conscience expect employers to undertake affirmative action efforts, as they must under Executive Order 11,246 and other federal laws, yet expose themselves to Title VII liability for doing so. To avoid this result, I would suggest that an additional sentence be added to the end of proposed section 703(1), stating:

> It shall not be unlawful under this section or this title for an employer to take actions pursuant to the provisions of a lawful affirmative action plan.

As I stated above, these are not the only problems with the proposed language, or with the bills as passed. In the interest of brevity, I have addressed only the issues that seem central to me. I would be pleased to discuss these comments, or any other aspects of the bills or the proposed language, with you or your staff at your convenience.

Very truly yours,

Zachary D. Fasman
of PAUL, HASTINGS, JANOFSKY & WALKER

Zachary D. Fasman

Practical Problems of the Civil Rights Act

Suits for compensatory and punitive damages will benefit no one but lawyers.

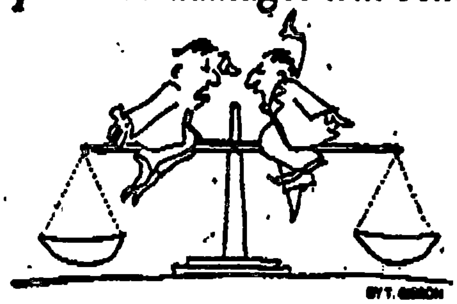
The quota issue continues to dominate debate about the Civil Rights Act of 1990, obscuring several serious practical problems presented by the bill. Foremost among these is the proposal to allow compensatory and punitive damages under Title VII of the Civil Rights Act of 1964. The omnibus federal employment discrimination statute, Title VII currently allows monetary relief for economic injuries alone. An employee improperly discharged because of his race can be reinstated to his job and recover lost wages and benefits; a woman wrongfully refused promotion because of her sex can obtain the lost promotion and back pay as well. Neither can recover damages for mental anguish or pain and suffering, nor can either obtain punitive damages. The Civil Rights Act of 1990 would change this, and allow their claims to be tried before a jury rather than before a judge.

This proposal to create a federal tort law system for employment discrimination cases is likely to benefit no one but lawyers. Authorizing recovery of compensatory and punitive damages will lead to a dramatic increase in Title VII litigation, with accompanying judicial delays. At present, Title VII emphasizes obtaining full economic redress quickly and without litigation. Discrimination charges must be filed promptly, the Equal Employment Opportunity Commission is supposed to investigate expeditiously and if reasonable cause exists to believe that the stature has been violated, the EEOC must attempt to conciliate prior to suit.

An employer's economic incentive to settle will largely be destroyed.

Early in the process, even full recompense for an employee's economic injury is relatively slight in comparison to the employer's projected litigation costs, to say nothing of the plaintiff's legal fees that the employer will incur in the event of a loss. While some cases involve matters of principle, most cases are resolved early in the process because the employer has strong economic incentives to settle rather than to litigate.

An employer's economic incentive to settle is largely destroyed if compensatory and punitive damages become available. Experience in state wrongful discharge litigation reveals that compensatory and punitive damage awards regularly average in the hundreds of thousands of dollars. Six-figure liability automatically will increase settlement costs in most individual



cases beyond the employer's projected litigation costs, and thus employers will have an economic incentive to litigate rather than settle. In cases where an employer believes he has a reasonable chance of prevailing, the proverbial reasonable person would choose litigation on the basis of economics alone, contrary to the current situation.

Such an increase in litigation is not justified by the claim that Title VII remedies are inadequate. Title VII's remedial structure certainly is not unique. Congress repeatedly has concluded that employment principally is an economic relationship and that employment injuries do not required tort remedies. Almost every federal statute addressed specifically to the employment relationship—the National Labor Relations Act and ERISA spring to mind—provides relief for economic injuries alone rather than pain and suffering or punitive damages. These statutes, like Title VII, long have been regarded as successful. The multimillion-dollar Title VII class actions that have resulted in redesign of so many employment practices have not required the enhanced remedial scheme envisioned by the Civil Rights Act of 1990.

Our tort system, long renowned for its unfairness and glacial pace, has little to recommend it in employment discrimination cases. It is ironic that a majority of the Senate and at least 180 representatives apparently support creating a new federal tort system for employment discrimination cases at the same time that legislators on both the federal and state levels actively are seeking alternatives to the tort system itself in areas such as products liability and medical malpractice.

This irony is even more pronounced given the increasing congestion in the federal courts, evidenced by the recent Report of the Federal Courts Study Commission, which concluded that the "recent surge in federal criminal trials . . . is preventing federal judges in major metropolitan areas from scheduling civil trials, especially civil jury trials, of which there is a rapidly growing backlog." That report recommended arbitration rather than federal litigation of individual employment discrimination cases.

Proponents of the Civil Rights Act of 1990 argue that compensatory and punitive damages and jury trials already are available to blacks under the Civil Rights Act of 1866 and that the new law merely seeks to preserve parity among groups by making such remedies available to all victims of employment discrimination. But this argument does not address whether it makes practical sense to extend tort remedies any further. The Civil Rights Act of 1866 initially was extended to employment discrimination by a Supreme Court decision in 1976, more than a century after its passage, and there is no evidence that Congress (either in 1866 or subsequently) ever debated the wisdom of applying the statute to the workplace.

More thoughtful proponents of the bill claim that certain injuries actionable under Title VII have no economic component. In 1986, the Supreme Court held that pervasive racial or sexual harassment in the workplace was actionable under Title VII even absent an economic injury. Shouldn't there be some financial remedy for this conduct?

Perhaps so. But even assuming it is appropriate to create a greater financial remedy for harassment in the workplace, surely this limited lacuna in the law does not justify creating a federal tort system that would apply to almost every employment discrimination case.

That certainly is the purport of this legislation. Courts traditionally distinguish between disparate treatment cases—in which an individual claims to have been treated less favorably because of his race or her sex—and disparate impact cases, which generally involve systemic barriers to equality. The Civil Rights Act of 1990 would provide compensatory relief in all disparate treatment cases, not just those involving egregious intentional misconduct. Thus a run of the mill absenteeism discharge, in which a black or a woman claims that his or her absenteeism record was not as bad as that of another employee who was retained, would fall within the ambit of compensatory relief even though there was no direct evidence of race or sex animus in the workplace. So would broadly based class actions that allege that the employer engages in a "pattern or practice" of discrimination, thus inveigling juries in adjudicating sophisticated statistical issues with millions in compensatory and punitive damages hanging in the balance.

The monumental delays and the inordinate expense involved in litigating such cases before juries are daunting. Only lawyers would want to multiply this type of litigation by making settlements less likely or making it normal to introduce psychiatric testimony attempting to quantify the pain and suffering of an employee who has been discharged. The remedial provisions of the Civil Rights Act of 1990 need to be amended if the bill is to benefit anyone but members of the bar.

The writer is a Washington attorney.

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October 11, 1990

Honorable Robert Dole
United States Senate
Washington, DC 20510

Dear Senator Dole:

Thank you for providing me with an opportunity to comment on the suggested revisions to the Civil Rights Act of 1990 ("Act"). Unfortunately, it is quite clear that these suggested revisions do nothing to eliminate the serious problems which led you to vote against the Act in July. Since you have already identified your objections to the original version of the Act, I will not attempt to rehash its deficiencies, but will simply explain why I do not believe the revisions mitigate these faults.

First, and perhaps most important, the revisions do nothing to solve the fundamental flaw in the Act's definition of "business necessity." Under the proposed revision, as under the original Act, all "employment practices involving selection" need be justified as having a "significant relationship to successful performance of the job." The only change is to impose this onerous requirement on _either_ selection devices _or_ "practices primarily related to a measure of job performance," but the revised version does nothing to lift or modify this requirement for selection devices. Accordingly, the revision simply does not address the fundamental objection that an employer should be permitted to take account of business objectives other than job performance when making a hiring or promotion decision. The revised Act's myopic rule would foreclose an employer from considering, for example, whether an applicant had been convicted of a felony or from considering anything else bearing on character, motivation or other intangible attributes not directly linked to the four corners of the job for which he or she is an applicant.

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The only other cognizable change in the revised version is its substitution of the word "manifest" for "significant," so that nonselection devices may now be justified if they "bear a significant relationship to a <u>manifest</u> business objective." This does little to alleviate the difficult burden initially imposed by the Act and does much to confuse it. While "manifest" is arguably less demanding than "significant," the dictionary definition of that term is "readily perceived" or "easily understood." Thus, a literal construction of the revised standard would invalidate even important business objectives unless the objective's purpose was readily understood by outsiders -- a genuinely bizarre result. This straightforward interpretation is more likely because, so far as I can discern, the phrase "manifest business objective" appears nowhere in Title VII case law and thus has no preexisting judicial meaning or gloss. Substituting the word "manifest" would thus lead only to confusion. Further, because this second category covers so little (<u>all</u> selection practices being judged under the first -- often inapposite -- standard), change here is often irrelevant in any event.

More important, even if "manifest" were arguably more palatable than "significant" when viewed in isolation, such tinkering with the law's substantive standard accomplishes precisely nothing absent deletion of the Act's directive that the "subsection is meant to codify the meaning of 'business necessity' as used in <u>Griggs</u> . . . . and to overrule the treatment of business necessity as a defense in <u>Wards Cove Packing Co.</u> . . . ." This plainly requires that courts create a significant distinction between <u>Griggs</u>' and <u>Wards Cove</u>'s definition of business necessity, which does not exist under a proper interpretation of <u>Griggs</u>, and reject <u>Wards Cove</u>'s practical application of traditional "disparate impact" doctrine. So treating <u>Wards Cove</u> as judicial kryptonite obviously renders its proper understanding of disparate impact a nullity and mandates that courts apply the most extreme, pro-quota understanding of <u>Griggs</u> that can possibly be gleaned from isolated lower court decisions. This congressional internment of <u>Wards Cove</u> is particularly problematical because that decision was an avowed attempt to ensure that the disparate impact doctrine was not distorted into a standard so onerous that it effectively mandated racial preferences and quotas. This was especially important because the <u>Watson</u> case had vastly expanded the reach of disparate impact theory the year before. Congressional rejection of every aspect of the <u>Wards Cove</u> treatment of business necessity in favor of a "tougher" disparate impact theory would thus likely be taken by the courts to indicate a

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congressional lack of concern that this "tougher" standard will effectively mandate quotas.

Nor do the revisions make any discernible substantive change in the "particularity" requirements for plaintiffs. The bill currently states that plaintiffs need not isolate the specific employment practice allegedly causing the alleged impact if the relevant records are not "reasonably available" from the defendant. This is objectionable because it establishes the unique rule that a plaintiff is relieved of the obligation of establishing even a prima facie case solely because it cannot gather the evidence to establish that the defendant has caused the alleged injury. This places defendants in the impossible position of being required to demonstrate to the plaintiff how the plaintiff could have identified a particular employment practice in order to show that the plaintiff has not met its burden of identifying a particular employment practice. The newly proposed revisions to the Act do not change this circular and self-defeating state of affairs. The revised version merely identifies all the situations in which evidence would not be "reasonably available" to the plaintiff; i.e., those situations in which the relevant evidentiary records have never been kept or are no longer in existence. It does not, however, in any way change the rule that the plaintiff need not make his case if there is any difficulty with gathering the evidence necessary to make his case. Moreover, the revised version still does not require the plaintiff to show that a particular employment practice caused any statistical disparity.

