- Because your letter deals with the proper way to interpret a judicial opinion, the Attorney General will respond in writing.

- We hope his letter will be ready by C.O.B. today.

- As I understand it, the basic problems with your proposal are (1) that it would overturn 20 years of settled precedent on the meaning of business necessity, and (2) that it would make it impossible for employers to defend a wide range of legitimate employment practices.

- Can you explain what's wrong with the definition that the Supreme Court (and the Administration) have adopted?

When the official subject is presidential politics, taxes, welfare, crime, rights, or values . . . the real subject is

BY
THOMAS BYRNE EDSALL WITH MARY D. EDSALL

RACE IS NO LONGER A STRAIGHTFORWARD, morally unambiguous force in American politics; instead, considerations of race are now deeply imbedded in the strategy and tactics of politics, in competing concepts of the function and responsibility of government, and in each voter's conceptual structure of moral and partisan identity. Race helps define liberal and conservative ideologies, shapes the presidential coalitions of the Democratic and Republican parties, provides a harsh new dimension to concern over taxes and crime, drives a wedge through alliances of the working classes and the poor, and gives both momentum and vitality to the drive to establish a national majority inclined by income and demography to support policies benefiting the affluent and the upper-middle class. In terms of policy, race has played a critical role in the creation of a political system that has tolerated, if not supported, the growth of the disparity between rich and poor over the past fifteen years. Race-coded images and language changed the course of the 1980, 1984, and 1988 presidential elections and the 1990 elections for the governorships of California and Alabama, the U.S. Senate in North Carolina, and the post of Texas secretary of agriculture. The political role of race is subtle and complex, requiring listening to those whose views are deeply repellent to some and deeply resonant for others. The debate over racial policy has been skewed and distorted by a profound failure to listen.

"You could classify me as a working-class Democrat, a card-carrying union member," says Dan Donahue, a Chicago carpenter who became active in the campaign of a Republican state senator in 1988. "I'm not a card-carrying Republican—yet. We have four or five generations of welfare mothers. And they [Democrats] say the answer to that is we need more programs. Come on. It's well and good we should have compassion for these people, but

your compassion goes only so far. I don't mind helping, but somebody has got to help themselves, you've got to pull. When you try to pick somebody up, they have to help. Unfortunately, most of the people who need help in this situation are black and most of the people who are doing the helping are white. We [white Cook County voters] are tired of paying for the Chicago Housing Authority, and for public housing and public transportation that we don't use. They [taxpayers] hate it [the school-board tax] because they are paying for black schools that aren't even educating kids, and the money is just going into the Board of Education and the teachers' union."

Moderate-income voters like Donahue pose a central dilemma for the Democratic Party. They are essential if the party is to have an economically coherent base, and if the party is legitimately to claim to represent not only the poor but also the average working man and woman. These voters have, however, been caught up in an explosive chain reaction of race, rights, values, and taxes which has propelled significant percentages of them out of the Democratic Party in presidential elections and into the "unreliable" column in state and local contests. Racism and racial prejudice fail to explain such voter defection adequately, and Democratic liberals' reliance on charges of racism guarantees political defeat and, more important, guarantees continued ignorance of the dynamics at the core of presidential politics.

The Costs of Liberalism

THE PAST TWO DECADES HAVE SEEN A SIGNIFICANT enlargement of the ideological and value-based underpinnings of political conservatism and, to a large extent, of the Republican Party. Race, rights, and taxes have become key forces behind this enlargement, helping to bring about a new polarization of the electorate, a polarization that has effectively replaced the New Deal coalition structure of presidential contests.