Perhaps the most indefensible, and certainly the most cynical, provision of the current Act is the section which prevents nonminority victims of reverse discrimination from even having a day in court to argue that such discrimination is illegal or unconstitutional. The revised version of the bill does virtually nothing to solve this blatant attempt to shield long-standing quotas from any judicial scrutiny. It still closes the courthouse door to persons who were complete strangers to any quota deal signed off on by an employer and the beneficiaries of the quota, so long as these two self-interested parties made "diligent and best," albeit unsuccessful, "efforts" to notify the affected nonminority employee. While "diligent and best efforts" is arguably a slight improvement over the Act's current requirement of "reasonable efforts" to notify affected employees, it still does not cure the basic flaw of denying a person the ability to sue even though that person never received the notice that is an "elementary and fundamental requirement of due process."

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Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Even worse, the revisions, like the current Act, deny access to the courts to a person who was not even born when the quota was installed, so long as some other person "adequately represented" the nonminority plaintiff's interests. The proposed revision here is meaningless because the previous challenge that allegedly "adequately represents" the plaintiff's interest will always be "on the same legal grounds and with a similar factual situation" as the subsequent challenge.

Finally, the revised bill draws an inexplicable distinction between existing and future quota decrees: it holds that those decrees entered within 30 days of enactment are subject to challenge only under the "tougher" standards of the existing Act, while those entered after that time may be challenged under the revised standards just described. This dichotomy drains the revisions of virtually any practical significance and is unsupported by any coherent rationale.

Indeed, the only substantive change in the proposed revisions makes the bill worse. The much ballyhooed concession by the Act's sponsors to change the Price Waterhouse standard from a "motivating factor" to a "contributing factor" is now withdrawn. Thus, once again the Act penalizes bad thoughts even if they do not have any tangible effect on a civil rights plaintiff.

For these reasons, the various proposed revisions to the bill certainly will not, in response to your specific questions, "reduce the likelihood that employers would be forced to hire workers according to rigid racial and ethnic quotas," or "strike a fair balance between the need to protect our Nation's minorities . . . and the need to protect our Nation's employers from unnecessary litigation" or "restore the meaning of Title VII as it has been interpreted by the Supreme Court in Griggs v. Duke Power Co. and in subsequent cases." Moreover, it remains just as likely, if not more likely, that the Act will lead to "time-consuming and expensive litigation."

Either the revised or the current version of the Act will unquestionably result in a litigation bonanza that will take years to unravel. Juries and judges will be asked to decide questions such as whether an employer has carried his burden of proving [demonstrating?, establishing?] that a plaintiff should have to carry its burden of demonstrating that a particular employment practice or group of practices was "responsible for"

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[even if it did not "cause" or, perhaps, "result in"] a disparate impact [which is nowhere defined but is not satisfied by a "mere statistical imbalance in an employer's workforce," but apparently is satisfied by a statistical imbalance resulting from an employer's practices] such that the employer is required to establish its affirmative defense (rebuttal burden?) of proving, in the case of "employment practices involving selection such as . . . requirements of . . . physical characteristics[?]," as opposed to "practices primarily related to a measure of job performance" or "other employment decisions" or "rules relating to methadone [but not other narcotics], alcohol or tobacco," that the practice or group of practices is "required by" or "bears a significant [as opposed to manifest] relationship" [but is not essential] to "successful job performance" [as opposed to "significant (manifest) business objectives"] as shown by "demonstrable evidence," which includes an illustrative, but not comprehensive, list of the "types of evidence [which] is, or is not, in a particular case, sufficient to meet the standards for business necessity . . as is appropriate under the meaning of 'business necessity' as used in Griggs v. Duke Power Co. . . .," but not under the apparently very different, albeit entirely undefined, standard of Wards Cove, or, alternatively, if the employer shows (on the basis of records that the court has already found were "destroyed" or that the employer "failed to keep") that a "specific employment practice within such group of employment practices is not responsible in whole or significant part for the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity," although perhaps only if the challenged practice was a "motivating," as opposed to a "contributing," factor, in which case an employer must "demonstrate" [as opposed to "establish"] it would have "taken the same action in the absence of any discrimination," all of which is subject to the exception "that an employment practice or group of employment practices demonstrated to be required by business necessity shall be unlawful where a complaining party demonstrates that a different employment practice or group of employment practices with less disparate impact would serve the respondent as well."

Courts must resolve these questions in light of what it thinks Congress believed was the existing state of "disparate impact" law under Griggs, but not Wards Cove, or, presumably, Beazer, although possibly some intervening cases, the state of the law concerning "existing cases involving comparable worth" and in light of Congress' directive that civil rights statutes be "broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies," but not

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so broadly that they would be "construed to require an employer to adopt hiring or promotion quotas" except, of course, for those quotas which are part of "court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law." All these questions must be resolved before the court even reaches the question of remedies or damages, an area that is even more convoluted and contradictory than the rules for liability.

Since the Civil Rights Act of 1990, with or without the proposed revisions, converts Title VII into a law with almost the length, though not the clarity, of the IRS code, and simultaneously increases the potential damages available to a size at which the bar has every incentive to pursue novel legal theories, it will unquestionably lead to an explosion of expensive and drawn-out litigation for those employers foolhardy enough to attempt to defend themselves. The proposed revisions do nothing to ameliorate this problem, nor the more serious and closely related one of effectively mandating racial quotas throughout the Nation's workforce. They therefore leave in place all the concerns that led you to vote against the Act in the first instance.

I hope this has been responsive to your request. Should you need further advice, or further explanation of the foregoing, please do not hesitate to give me a call.

Sincerely,

Michael Carvin

Michael Carvin

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TEXAS ONLY

October 10, 1990

The Honorable Bob Dole
Office of the Republican Leader
United States Senate
Washington, D.C. 20810-7020

Dear Senator Dole:

Pursuant to your request, I have examined the proposed revisions to the Civil Rights Act of 1990 (the "Act") which purport to modify the Act's definition of "business necessity", the "particularity requirement" for plaintiffs alleging an unlawful "disparate impact" in an employer's workforce, the section of the Act overturning the Price Waterhouse decision, and add several new exceptions to the section of the Act that overturns Martin v. Wilks. In this endeavor, I was assisted by my partner, Tom Bagby, who prosecuted Title VII cases for the Justice Department from 1977 to 1981.

The proposed revisions simply fail to reduce the likelihood that employers would be forced to hire workers according to rigid racial and ethnic quotas and would lead to increased litigation since the Act, as now proposed (even with the revisions), is structured in such a way as to discourage settlement of cases prior to suit being filed. In addition, the litigation that would result from the adoption of the Act would be even more costly, complex and time-consuming due to the total reliance the Act places on the vast amounts of statistical and documentary evidence that would be necessary to justify each and every employment decision an employer makes in the normal course of business, from the number of employees needed to do the available work to the amount the employer will pay his/her employees. Logic and common sense would no longer be applicable in disparate impact cases.

The Honorable Bob Dole
October 10, 1990
Page 2

The version of the Act adopted by the Conference Report, as a practical, matter would still compel employers to adopt quotas to avoid costly and time-consuming litigation. The revisions as a whole fail to restore the meaning and intent of Title VII, which is to provide equal employment opportunity (and not necessarily equal results) for the persons protected by the law. Finally, the revisions go far beyond restoring Griggs v. Duke Power Company and subsequent Supreme Court cases.

In particular, the proposed definition of "business necessity" will not eliminate the previously expressed concerns that the legislation may force employers to engage in "quota" hiring. Moreover, certain aspects of the proposed "business necessity" language may create additional concerns not previously present in earlier versions.

First, there is a strong implication, at least, that formal, detailed validation studies will be required to meet the stringent requirements of (o)(1)(A). Such validation studies simply are beyond the economic means or capabilities of most employers. Moreover, the language of (o)(1)(A) arguably would preclude the use of "content" validation strategies and allow only more costly and complex "criterion-related" studies. (Historically, there has been an antipathy in the civil rights community toward otherwise generally accepted "content" validation strategies.) The language in the proposal is sufficiently onerous that it may force the few remaining employers who use written tests to abandon their use, with the consequent significant loss of productivity associated with the use of less objective selection procedures.

Second, certain portions of the proposal may contain terms of art that could result in substantial unforeseen problems for employers in defending against disparate impact claims. For example, "significant" may be interpreted to mean "statistically significant", in which case the burden on an employer of demonstrating the required relationship to successful job performance would be dramatically greater. In addition, to the extent "demonstrable" evidence is interpreted to mean "demonstrative" evidence, it may require written evidence (such as formal validation studies) in addition to otherwise the wholly acceptable and sufficient testimony from witnesses. Moreover, a single standard of business necessity would appear to be preferable to the current bifurcated approach.

Finally, the inclusion in (o)(1)(B) of a "plant closing or bankruptcy" as examples of employment decisions that could be challenged on a disparate impact basis is quite disturbing. Presumably, this means that a decision to close down a plant that had a largely minority workforce could be challenged on a disparate impact basis. This is a dramatic expansion of Title VII into areas which it previously has not covered and would impinge significantly on areas of employer prerogative that the courts previously have been unwilling to disturb.

From a practitioner's standpoint, perhaps the most significant aspect of the proposed legislation relates to the availability of jury trials and compensatory and punitive damages. While disparate impact cases remain important under Title VII, the vast majority of cases filed today are disparate treatment cases. All disparate treatment would be subject to jury trials and compensatory and punitive damages under the proposed amendments to Title VII. The proposed cap on punitive damages is of little practical value given the availability of unlimited compensatory damages for pain and suffering, embarrassment, humiliation, and the like.

The case of Rawson v. Sears, Roebuck & Co., 615 F. Supp. 1546 (D. Colo. 1985), rev'd on other grounds, Nos. 85-1223 and 2366 (10th Cir. 1986), provides an illustration of how Title VII may be affected by the availability of such unlimited damage awards. Rawson involved a claim asserting a private right of action of age discrimination under a Colorado criminal misdemeanor age discrimination statute by an individual whose employment had been terminated. Following a jury verdict, a judgment was entered against the employer in the amount of $19,096,495.01. Of this amount, $5,000,000 ($5 million) was for pain, suffering and humiliation and $10,000,000 ($10 million) was for exemplary or punitive damages. While the verdict was overturned on appeal because the lower court improperly had approved a civil cause of action under the state criminal misdemeanor statute, the decision nonetheless demonstrates the significant potential for nearly unlimited jury verdicts under Title VII for compensatory damages in the form of pain and suffering, humiliation, embarrassment, and the like. The capping of punitive damages, of course, under the proposed amendments to Title VII would have absolutely no effect on limiting the amount of compensatory damages which could be awarded in similar EEO cases brought under Title VII.

In sum, we believe significant problems remain with the proposed legislation that tip the scales decidedly against employers in defending against not only disparate impact but also disparate treatment claims. The onerous requirements for defending against claims of discrimination, when coupled with the availability of jury trials and compensatory and punitive damages, make it likely that many employers will have no alternative but to engage in "quota"

The Honorable Bob Dole
October 10, 1990
Page 4

hiring or selection. If you have any questions or if you would like to discuss any of these issues further, please do not hesitate to contact me.

Sincerely,

Cathie A. Shattuck

Cathie A. Shattuck

CAS:jlh

SOCIETY FOR INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY, INC.

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September 19, 1990

Honorable C. Boyden Gray
The White House
Washington, DC 20500

Dear Mr. Gray:

As you may remember from earlier correspondence, the Society of Industrial and Organizational Psychology is a 2400-member organization and a Division of the American Psychological Association, an association of over 90,000 psychologists. The members of our Society are centrally involved in employee selection issues. Our Society's publication entitled, __Principles for the Validation and Use of Personnel Selection Procedures__ is commonly referred as a leading statement of the most current scientific thinking on personnel selection issues. They are frequently cited in Federal District Court cases on issues related to employment discrimination. In addition, our members conduct the research and practice that underlies legislative, judicial and administrative action at the local, state and federal level. Thus, we have followed with great interest the development of the Kennedy-Hawkins Civil Rights Act of 1990.

We have been monitoring the progress of the Civil Rights Act of 1990 as closely as possible during the discussions of this bill in both the House and Senate. On a number of occasions, we have suggested wording changes that would make the bill compatible with the current thinking of scientists who are expert in the area of selection testing. Unfortunately, our suggestions have not yet been implemented into the language of the bill. It appears to us that the language of HR4000 exceeds the __Griggs__ doctrine and, further, that this non-__Griggs__ language is technically unacceptable and at odds with professional standards. Even though there are legislative disclaimers to the contrary, it is still possible that employers might choose to adopt quotas rather than challenge what might appear to be an impossble standard of proof. For that reason, I would like to urge members of the conference committee to make the appropriate changes. Any influence you might bring to bear on this issue would be greatly appreciated. Below, I have listed our concerns.

1. In HR4000, the term "group of practices" is ambiguous. On many (if not most) occasions, employers use combinations of tests, or test "batteries" to make hiring decisions. It is well accepted in measurement theory that a combination is often more valid than any of its pieces. In other words, the predictive power accumulates across the different components of the combination. Our concern centers on Section 4 (B), i. and ii. It is our fear that this important combination principle is lost and that employers will be required to show that each of the tests in the battery either has no adverse impact or sufficient validity tro stand on its own, even though the battery combination is demonstrably job related. In this case, we have drowned the baby in the bathwater. The employer, once again, might be tempted to either eliminate a procedure that contributes to validity or to simply make sure that there is no adverse impact. It is obvious that the best way to eliminate adverse impact is through the adoption of quotas.

2. As before, we are concerned about the eventual interpretation of the term "significant" relationship. If this is interpreted as statistical significance, then it substantially alters the Griggs doctrine. Rather than lay the groundwork for later confusion, we continue to urge the use of the term "manifest" relationship. As I indicated in an earlier letter, this battle has been fought long ago and a compromise has been reached between those representing the interests of plaintiffs and defendants in Title VII cases. The language of HR4000 simply creates new chaos to replace order and understanding.

3. The use of the term successful to describe job performance creates an inappropriate dichotomy. It is a well accepted principle in our profession (a principle with wide empirical support) that performance is continuous and not dichotomous. There is no magic line that separates successful from unsuccessful performance. Rather, the generally accepted principle is that higher scores imply higher performance. This principle is clearly stated in the document that has been widely cited in Title VII litigation and published by our Society. The document to which I refer is titled "Principles for the Validation and Use of Personnel Selection Procedures" published in 1987. The following statement appears on p. 24 of that document:

> "If a selection instrument measures a substantial and important part of the job reliably, and provides adequate discrimination in the score ranges involved, persons may be ranked on the basis of its results."

It is clear from this statement that ranking of candidates from the top scorer to the bottom scorer should be the rule rather than the exception. For this reason, we are concerned about the implications of the term "successful" performance in HR4000. In addition, this terminology might suggest that the standard for comparison is minimal qualifications necessary to perform the job. Griggs, on the other hand, permitted employers to adopt higher standards rather than only minimal ones.

4. The term "performance on the job" also creates problems. As we have stated previously, many employers have legitimate concerns with employee behaviors such as absenteeism, tardiness, accident rate, and turnover. In fact, many of these outcomes are more closely related to employer profitability or effectiveness than more traditional measures of performance. For that reason, we fear that the term "job performance" is too restrictive and would like to see the concept expanded to include all relevant job behaviors (including those listed above).

5. Finally, one might construe the language in HR4000 specifying performance on the job to imply that a new validation study must be conducted for each and every job in each and every situation. This principle has been dubbed "situational specificity" and has been clearly abandoned by our profession. The corner stone of applied prediction (and in fact, of all science) is the notion of generalizability. We conduct research **in order to apply the results to similar situations**. This is just as true in employee testing as it is in cancer research. In medical research, when the clinical trials are completed and the results satisfactory, the drug is presented for use in a range of situations that involve particular symptoms. One does not conduct new clinical trials in each city with each doctor for each patient. The same is true in testing. When we have gathered sufficient evidence to demonstrate that a particular test is predictive of performance for a job title or job family, it is not necessary to "re-validate" that test for similar uses in other settings. To be sure, one would require that the test user demonstrate the similarity of the situations (e.g. through a comparison of job analysis results) but a new validation study would not be required. This principle is the cornerstone of the concept of validity transport, a concept well recognized in both professional (e.g. SIOP Principles) and administrative (e.g. Uniform Guidelines) documents. We urge that the use of the term "the" job be clarified so that there will be no argument about the concept of validity transportability, as currently addressed in the Uniform Guidelines.

As scientists heavily involved in the development and administration of tests, we can see the logic behind the Civil Rights Act of 1990 and, in principle, are in favor of this type of legislation. Our concerns are with language that may do more harm than good. Once again, we urge you to adopt language defining business necessity that we proposed in earlier correspondence.

"The term 'required for business necessity' means shown to be (1) predictive of or significantly correlated with work behavior(s) comprising or relevant to the job or job family for which the procedure or combination of procedures is in use, or (2) representative of one or more important components of the job, or (3) otherwise manifestly and demonstrably job related.

We encourage the conference committee to consider these suggestions. We stand ready to assist in any way in the further development of the Civil Rights Act of 1990.

Sincerely,

Frank J. Landy, President

FJL/jls

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FRANK J LANDY, PRESIDENT
SOCIETY FOR INDUSTRIAL
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September 13, 1990

The Honorable C. Boyden Gray
The White House
Washington, DC, 20500

Dear Mr. Gray:

We are writing on behalf of the American Psychological Association (APA) and the American Psychological Society (APS), scientific and professional organizations representing over 113,000 psychologists, to address the Civil Rights Act of 1990 (HR 4000). APA and APS are deeply committed to the rationale and logic set forth in the Civil Rights Act and we continue to support efforts to ban discrimination in employment settings.

As scientific organizations we are also concerned that proposed language defining business necessity (Section 3) should be consistent with accepted scientific standards concerning assessment.

We are proposing the following definition of business necessity that would both restore the standard established by the Supreme Court in Griggs vs Duke Power Company and ensure that employers could successfully meet current scientific standards for demonstrating the business necessity of selection procedures without resorting to quotas:

> "The term 'required for business necessity' means shown to be (1) predictive of or significantly related to work behavior(s) comprising or relevant to the job or job family for which the procedure or combination of procedures is in use, or (2) representative of one or more important components of the job, or (3) otherwise manifestly and demonstrably job related."

As we have noted in earlier correspondence on this legislation, the above definition provides a much more concise and objective standard by which to evaluate employment selection procedures than the current language. This proposed definition would allow job performance to be viewed as continuous, as opposed to the current definition which would characterize the job performance of individuals as either effective or ineffective. The term "successful" within the current definition should be eliminated since it also reinforces this characterization and implies that a level of "minimal" job performance is acceptable for all jobs.

We also believe that the term "manifest relationship," which was adopted in the Griggs decision, should replace the term "significant relationship" in Section 3. The former term would permit the use of several types of accepted scientific strategies to establish job relatedness, while the current language might restrict evidence to statistical correlations.

accepted scientific strategies to establish job relatedness, while the current language might restrict evidence to statistical correlations.

Scientifically developed, reliable, and valid employment selection procedures have a history of greatly improving selection decisions while increasing efficiency in the use of human resources, output and productivity in organizations. We believe the proposed definition provides organizations adequate opportunities to develop and use job related selection procedures without having to resort to other less efficient methods.

We hope you will give full consideration to each of these recommendations and will contact us if we can be of any further assistance in this area.

Sincerely,

Raymond D. Fowler
Raymond D. Fowler
Chief Executive Officer, APA

Alan Kraut
Alan G. Kraut
Executive Director, APS

THE WHITE HOUSE
WASHINGTON

7/11

TO: JOHN H. SUNUNU

FROM: **FRED McCLURE** FM
Assistant to the President for Legislative Affairs

THE CHIEF of STAFF
has seen

☒ **FYI**

☐ **Comment**

☐ **Action**

Sen. Pete Wilson called just to apprise us of a recent LA Times poll (which he believes is skewed about 6 pts. toward Democrats) that found that women rejected quotas by 2 to 1; men rejected by 4 to 1; and the overall population response was 3 to 1. This flows from the Feinstein statement regarding what hiring practices she would employ if she became Governor. Pete thought we should know this as we go through the civil rights negotiations.

Substantively, he noted that we should not forget the linkage between -- "did discrimination occur" and the definition of "business necessity."

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Series: Sununu, John, Files
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THE WHITE HOUSE

WASHINGTON

October 15, 1990

MEMORANDUM FOR JOHN H. SUNUNU

FROM: Fred D. McClure FM

SUBJECT: Civil Rights

As you know, the Kennedy-Hawkins civil rights bill was recommitted to conference last week where the so-called "Coleman-Hatch language" was added. The amended bill is expected to pass both chambers and come to the White House this week.

House Status

The House is tentatively scheduled to consider the bill tomorrow (Tuesday). When the bill passed in early August, 154 Members voted against it, 9 more than would be needed to sustain a veto.

Attached is the second whip check that the House Republicans have done on the conference report. The first one was done two weeks ago, prior to the reopening of the conference last Thursday. That whip check showed no slippage at all among the 142 Republicans and 12 Democrats who opposed the bill on final passage. Had that count held, we would have showed veto strength on the House side.

However, the second count shows the potential for significant slippage. I have indicated after the Members' names what their votes were on final passage. You will note that there are 12 Members now in the undecided column who had voted against the bill on final passage. In particular, Representative Goodling, who has been our leader among House Republicans on this issue, is now listed as "undecided."

There are two Members who appear to be switching their position. Representatives Marlenee and Bliley, both of whom opposed the bill, are now listed as a "yes" and a "leaning yes", respectively. There are rumors from the business community that Representative Paul Henry may also switch his vote from "no" on final passage to "yes" on the conference report. He is listed as a "no response" on the whip check.

We are in the process of determining exactly what the reasons are for these shifts. However, it is important to note that, while this whip check was being done on Friday, one of the concerns being expressed by the Members was our lobbying tactics against the Kasich/Pursell budget plan and on behalf of the "bare-bones" Ways and Means package. Two Members commented that, if this is the way the White House is going to handle the budget issue, then they might switch their position on another issue of importance to the White House.

The other concern being expressed is that the "Hatch" language adopted in conference is being portrayed by the civil rights community as a "compromise." Although we have made clear that the Administration cannot accept that language, some Members are finding it harder to oppose the bill when a "compromise" has been reached. In an effort to combat this problem, we have circulated the letter from the Attorney General which states clearly that the new changes are merely cosmetic and the President will be compelled to veto the bill if it comes to him with that language.

Senate Status

The Senate is also expected to bring up conference report tomorrow. Thirty-five Senators opposed the civil rights bill in July (including Armstrong who was absent). It may be more difficult to retain veto strength in the Senate with the new Coleman-Hatch language. Even though Senator Hatch has said he would support the President's veto, the very fact of his negotiating a "bipartisan" compromise has made some Senators who voted with us very worried.

Also, some Senators believe we will pocket veto the bill, thus making a vote for the compromise a free vote.

Because there is a perception on the Senate side that you are the key Administration official on civil rights, a phone call from you may be very effective in firming up wavering Senators. The Senators who now say they are undecided include: Boschwitz, D'Amato, Stevens, Rudman and McCain. Senator Domenici, who voted for the bill, has indicated that he may switch to support us on a veto override vote.

It would also be helpful to mention to Senator Dole that we intend to veto, not pocket veto, the bill and thus it is critical to keep veto strength on the conference report vote tomorrow.

03:37 PM 12-Oct MEMBER TO MEMBER: CIVIL RIGHTS CONFERENCE REPORT PART II

YES	LEAN YES	UNDECIDED	LEAN NO	NO	NO RESPONSE	ABSENT
22	3	16	15	77	43	0
Campbell	Bliley N	Bentley N	Ballenger N	Archer	Boehlert Y	
Conte	Horton Y	Bereuter N	Bilirakis 0	Armey	Broomfield N	
Fish	Martin (IL) Y	Clinger N	Coble N	Baker	Burton N	
Gilman		Coughlin Y	Coleman N	Bartlett	Chandler N	
Grant		Goodling N	Goss N	Barton Y	Cox N	
Green		Houghton N	Ireland N	Bateman	Davis Y	
James		Martin (NY) N	Lewis (FL) N	Brown	DeWine N	
Leach		McDade N	McCandless N	Buechner	Gillmor N	
Machtley		McGrath N	Nielson N	Bunning	Gradison N	
Marlenee N		McMillan N	Ravenel N	Callahan	Grandy N	
Morella		Meyers (KA) Y	Roth N	Combest	Hammers'mt N	
Rinaldo		Ridge N	Shaw N	Courter	Henry Y	
Ros-Lehtinen		Roukema Y	Smith, V (NE) N	Craig	Herger N	
Rowland		Slaughter N	Tauke N	Crane	Hiler N	
Saiki		Smith, C (NJ) N	Whittaker N	Dannemeyer	Hunter N	
Schiff		Weldon Y		DeLay	Johnson Y	
Schneider				Dickinson	Kasich N	
Schulze				Dornan	Kolbe N	
Shays				Douglas	Kyl N	
Smith, P (VT)				Dreier	Lagomarsino N	
Snowe				Duncan	Lent N	
Walsh				Edwards	Lewis (CA) N	
				Emerson	Lowery N	
				Fawell	Lukens N	
				Fields	McEwen N	
				Frenzel	Miller, C. N	
				Gallegly	Miller (WA) N	
				Gallo	Morrison N	
				Gekas	Myers (IN) N	
				Gingrich	Oxley N	
				Gunderson	Parris N	
				Hancock	Pursell N	
				Hansen	Regula Y	
				Hastert	Rhodes N	
				Hefley	Robinson 0	
				Holloway	Schuette N	
				Hopkins	Sensenbrenner N	
				Hyde	Shuster N	
				Inhofe	Spence N	
				Lightfoot	Stump N	
				Livingston	Upton N	
				Madigan	VanderJagt N	
				McCollum	Wylie N	
				McCrery		
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Smith, L (TX)
Smith, R (NH)
Solomon
Stangeland
Stearns
Sundquist
Thomas, (CA)
Thomas, (WY)
Vucanovich
Walker
Weber
Wolf
Young, Bill
Young, Don

BOB DOLE
KANSAS

United States Senate

OFFICE OF THE REPUBLICAN LEADER
WASHINGTON, DC 20510-7020

October 15, 1990

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

Dear John:

As promised, I am enclosing copies of letters that I have received from several recognized experts on Title VII.

As you will see, three of the letters are highly critical of the proposed changes to the conference report on the Civil Rights Act of 1990. The fourth letter -- by Thomas S. Williamson, Jr. of Covington & Burling -- takes a more positive view.

I hope that these letters will be helpful in your analyis of the revised conference report.

Sincerely,

Bob

BOB DOLE

cc: The Honorable Orrin G. Hatch
The Honorable Arlen Specter
C. Boyden Gray, Esq.

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October 10, 1990

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OUR FILE NO:
09071.00001

VIA MESSENGER

Senator Robert Dole
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Office of the Republican Leader
United States Capitol
Room S 230
Washington, D.C. 20510-7020

Re: Civil Rights Act of 1990

Dear Senator Dole:

Thank you for sending me proposed alternative language on the Civil Rights Act of 1990. I have reviewed that language carefully, and it raises several serious concerns. I have addressed the most important of these below. I am troubled by other provisions and omissions in this language, and would be pleased to explore those with you or your staff at your convenience.

1. Remedies. My major concern about the Civil Rights Act of 1990 lies in its potential to spur litigation and reduce the level of settlement in Title VII cases.[1/] My views are set forth in detail in the attached article from the editorial page of the Washington Post.

The proposed alternative language (like the bills as passed) does not deal meaningfully with this problem.

1/ These comments apply equally to the new Americans with Disabilities Act, which will be enforced under Title VII procedures. With 43,000,000 disabled citizens who may become potential plaintiffs in ADA litigation, enforcement issues assume even greater importance.

Under the alternative language, large damage awards and jury trials would remain available, and their potential to disrupt Title VII's remedial scheme would remain undiminished. I suspect that omission of any provision on remedies in the proposal is due to the belief that the cap placed on punitive damages in the bills as passed resolves the litigation problem. That simply is not the case.

The cap placed in the bills limits recovery of punitive damages only. It does not affect the ability of plaintiffs, in every individual Title VII case, to recover compensatory (pain and suffering) damages. Thus, one of the major problems I envision in Title VII litigation -- the routine introduction of psychiatric or other expert testimony attempting to quantify pain and suffering and thus support a large jury verdict -- remains undiminished. Indeed, because the cap on punitive damages is $150,000 <u>or the amount of compensatory damages plus back pay</u>, whichever is <u>greater</u>, there is a premium placed on proof of compensatory damages and the role of the psychiatrist in Title VII litigation would be highlighted.

Moreover, the cap placed on punitive damages hardly will diminish the amount of damages that can be recovered in Title VII litigation. A jury convinced that an employer committed serious wrongs easily could evade the punitive damages cap by awarding a large sum for pain and suffering, and then awarding a matching amount in punitive damages. Juries are notorious for allocating relief between compensatory and punitive damages in just such mysterious ways. The possibility for multi-million dollar liability remains undiminished under the bills as passed and under the proposed alternative language.

I am firmly convinced that the basic Title VII remedial structure -- administrative conciliation, restorative relief rather than damages and bench rather than jury trials -- remains appropriate for the vast majority of Title VII cases. There may be situations where some variance from this scheme is called for; for example, in harassment cases where there is no economic remedy available under current law. If Congress wishes to supplement existing remedies in these areas, it should do so specifically. It should not turn Title VII into a national tort law, at a time when tort law has shown itself so troublesome in so many areas of our society.

2. Definition of business necessity. An appropriate definition of "business necessity" is central to this legislation. An unduly strict definition of business necessity would lead employers to abandon attempts to use merit-related selection criteria, because the standards for their justification would be too stringent. There seems to be general agreement, reflected in language in the bills as passed and in the alternative proposal, that the business necessity standard initially enunciated in Griggs v. Duke Power Company, 401 U.S. 424 (1971), and developed by the federal courts during the 19 years since the Griggs decision, represents an appropriate accommodation of the competing interests involved.

Unfortunately, I do not believe either the alternative language that you sent to me, or the language in the bills as passed, effectively restores the Griggs standard. Section 3(o) of the alternative language continues to distinguish between employment practices involving selection and other employment practices, creating two different business necessity standards. I never have understood the need for two business necessity standards; the Court's decision in Griggs created only one standard. Two standards surely will lead to uncertainty and increased litigation, especially concerning what definition applies in any given case. For example, does a discharge fall within the clause for "selection practices" (Section 1(A)) or does it fall under paragraph 1(B)? Should some discharges (for example, discharges occasioned by theft) be treated differently than discharges based upon poor performance? Deciding what types of practices fall outside of the job performance criteria discussed in Section 1(A) needlessly will occupy the courts and employment lawyers for many years.

The Griggs test was clear and simple. The Court held that where an employment practice is shown to have a disparate impact upon the employment opportunities of a protected group, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S., at 432. That concept has been elucidated by the federal courts during the past twenty years, and until the controversy over Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989), no one (in my memory) in the civil rights community argued that Griggs was not stringent enough. A return to Griggs would embody a very simple definition of business necessity:

> "1. The term 'required by business necessity' shall mean having a manifest relationship to the employment in question."

That definition is consistent with the paragraph of the proposed language, and of the bills, stating that the intent of the bill is to restore the Griggs standard and overturn Wards Cove.

Even if there was a need to create two business necessity standards, the proposed alternative language raises serious problems. For example, requiring a showing that the practice or practices "must bear a significant relationship to successful performance of the job", as in Section 1(A), could be construed to penalize employers who attempt to set their standards for "optimal" rather than "successful" performance. The Supreme Court in Griggs stated that "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins", 401 U.S., at 436, a proposition that remains equally vital today. Moreover, "successful job performance" does not seem to take into account concepts such as absenteeism, tardiness, accident rates or misconduct, which may not involve "job performance" but which are related directly to business needs and should be acceptable measures for employment criteria. Finally, by concentrating solely on "job performance", the proposed definition seems to exclude consideration of financial and safety concerns applied by many courts in business necessity cases. In transportation cases particularly, the courts have held that the risk to public safety justifies a somewhat less stringent approach to business necessity.

Others commenting on this language (including Division 14 of the American Psychological Association, a professional group composed of experts who deal with test validation and selection criteria for a living) have pointed out that use of the term "significant" may cause problems if it is understood to impose a requirement that employers establish the relationship between the test and the job by measures of statistical significance. This view is set forth in a recent letter from the President of Division 14, Dr. Frank Landy, to Rep. Augustus Hawkins, which I attach for your review.

I also commend to you the proposed definition of business necessity endorsed by Division 14, which states:

> "The term 'required for business necessity' means shown to be (1) predictive of or significantly correlated with work behavior(s) comprising or relevant to the job or job family for which the procedure or combination of procedures is in use, or (2) representative of one or more important components of the job, or (3) otherwise manifestly and demonstrably job related."

I believe this language tracks the Griggs principle fairly closely, and embodies standards currently accepted by the professional community most familiar with this area. It also solves the difficult problem of justification of subjective employment criteria, which I believe led the Supreme Court to rule as it did in Wards Cove. I also cannot help but believe that this language would be acceptable to civil rights groups who in fact wish to see a restoration of Griggs.

The other basic problem I see with the business necessity section of the proposed compromise, and of the language contained in the bills themselves, lies in Section 2's specification of the types of evidence that a court may consider. I can recall no other statute in which Congress has attempted to instruct the federal courts on admission of evidence. In particular, I disagree with a requirement that an employer produce "demonstrable evidence" of business necessity. If Congress believes that the courts are likely to accept "unsubstantiated opinion and hearsay" as proof of business necessity (a fear that I believe has no basis under the Federal Rules of Evidence), Congress ought to say that and no more. Must an employer produce charts or other documents under the "demonstrable evidence" language? A "demonstrable evidence" requirement seems to command that a federal court to accept only a portion of the evidence that may be relevant to the issue before it, and illustrates the problems that undoubtedly will arise when Congress begins telling the federal courts what types of evidence they may receive and consider in any given case.

3. Particularity. Closely tied to the business necessity definition is the issue of proving which practice causes the disparate impact. In Wards Cove, the Supreme Court held that a plaintiff was required to demonstrate which employment practice caused the adverse impact, thus shifting the burden to the employer to validate that practice. Allowing the plaintiff to establish his or her prima facie case merely by showing that the employer's practices, taken as a whole, create an adverse impact would be a significant incentive for employers to abandon merit-based hiring and merely ensure that their work forces are racially and gender balanced.

The bills as passed seem to reflect an understanding of this problem. S.2104 as passed requires that a plaintiff demonstrate which specific practice or practices contributed to the disparate impact if the court finds that this information can be identified from records or other information available through discovery or otherwise.

The alternative language on this issue wisely builds on this concept by requiring that the plaintiff demonstrate "which specific practice or practices are responsible for the disparate impact..." Further, the alternative language clearly states that plaintiffs bear this burden in all cases, a proposition that S.2104 endorses in recondite fashion. The intent of the alternative language appears to be that this requirement holds true in all cases except where the employer has impeded access to information necessary for the plaintiff to meet this burden.

While this approach makes sense and is an improvement over the bills, I believe the proposed language is unwise in two respects. First, I am troubled by the proposition that the plaintiff may avoid his or her burden where an employer fails to keep records necessary to enable plaintiff to demonstrate adverse impact. There is no existing requirement that employers keep any such records. If an employer must keep records on this issue, and the plaintiff may obtain such records through discovery, why place the burden on the plaintiff in the first place? Moreover, this language seems to assume that proof of impact can be generated only through employer records, which simply is not true. While proof of impact in the individual workplace is preferable, statistical showings of adverse impact that do not depend upon employer records are routinely made and accepted under Title VII.

Second, I believe it is unnecessary to specify particular acts of employer misconduct, as in subsection (a) (destruction, concealment or refusal to produce necessary records). Such misconduct normally warrants severe sanctions under existing law, including issue preclusion where appropriate. Rather than go into such detail, I suggest that this paragraph be rephrased to read:

> (iii) the complaining party shall be required to demonstrate which specific practice or practices are responsible for the disparate impact in all cases, unless the court finds that the employer has wilfully impeded the complaining party's access to information necessary to make this showing.

4. Price Waterhouse. The proposed language is a substantial improvement over the bills in this area. The restoration of "motivating" factor language reflects the general rules applied in mixed motive cases, and is taken from the heart of the Price Waterhouse opinion itself.

My concern with this clause lies in its potential to spur reverse discrimination lawsuits. Almost by definition, employers engaged in lawful affirmative action regularly consider the race or sex of applicants or employees in their decisions. This does not mean they are engaged in quota hiring or promotion; rather, they consider race or sex as part of their decisional process. As I understand the motivating factor analysis created by the proposal, such consideration would be a violation of Title VII.

Proponents of the Civil Rights Act of 1990 have told me that they assume the courts will follow existing law and not find an employer liable for action taken pursuant to a lawful affirmative action program. I believe it is wrong to leave such an important proposition implicit in this bill. The federal government cannot in good conscience expect employers to undertake affirmative action efforts, as they must under Executive Order 11,246 and other federal laws, yet expose themselves to Title VII liability for doing so. To avoid this result, I would suggest that an additional sentence be added to the end of proposed section 703(l), stating:

> It shall not be unlawful under this section or this title for an employer to take actions pursuant to the provisions of a lawful affirmative action plan.

As I stated above, these are not the only problems with the proposed language, or with the bills as passed. In the interest of brevity, I have addressed only the issues that seem central to me. I would be pleased to discuss these comments, or any other aspects of the bills or the proposed language, with you or your staff at your convenience.

Very truly yours,

Zachary D. Fasman

Zachary D. Fasman
of PAUL, HASTINGS, JANOFSKY & WALKER

Zachary D. Fasman

Practical Problems of the Civil Rights Act

Suits for compensatory and punitive damages will benefit no one but lawyers.

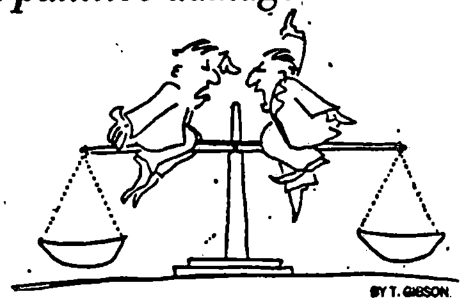
The quota issue continues to dominate debate about the Civil Rights Act of 1990, obscuring several serious practical problems presented by the bill. Foremost among these is the proposal to allow compensatory and punitive damages under Title VII of the Civil Rights Act of 1964. The omnibus federal employment discrimination statute, Title VII currently allows monetary relief for economic injuries alone. An employee improperly discharged because of his race can be reinstated to his job and recover lost wages and benefits; a woman wrongfully refused promotion because of her sex can obtain the lost promotion and back pay as well. Neither can recover damages for mental anguish or pain and suffering, nor can either obtain punitive damages. The Civil Rights Act of 1990 would change this, and allow their claims to be tried before a jury rather than before a judge.

This proposal to create a federal tort law system for employment discrimination cases is likely to benefit no one but lawyers. Authorizing recovery of compensatory and punitive damages will lead to a dramatic increase in Title VII litigation, with accompanying judicial delays. At present, Title VII emphasizes obtaining full economic redress quickly and without litigation. Discrimination charges must be filed promptly, the Equal Employment Opportunity Commission is supposed to investigate expeditiously and if reasonable cause exists to believe that the stature has been violated, the EEOC must attempt to conciliate prior to suit.

An employer's economic incentive to settle will largely be destroyed.

Early in the process, even full recompense for an employee's economic injury is relatively slight in comparison to the employer's projected litigation costs, to say nothing of the plaintiff's legal fees that the employer will incur in the event of a loss. While some cases involve matters of principle, most cases are resolved early in the process because the employer has strong economic incentives to settle rather than to litigate.

An employer's economic incentive to settle is largely destroyed if compensatory and punitive damages become available. Experience in state wrongful discharge litigation reveals that compensatory and punitive damage awards regularly average in the hundreds of thousands of dollars. Six-figure liability automatically will increase settlement costs in most individual



BY T. GIBSON

cases beyond the employer's projected litigation costs, and thus employers will have an economic incentive to litigate rather than settle. In cases where an employer believes he has a reasonable chance of prevailing, the proverbial reasonable person would choose litigation on the basis of economics alone, contrary to the current situation.

Such an increase in litigation is not justified by the claim that Title VII remedies are inadequate. Title VII's remedial structure certainly is not unique. Congress repeatedly has concluded that employment principally is an economic relationship and that employment injuries do not required tort remedies. Almost every federal statute addressed specifically to the employment relationship—the National Labor Relations Act and ERISA spring to mind—provides relief for economic injuries alone rather than pain and suffering or punitive damages. These statutes, like Title VII, long have been regarded as successful. The multimillion-dollar Title VII class actions that have resulted in redesign of so many employment practices have not required the enhanced remedial scheme envisioned by the Civil Rights Act of 1990.

Our tort system, long renowned for its unfairness and glacial pace, has little to recommend it in employment discrimination cases. It is ironic that a majority of the Senate and at least 180 representatives apparently support creating a new federal tort system for employment discrimination cases at the same time that legislators on both the federal and state levels actively are seeking alternatives to the tort system itself in areas such as products liability and medical malpractice.

This irony is even more pronounced given the increasing congestion in the federal courts, evidenced by the recent Report of the Federal Courts Study Commission, which concluded that the "recent surge in federal criminal trials . . . is preventing federal judges in major metropolitan areas from scheduling civil trials, especially civil jury trials, of which there is a rapidly growing backlog." That report recommended arbitration rather than federal litigation of individual employment discrimination cases.

Proponents of the Civil Rights Act of 1990 argue that compensatory and punitive damages and jury trials already are available to blacks under the Civil Rights Act of 1866 and that the new law merely seeks to preserve parity among groups by making such remedies available to all victims of employment discrimination. But this argument does not address whether it makes practical sense to extend tort remedies any further. The Civil Rights Act of 1866 initially was extended to employment discrimination by a Supreme Court decision in 1976, more than a century after its passage, and there is no evidence that Congress (either in 1866 or subsequently) ever debated the wisdom of applying the statute to the workplace.

More thoughtful proponents of the bill claim that certain injuries actionable under Title VII have no economic component. In 1986, the Supreme Court held that pervasive racial or sexual harassment in the workplace was actionable under Title VII even absent an economic injury. Shouldn't there be some financial remedy for this conduct?

Perhaps so. But even assuming it is appropriate to create a greater financial remedy for harassment in the workplace, surely this limited lacuna in the law does not justify creating a federal tort system that would apply to almost every employment discrimination case.

That certainly is the purport of this legislation. Courts traditionally distinguish between disparate treatment cases—in which an individual claims to have been treated less favorably because of his race or her sex—and disparate impact cases, which generally involve systemic barriers to equality. The Civil Rights Act of 1990 would provide compensatory relief in all disparate treatment cases, not just those involving egregious intentional misconduct. Thus a run of the mill absenteeism discharge, in which a black or a woman claims that his or her absenteeism record was not as bad as that of another employee who was retained, would fall within the ambit of compensatory relief even though there was no direct evidence of race or sex animus in the workplace. So would broadly based class actions that allege that the employer engages in a "pattern or practice" of discrimination, thus inveigling juries in adjudicating sophisticated statistical issues with millions in compensatory and punitive damages hanging in the balance.

The monumental delays and the inordinate expense involved in litigating such cases before juries are daunting. Only lawyers would want to multiply this type of litigation by making settlements less likely or making it normal to introduce psychiatric testimony attempting to quantify the pain and suffering of an employee who has been discharged. The remedial provisions of the Civil Rights Act of 1990 need to be amended if the bill is to benefit anyone but members of the bar.

The writer is a Washington attorney.

SOCIETY FOR INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY, INC.

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September 7, 1990

Representative Augustus F. Hawkins, Chairman
Committee on Education and Labor
2181 Rayburn House Office Building
Washington, DC 20515-6100

Dear Representative Hawkins:

As you may remember from earlier correspondence, the Society of Industrial and Organizational Psychology is a 2400-member organization and a Division of the American Psychological Association, an association of over 90,000 psychologists. The members of our Society are centrally involved in employee selection issues. Our Society's publication entitled, **Principles for the Validation and Use of Personnel Selection Procedures** is commonly referred as a leading statement of the most current scientific thinking on personnel selection issues. They are frequently cited in Federal District Court cases on issues related to employment discrimination. In addition, our members conduct the research and practice that underlies legislative, judicial and administrative action at the local, state and federal level. Thus, we have followed with great interest the development of the Kennedy-Hawkins Civil Rights Act of 1990.

We have been monitoring the progress of the Civil Rights Act of 1990 as closely as possible during the discussions of this bill in both the House and Senate. On a number of occasions, we have suggested wording changes that would make the bill compatible with the current thinking of scientists who are expert in the area of selection testing. Unfortunately, our suggestions have not yet been implemented into the language of the bill. It appears to us that the language of HR4000 exceeds the Griggs doctrine and, further, that this non-Griggs language is technically unacceptable and at odds with professional standards. Even though there are legislative disclaimers to the contrary, it is still possible that employers might choose to adopt quotas rather than challenge what might appear to be an impossble standard of proof. For that reason, I would like to urge members of the conference committee to make the appropriate changes. Any influence you might bring to bear on this issue would be greatly appreciated. Below, I have listed our concerns.

1. In HR4000, the term "group of practices" is ambiguous. On many (if not most) occasions, employers use combinations of tests, or test "batteries" to make hiring decisions. It is well accepted in measurement theory that a combination is often more valid than any of its pieces. In other words, the predictive power accumulates across the different components of the combination. Our concern centers on Section 4 (B), i. and ii. It is our fear that this important combination principle is lost and that employers will be required to show that each of the tests in the battery either has no adverse impact or sufficient validity tro stand on its own, even though the battery combination is demonstrably job related. In this case, we have drowned the baby in the bathwater. The employer, once again, might be tempted to either eliminate a procedure that contributes to validity or to simply make sure that there is no adverse impact. It is obvious that the best way to eliminate adverse impact is through the adoption of quotas.

2. As before, we are concerned about the eventual interpretation of the term "significant" relationship. If this is interpreted as **statistical** significance, then it substantially alters the Griggs doctrine. Rather than lay the groundwork for later confusion, we continue to urge the use of the term "manifest" relationship. As I indicated in an earlier letter, this battle has been fought long ago and a compromise has been reached between those representing the interests of plaintiffs and defendants in Title VII cases. The language of HR4000 simply creates new chaos to replace order and understanding.

3. The use of the term **successful** to describe job performance creates an inappropriate dichotomy. It is a well accepted principle in our profession (a principle with wide empirical support) that performance is continuous and not dichotomous. There is no magic line that separates successful from unsuccessful performance. Rather, the generally accepted principle is that higher scores imply higher performance. This principle is clearly stated in the document that has been widely cited in Title VII litigation and published by our Society. The document to which I refer is titled "Principles for the Validation and Use of Personnel Selection Procedures" published in 1987. The following statement appears on p. 24 of that document:

> "If a selection instrument measures a substantial and important part of the job reliably, and provides adequate discrimination in the score ranges involved, persons may be ranked on the basis of its results."

It is clear from this statement that ranking of candidates from the top scorer to the bottom scorer should be the rule rather than the exception. For this reason, we are concerned about the implications of the term "successful" performance in HR4000. In addition, this terminology might suggest that the standard for comparison is minimal qualifications necessary to perform the job. Griggs, on the other hand, permitted employers to adopt higher standards rather than only minimal ones.

4. The term "performance on the job" also creates problems. As we have stated previously, many employers have legitimate concerns with employee behaviors such as absenteeism, tardiness, accident rate, and turnover. In fact, many of these outcomes are more closely related to employer profitability or effectiveness than more traditional measures of performance. For that reason, we fear that the term "job performance" is too restrictive and would like to see the concept expanded to include all relevant job behaviors (including those listed above).

5. Finally, one might construe the language in HR4000 specifying performance on **the** job to imply that a new validation study must be conducted for each and every job in each and every situation. This principle has been dubbed "situational specificity" and has been clearly abandoned by our profession. The corner stone of applied prediction (and in fact, of all science) is the notion of generalizability. We conduct research **in order to apply the results to similar situations**. This is just as true in employee testing as it is in cancer research. In medical research, when the clinical trials are completed and the results satisfactory, the drug is presented for use in a range of situations that involve particular symptoms. One does not conduct new clinical trials in each city with each doctor for each patient. The same is true in testing. When we have gathered sufficient evidence to demonstrate that a particular test is predictive of performance for a job title or job family, it is not necessary to "re-validate" that test for similar uses in other settings. To be sure, one would require that the test user demonstrate the similarity of the situations (e.g. through a comparison of job analysis results) but a new validation study would not be required. This principle is the cornerstone of the concept of validity transport, a concept well recognized in both professional (e.g. SIOP Principles) and administrative (e.g. Uniform Guidelines) documents. We urge that the use of the term "the" job be clarified so that there will be no argument about the concept of validity transportability, as currently addressed in the Uniform Guidelines.

As scientists heavily involved in the development and administration of tests, we can see the logic behind the Civil Rights Act of 1990 and, in principle, are in favor of this type of legislation. Our concerns are with language that may do more harm than good. Once again, we urge you to adopt language defining business necessity that we proposed in earlier correspondence.

"The term 'required for business necessity' means shown to be (1) predictive of or significantly correlated with work behavior(s) comprising or relevant to the job or job family for which the procedure or combination of procedures is in use, or (2) representative of one or more important components of the job, or (3) otherwise manifestly and demonstrably job related.

We encourage the conference committee to consider these suggestions. We stand ready to assist in any way in the further development of the Civil Rights Act of 1990.

Sincerely,

Frank J. Landy, President

FJL/jls

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October 10, 1990

The Honorable Bob Dole
Office of the Republican Leader
United States Senate
Washington, D.C. 20810-7020

Dear Senator Dole:

Pursuant to your request, I have examined the proposed revisions to the Civil Rights Act of 1990 (the "Act") which purport to modify the Act's definition of "business necessity", the "particularity requirement" for plaintiffs alleging an unlawful "disparate impact" in an employer's workforce, the section of the Act overturning the Price Waterhouse decision, and add several new exceptions to the section of the Act that overturns Martin v. Wilks. In this endeavor, I was assisted by my partner, Tom Bagby, who prosecuted Title VII cases for the Justice Department from 1977 to 1981.

The proposed revisions simply fail to reduce the likelihood that employers would be forced to hire workers according to rigid racial and ethnic quotas and would lead to increased litigation since the Act, as now proposed (even with the revisions), is structured in such a way as to discourage settlement of cases prior to suit being filed. In addition, the litigation that would result from the adoption of the Act would be even more costly, complex and time-consuming due to the total reliance the Act places on the vast amounts of statistical and documentary evidence that would be necessary to justify each and every employment decision an employer makes in the normal course of business, from the number of employees needed to do the available work to the amount the employer will pay his/her employees. Logic and common sense would no longer be applicable in disparate impact cases.

The version of the Act adopted by the Conference Report, as a practical, matter would still compel employers to adopt quotas to avoid costly and time-consuming litigation. The revisions as a whole fail to restore the meaning and intent of Title VII, which is to provide equal employment opportunity (and not necessarily equal results) for the persons protected by the law. Finally, the revisions go far beyond restoring Griggs v. Duke Power Company and subsequent Supreme Court cases.

In particular, the proposed definition of "business necessity" will not eliminate the previously expressed concerns that the legislation may force employers to engage in "quota" hiring. Moreover, certain aspects of the proposed "business necessity" language may create additional concerns not previously present in earlier versions.

First, there is a strong implication, at least, that formal, detailed validation studies will be required to meet the stringent requirements of (o)(1)(A). Such validation studies simply are beyond the economic means or capabilities of most employers. Moreover, the language of (o)(1)(A) arguably would preclude the use of "content" validation strategies and allow only more costly and complex "criterion-related" studies. (Historically, there has been an antipathy in the civil rights community toward otherwise generally accepted "content" validation strategies.) The language in the proposal is sufficiently onerous that it may force the few remaining employers who use written tests to abandon their use, with the consequent significant loss of productivity associated with the use of less objective selection procedures.

Second, certain portions of the proposal may contain terms of art that could result in substantial unforeseen problems for employers in defending against disparate impact claims. For example, "significant" may be interpreted to mean "statistically significant", in which case the burden on an employer of demonstrating the required relationship to successful job performance would be dramatically greater. In addition, to the extent "demonstrable" evidence is interpreted to mean "demonstrative" evidence, it may require written evidence (such as formal validation studies) in addition to otherwise the wholly acceptable and sufficient testimony from witnesses. Moreover, a single standard of business necessity would appear to be preferable to the current bifurcated approach.

Finally, the inclusion in (o)(1)(B) of a "plant closing or bankruptcy" as examples of employment decisions that could be challenged on a disparate impact basis is quite disturbing. Presumably, this means that a decision to close down a plant that had a largely minority workforce could be challenged on a disparate impact basis. This is a dramatic expansion of Title VII into areas which it previously has not covered and would impinge significantly on areas of employer prerogative that the courts previously have been unwilling to disturb.

From a practitioner's standpoint, perhaps the most significant aspect of the proposed legislation relates to the availability of jury trials and compensatory and punitive damages. While disparate impact cases remain important under Title VII, the vast majority of cases filed today are disparate treatment cases. All disparate treatment would be subject to jury trials and compensatory and punitive damages under the proposed amendments to Title VII. The proposed cap on punitive damages is of little practical value given the availability of unlimited compensatory damages for pain and suffering, embarrassment, humiliation, and the like.

The case of Rawson v. Sears, Roebuck & Co., 615 F. Supp. 1546 (D. Colo. 1985), rev'd on other grounds, Nos. 85-1223 and 2366 (10th Cir. 1986), provides an illustration of how Title VII may be affected by the availability of such unlimited damage awards. Rawson involved a claim asserting a private right of action of age discrimination under a Colorado criminal misdemeanor age discrimination statute by an individual whose employment had been terminated. Following a jury verdict, a judgment was entered against the employer in the amount of $19,096,495.01. Of this amount, $5,000,000 ($5 million) was for pain, suffering and humiliation and $10,000,000 ($10 million) was for exemplary or punitive damages. While the verdict was overturned on appeal because the lower court improperly had approved a civil cause of action under the state criminal misdemeanor statute, the decision nonetheless demonstrates the significant potential for nearly unlimited jury verdicts under Title VII for compensatory damages in the form of pain and suffering, humiliation, embarrassment, and the like. The capping of punitive damages, of course, under the proposed amendments to Title VII would have absolutely no effect on limiting the amount of compensatory damages which could be awarded in similar EEO cases brought under Title VII.

In sum, we believe significant problems remain with the proposed legislation that tip the scales decidedly against employers in defending against not only disparate impact but also disparate treatment claims. The onerous requirements for defending against claims of discrimination, when coupled with the availability of jury trials and compensatory and punitive damages, make it likely that many employers will have no alternative but to engage in "quota" hiring or selection. If you have any questions or if you would like to discuss any of these issues further, please do not hesitate to contact me.

Sincerely,

Cathie A. Shattuck

Cathie A. Shattuck

CAS:jlh

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October 11, 1990

Honorable Robert Dole
United States Senate
Washington, DC 20510

Dear Senator Dole:

Thank you for providing me with an opportunity to comment on the suggested revisions to the Civil Rights Act of 1990 ("Act"). Unfortunately, it is quite clear that these suggested revisions do nothing to eliminate the serious problems which led you to vote against the Act in July. Since you have already identified your objections to the original version of the Act, I will not attempt to rehash its deficiencies, but will simply explain why I do not believe the revisions mitigate these faults.

First, and perhaps most important, the revisions do nothing to solve the fundamental flaw in the Act's definition of "business necessity." Under the proposed revision, as under the original Act, all "employment practices involving selection" need be justified as having a "significant relationship to successful performance of the job." The only change is to impose this onerous requirement on either selection devices or "practices primarily related to a measure of job performance," but the revised version does nothing to lift or modify this requirement for selection devices. Accordingly, the revision simply does not address the fundamental objection that an employer should be permitted to take account of business objectives other than job performance when making a hiring or promotion decision. The revised Act's myopic rule would foreclose an employer from considering, for example, whether an applicant had been convicted of a felony or from considering anything else bearing on character, motivation or other intangible attributes not directly linked to the four corners of the job for which he or she is an applicant.

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The only other cognizable change in the revised version is its substitution of the word "manifest" for "significant," so that nonselection devices may now be justified if they "bear a significant relationship to a <u>manifest</u> business objective." This does little to alleviate the difficult burden initially imposed by the Act and does much to confuse it. While "manifest" is arguably less demanding than "significant," the dictionary definition of that term is "readily perceived" or "easily understood." Thus, a literal construction of the revised standard would invalidate even important business objectives unless the objective's purpose was readily understood by outsiders -- a genuinely bizarre result. This straightforward interpretation is more likely because, so far as I can discern, the phrase "manifest business objective" appears nowhere in Title VII case law and thus has no preexisting judicial meaning or gloss. Substituting the word "manifest" would thus lead only to confusion. Further, because this second category covers so little (<u>all</u> selection practices being judged under the first -- often inapposite -- standard), change here is often irrelevant in any event.

More important, even if "manifest" were arguably more palatable than "significant" when viewed in isolation, such tinkering with the law's substantive standard accomplishes precisely nothing absent deletion of the Act's directive that the "subsection is meant to codify the meaning of 'business necessity' as used in <u>Griggs</u> . . . and to overrule the treatment of business necessity as a defense in <u>Wards Cove Packing Co.</u> . . . " This plainly requires that courts create a significant distinction between <u>Griggs</u>' and <u>Wards Cove</u>'s definition of business necessity, which does not exist under a proper interpretation of <u>Griggs</u>, and reject <u>Wards Cove</u>'s practical application of traditional "disparate impact" doctrine. So treating <u>Wards Cove</u> as judicial kryptonite obviously renders its proper understanding of disparate impact a nullity and mandates that courts apply the most extreme, pro-quota understanding of <u>Griggs</u> that can possibly be gleaned from isolated lower court decisions. This congressional internment of <u>Wards Cove</u> is particularly problematical because that decision was an avowed attempt to ensure that the disparate impact doctrine was not distorted into a standard so onerous that it effectively mandated racial preferences and quotas. This was especially important because the <u>Watson</u> case had vastly expanded the reach of disparate impact theory the year before. Congressional rejection of every aspect of the <u>Wards Cove</u> treatment of business necessity in favor of a "tougher" disparate impact theory would thus likely be taken by the courts to indicate a

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congressional lack of concern that this "tougher" standard will effectively mandate quotas.

Nor do the revisions make any discernible substantive change in the "particularity" requirements for plaintiffs. The bill currently states that plaintiffs need not isolate the specific employment practice allegedly causing the alleged impact if the relevant records are not "reasonably available" from the defendant. This is objectionable because it establishes the unique rule that a plaintiff is relieved of the obligation of establishing even a prima facie case solely because it cannot gather the evidence to establish that the defendant has caused the alleged injury. This places defendants in the impossible position of being required to demonstrate to the plaintiff how the plaintiff could have identified a particular employment practice in order to show that the plaintiff has not met its burden of identifying a particular employment practice. The newly proposed revisions to the Act do not change this circular and self-defeating state of affairs. The revised version merely identifies all the situations in which evidence would not be "reasonably available" to the plaintiff; i.e., those situations in which the relevant evidentiary records have never been kept or are no longer in existence. It does not, however, in any way change the rule that the plaintiff need not make his case if there is any difficulty with gathering the evidence necessary to make his case. Moreover, the revised version still does not require the plaintiff to show that a particular employment practice caused any statistical disparity.

Perhaps the most indefensible, and certainly the most cynical, provision of the current Act is the section which prevents nonminority victims of reverse discrimination from even having a day in court to argue that such discrimination is illegal or unconstitutional. The revised version of the bill does virtually nothing to solve this blatant attempt to shield long-standing quotas from any judicial scrutiny. It still closes the courthouse door to persons who were complete strangers to any quota deal signed off on by an employer and the beneficiaries of the quota, so long as these two self-interested parties made "diligent and best," albeit unsuccessful, "efforts" to notify the affected nonminority employee. While "diligent and best efforts" is arguably a slight improvement over the Act's current requirement of "reasonable efforts" to notify affected employees, it still does not cure the basic flaw of denying a person the ability to sue even though that person never received the notice that is an "elementary and fundamental requirement of due process."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Even worse, the revisions, like the current Act, deny access to the courts to a person who was not even born when the quota was installed, so long as some other person "adequately represented" the nonminority plaintiff's interests. The proposed revision here is meaningless because the previous challenge that allegedly "adequately represents" the plaintiff's interest will always be "on the same legal grounds and with a similar factual situation" as the subsequent challenge.

Finally, the revised bill draws an inexplicable distinction between existing and future quota decrees: it holds that those decrees entered within 30 days of enactment are subject to challenge only under the "tougher" standards of the existing Act, while those entered after that time may be challenged under the revised standards just described. This dichotomy drains the revisions of virtually any practical significance and is unsupported by any coherent rationale.

Indeed, the only substantive change in the proposed revisions makes the bill worse. The much ballyhooed concession by the Act's sponsors to change the Price Waterhouse standard from a "motivating factor" to a "contributing factor" is now withdrawn. Thus, once again the Act penalizes bad thoughts even if they do not have any tangible effect on a civil rights plaintiff.

For these reasons, the various proposed revisions to the bill certainly will not, in response to your specific questions, "reduce the likelihood that employers would be forced to hire workers according to rigid racial and ethnic quotas," or "strike a fair balance between the need to protect our Nation's minorities . . . and the need to protect our Nation's employers from unnecessary litigation" or "restore the meaning of Title VII as it has been interpreted by the Supreme Court in Griggs v. Duke Power Co. and in subsequent cases." Moreover, it remains just as likely, if not more likely, that the Act will lead to "time-consuming and expensive litigation."

Either the revised or the current version of the Act will unquestionably result in a litigation bonanza that will take years to unravel. Juries and judges will be asked to decide questions such as whether an employer has carried his burden of proving [demonstrating?, establishing?] that a plaintiff should have to carry its burden of demonstrating that a particular employment practice or group of practices was "responsible for"

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[even if it did not "cause" or, perhaps, "result in"] a disparate impact [which is nowhere defined but is not satisfied by a "mere statistical imbalance in an employer's workforce," but apparently is satisfied by a statistical imbalance resulting from an employer's practices] such that the employer is required to establish its affirmative defense (rebuttal burden?) of proving, in the case of "employment practices involving selection such as . . . requirements of . . . physical characteristics[?]," as opposed to "practices primarily related to a measure of job performance" or "other employment decisions" or "rules relating to methadone [but not other narcotics], alcohol or tobacco," that the practice or group of practices is "required by" or "bears a significant [as opposed to manifest] relationship" [but is not essential] to "successful job performance" [as opposed to "significant (manifest) business objectives"] as shown by "demonstrable evidence," which includes an illustrative, but not comprehensive, list of the "types of evidence [which] is, or is not, in a particular case, sufficient to meet the standards for business necessity . . as is appropriate under the meaning of 'business necessity' as used in *Griggs v. Duke Power Co.* . . .," but not under the apparently very different, albeit entirely undefined, standard of *Wards Cove*, or, alternatively, if the employer shows (on the basis of records that the court has already found were "destroyed" or that the employer "failed to keep") that a "specific employment practice within such group of employment practices is not responsible in whole or significant part for the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity," although perhaps only if the challenged practice was a "motivating," as opposed to a "contributing," factor, in which case an employer must "demonstrate" [as opposed to "establish"] it would have "taken the same action in the absence of any discrimination," all of which is subject to the exception "that an employment practice or group of employment practices demonstrated to be required by business necessity shall be unlawful where a complaining party demonstrates that a different employment practice or group of employment practices with less disparate impact would serve the respondent as well."

Courts must resolve these questions in light of what it thinks Congress believed was the existing state of "disparate impact" law under *Griggs*, but not *Wards Cove*, or, presumably, *Beazer*, although possibly some intervening cases, the state of the law concerning "existing cases involving comparable worth" and in light of Congress' directive that civil rights statutes be "broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies," but not

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so broadly that they would be "construed to require an employer to adopt hiring or promotion quotas" except, of course, for those quotas which are part of "court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law." All these questions must be resolved before the court even reaches the question of remedies or damages, an area that is even more convoluted and contradictory than the rules for liability.

Since the Civil Rights Act of 1990, with or without the proposed revisions, converts Title VII into a law with almost the length, though not the clarity, of the IRS code, and simultaneously increases the potential damages available to a size at which the bar has every incentive to pursue novel legal theories, it will unquestionably lead to an explosion of expensive and drawn-out litigation for those employers foolhardy enough to attempt to defend themselves. The proposed revisions do nothing to ameliorate this problem, nor the more serious and closely related one of effectively mandating racial quotas throughout the Nation's workforce. They therefore leave in place all the concerns that led you to vote against the Act in the first instance.

I hope this has been responsive to your request. Should you need further advice, or further explanation of the foregoing, please do not hesitate to give me a call.

Sincerely,

Michael Carvin

Michael Carvin

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October 12, 1990

BY TELECOPIER

The Honorable Bob Dole
United States Senate
Office of the Republican Leader
Washington, D.C. 20510-7020

Attention: Dennis Shea, Esq.

Dear Senator Dole:

Thank you for the opportunity to provide my personal comments on the proposed revisions of the Civil Rights Act of 1990 ("the Act") enclosed with the letter that you sent to me yesterday afternoon (October 11). I will give my comments in the same order as the provisions were set forth in the enclosure with your letter, keeping in mind the specific questions you posed to help focus the analysis of the proposed revisions.

1. Definition of Business Necessity

The proposed revisions could be viewed as loosening or weakening the Griggs v. Duke Power Company interpretation of Title VII. The standard of "significant relationship to successful performance of the job" is arguably less demanding for the employer to meet than the traditional Griggs test of "closely related to a substantial business justification." The practical effect of such a change would probably be to discourage some marginal or frivolous suits challenging the "business necessity" of an employer's selection procedures.

This proposed revision, considered in conjunction with the language in the Act prohibiting reliance on the Act to justify quotas, would tend to "reduce the likelihood that employers would be forced to hire workers according to rigid racial and ethnic quotas." The reference to a "significant relationship to successful performance of the job" strengthens defendants' ability to argue that employment selection practices that are geared to successful job performance are appropriate and lawful even if those practices may result in a disparate racial impact.

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2. Martin v. Wilks Section

The complexity of the Martin v. Wilks portion of the Act seems to be beyond truly concise and cogent modification. Nevertheless, the proposed revisions identify classes of individuals who reasonably should be precluded from challenging previously litigated matters. By its nature, this provision would operate to reduce opportunities for lawyers to reopen previously settled litigation on behalf of the excluded groups.

3. Price Waterhouse

This proposal appears to be intended to permit or invite the mixed motive defense in discrimination cases. My sense is that this proposed revision is likely to foster artful and imaginative lawyering on the part of the Title VII defense bar. The issue of what "motivated" a defendant's conduct, as distinguished from what "contributed" to a defendant's conduct, is a highly subjective matter that readily lends itself to lawyerly contrivance and manipulation.

In addition, the proposal to limit the form of relief to injunctive relief in Section 5(b) provides defense counsel with a compelling incentive to find an alternative "motivating" pretext for conduct that was influenced by improper discriminatory motives. Also, the idea of trying to prove how a defendant would have acted in the absence of any discrimination, where it can be shown that discrimination did actually play a significant role, seems foreign to the basic evidentiary traditions of our judicial system. This is because the proposed change allows defendants to build their defense on a hypothetical situation rather than actual facts. Conversely, plaintiffs' lawyers would not only have to try to show what actually happened, but also have to rebut what might have happened. Moreover, giving weight to a defendant's proof of such a hypothetical could allow a defendant who has clearly caused compensable harm, with discriminatory intent, to avoid full redress of that harm in damages.

The mixed motive cases are relatively rare, but the defense of an alternative motive or pretext most often arises where the discriminatory motive is the most egregious. In those cases, experienced defense counsel are acutely aware that attempting to rebut the discriminatory motive directly is likely to be counterproductive. Accordingly, defense counsel will be tempted to try to deflect the attention of the factfinder by focusing on an alternative motivational pretext for the questioned conduct.

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In sum, this proposed revision is likely to inspire defense counsel to explore new frontiers regarding pretextual motives while undercutting the ability of otherwise demonstrable victims of discrimination to obtain relief to the same extent as other victims of discrimination. On the other hand, to the extent potential plaintiffs are aware of the nuances of this provision, suits might not be brought in the first instance by individuals who have not suffered any damages and who are not interested in obtaining simply injunctive relief.

4. Particularity

The proposal is considerably more Solomonic in allocating the burden of proof for showing the effect of a specific practice or group of practices than Wards Cove or prior case law. Compared with the current version of the Act, this proposed change favors employers and would, therefore, presumably be an additional barrier to marginal or frivolous litigation.

Comparable Worth

The major benefit of this change is to forestall relitigation of numerous "comparable worth" precedents. The proposed change should have the salutary effect of deterring repetitious and unnecessary litigation.

* * *

Thanks again for the chance to share with you some observations from the vantage point of one practitioner. At your convenience, I would be happy to respond to any clarification of these comments that you may need or requests for additional information relating to the Act.

Sincerely,

Thomas S. Williamson, Jr.

Thomas S. Williamson, Jr.

cc: Wesley S. Williams, Esq.

THE WHITE HOUSE

WASHINGTON

DECEMBER 1, 1990

MEMORANDUM FOR GOVERNOR SUNUNU

THROUGH: DAVID DEMAREST DD

FROM: DEB AMEND DA

RE: EDITORIAL RESPONSE

Sir, I forgot to send this over; an editorial in support of the President's veto of the civil rights bill by John Dunne at the Justice Department.

THE NATION'S NEWSPAPER
USA TODAY
PUBLISHED BY GANNETT

WEDNESDAY, OCTOBER 24, 1990

JOHN R. DUNNE

An opposing view

Bush's veto was right; the bill was wrong

WASHINGTON — The Congress should sustain President Bush's veto of the Kennedy-Hawkins civil rights bill and pass the president's alternative bill.

For many months, the president has stated clearly that he wants to sign a bill to end job discrimination against minorities and women — a bill that advances the goal of equality for all Americans, not a bill that would create powerful incentives for employers to adopt hiring and promotion quotas or would violate fundamental principles of fairness in our legal system.

John R. Dunne is assistant attorney general for civil rights.

The Congress, unfortunately, did not pass such a bill, and the president was forced to use his veto power. In his veto message, however, President Bush reaffirmed his strong support for providing necessary job discrimination protection and urged passage this week of his alternative bill.

That compromise legislation would allow claims for on-the-job discrimination; create broad, new monetary relief for victims of discrimination such as sexual harassment; allow plaintiffs to receive up to $150,000 in extra recovery, beyond lost wages, for intentional discrimination; extend the time to bring claims against discriminatory seniority systems; permit plaintiffs to win suits where they prove that invidious discrimination was a motivating factor; and shift the burden of proof in unintentional discrimination cases to the employer after it is found that the employer's practice caused a statistical imbalance in the workforce.

This is a far better approach than the Kennedy-Hawkins bill, which the president rightfully vetoed.

During months of discussions with the administration, the sponsors of the Kennedy-Hawkins bill made several superficial wording changes, but none altered the flaws in its approach.

As initially introduced, and as currently drawn, the Kennedy-Hawkins bill creates powerful pressures for adoption of employment quotas by businesses to avoid costly lawsuits. The bill would make it extremely difficult for an employer to prove his or her innocence of "unintentional discrimination" when the company had an "unbalanced" workforce.

The bill also runs counter to fundamental notions of fairness in our legal system. One of its provisions would make it harder for workers of any race or ethnic background to challenge agreements where a company unlawfully refuses to hire based on race or gender. It would do this by denying such workers their day in court to vindicate their civil rights.

In addition, it has too many provisions designed to help plaintiffs' lawyers at the expense of both employers and employees. For example, it has a whole section devoted just to making it easier for plaintiffs' lawyers to get their fees, in ways that would discourage settlement and force litigation to continue until the lawyer is satisfied with the result.

The time has come for Congress to put principles above politics. The president has recommended a comprehensive civil rights bill that is the product of months of negotiations.

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P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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PRM. Removed as a personal record misfile.

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

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

THE REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
EUROPEAN OFFICE OF THE UNITED NATIONS
GENEVA

CC

December 14, 1990

THE CHIEF of STAFF
has seen

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

ck

Dear Mr. President:

As we discussed in Geneva on November 23, we have the chance to rescue civil rights from the mire of racial preferences by introducing legislation that restores the plain, original, and unambiguous meaning of the word "equality." More is at stake than statutory definitions of "business necessity" and "burdens of proof." This country did not wage a war against white supremacy only to witness the undoing of that victory by those who would elevate color preference over color blindness. I deeply believe that the great majority of this nation remains committed to equal protection of the law and color blindness, and will support a <u>1991 Civil Rights Restoration Act</u> that embraces these principles.

We can offer legislation that reclaims this moral high ground and restores the irrefutable purpose of the Civil Rights Act of 1964: Racial discrimination in employment is impermissible and wrong, even when it proposes to correct imbalances by preferential treatment.

And we can go further than Kennedy-Hawkins to advance minority progress by offering tangible entrepreneurial and educational opportunities to the economically disenfranchised.

The Act should:

- Reaffirm our commitment to civil rights enforcement by salvaging portions of the White House version of the 1990 Civil Rights Act.

- Promote the original purposes of affirmative action: the development of human capital and the creation of opportunities, not the redistribution of entitlements by race-conscious goals and numerical timetables.

The President
December 14, 1990
Page Two

- Untangle the civil rights enforcement bureaucracy so that individuals can pursue legitimate grievances without enriching lawyers.

- Empower individuals by eliminating unnecessary barriers to educational and entrepreneurial opportunity.

- Insist that no civil rights legislation will gain your support unless it applies equally to Congress.

I have always believed that the strength of our nation lies in its ethnic and racial diversity. We should not let these differences balkanize and tribalize us. Your commitment to fairness in the fight over the Kennedy-Hawkins bill was the first step toward a lasting civil rights consensus in this country. The 1991 Civil Rights Restoration Act is the next, necessary, step.

Most respectfully,

Morris

Morris B. Abram
Ambassador

cc: The Honorable John H. Sununu
The Honorable C. Boyden Gray

Attachment

The Civil Right Restoration Act of 1991

Rather than try and squeeze marginal improvements from a warmed over Congressional version of Kennedy-Hawkins, we can set the terms of next year's civil rights debate by offering legislation that reclaims the original meaning of civil rights and offers hope to economically dispossessed minorities.

- Reclaim the language of civil rights: The proposed legislation should include preambulatory language that recalls the irrefutable, unambiguous purpose of Title VII: racial discrimination is impermissible, even to correct racial imbalances by preferential treatment. And it should recall Thurgood Marshall's argument in Brown v. Board of Education: the equal protection clause of the fourteenth amendment mandates color blindness, not color preference.

- Reinforce our commitment to the enforcement of civil rights laws: Certain portions of the White House version of the 1990 Civil Rights Act would have eliminated anomalies in existing law and proposed greater compensation for victims of workplace sexual harassment and age discrimination. These provisions should be salvaged.

- Offer affirmative action strategies that work: Whether or not one supports the legality or morality of race-conscious goals and timetables, the evidence is overwhelming that this sort of "affirmative action" merely redistributes, rather than creates, opportunities. Instead of disavowing affirmative action, we should restore its original meaning -- efforts to give people the tools to take advantage of equal opportunities before unavailable to them. The emphasis should be on human capital development and economic mobility: education, basic skills development, and literacy training. The bill could require that in any federal regulation, executive order, or consent decree in which affirmative action is required, that term be defined not in terms of race but in terms of efforts to promote economic mobility and human capital development.

- Untangle the civil rights enforcement bureaucracy: Today's vast, expanding, and complex maze of federal civil rights regulations and enforcement mechanisms has made the pursuit of legitimate grievances impossible without legal assistance. Why should taxpayers and businesses continue to underwrite this lawyers' full employment scheme? Why should it be so difficult for laymen to pursue their civil rights claims? This bureaucratic thicket is long overdue for pruning. The bill should establish a temporary, bipartisan commission to study specific legislation to rationalize and harmonize civil rights enforcement.

- Individual Empowerment: Educational vouchers, urban enterprise zones, urban homesteading, and the elimination of excessive or arbitrary regulatory obstacles to entrepreneurial and occupational opportunities, such as licensing regulations and the federal Davis-Bacon Act, can empower minorities on the lowest rungs of the economic ladder.

- Evenhanded application of civil rights legislation: Is it not time that Congress be evenhanded in its application of civil rights? The automatic majority in Congress that supports civil rights legislation should be expected to obey its own laws, and the President should insist that no anti-discrimination legislation will gain his support unless it applies equally to Congress.

UNITED STATES MISSION TO INTERNATIONAL ORGANIZATIONS
GENEVA, SWITZERLAND
EXECUTIVE OFFICE

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This is page 1 of 5 *pages.* **DATE:** December 14, 1990

FROM: (Name/Office Symbol/Extension)	**TO:** (Name/Organization/Telephone Number)
Ambassador Morris B. Abram	The Honorable John H. Sununu Chief of Staff The White House Washington, D.C. Tel: (202) 456-6797 Fax: (202) 456-2397

MESSAGE TEXT:

Deliver attached letter from Ambassador Abram to Mr. Sununu as soon as possible.

Thank you.