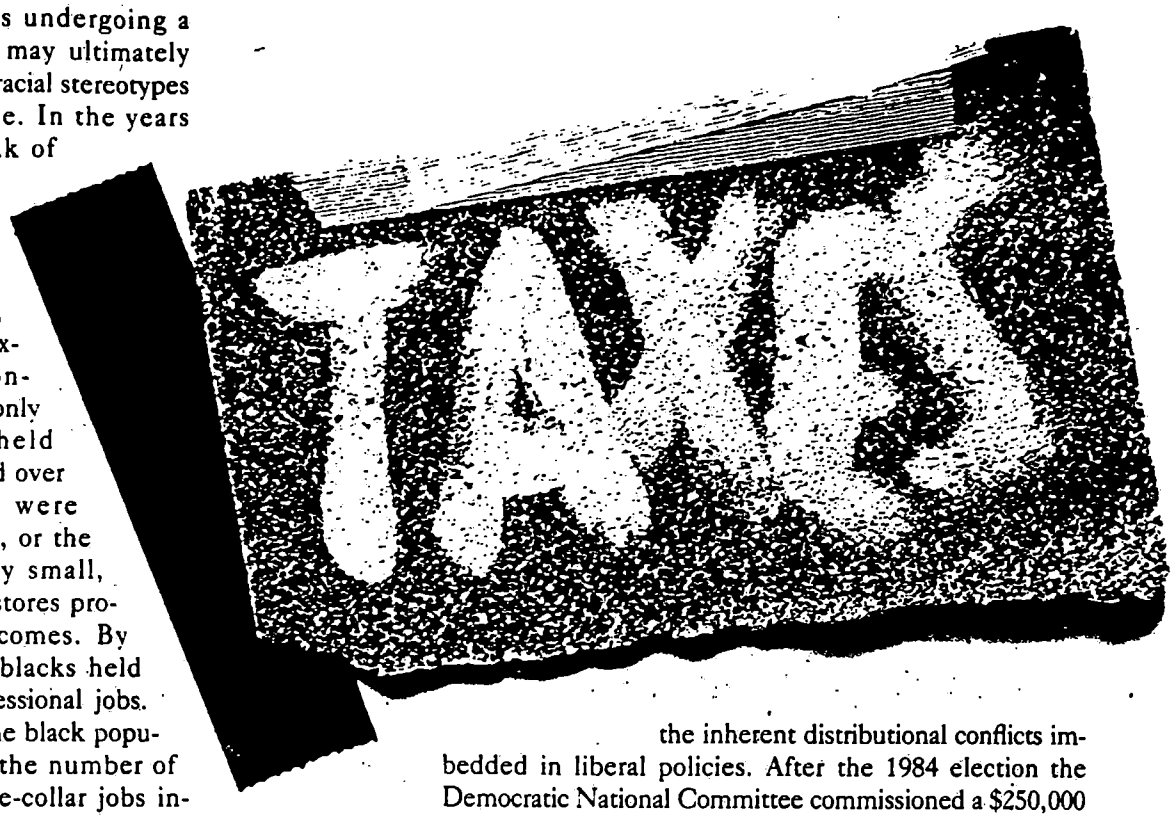
This polarization is built on mutually reinforcing divisions of the electorate: taxpayers against tax recipients; those who emphasize responsibility against those who emphasize rights; proponents of deregulation and an unfettered free market against supporters of the regulatory state and of policies protecting or advancing the interests of specific groups; and, finally, whites against blacks. Public policies backed by liberals have driven these new alignments. In particular, busing, affirmative action, and much of the rights revolution in behalf of criminal defendants, prisoners, homosexuals, welfare recipients, and a host of other previously marginalized groups have, for many voters, converted the government from ally to adversary. The simultaneous increase, over the past two and a half decades, in crime, welfare dependency, illegitimacy, and educational failure have established in the minds of many voters a numbing array of "costs"—perceived and real—of liberalism.

Major elements of the Republican Party have exploited and inflated the costs of liberal policies. Republican strategists and ideologues have furthermore capitalized on these costs to establish a new and evolving ideology: conservative egalitarianism, opposed to special preferences whether for blacks, unions, or any other liberal interest. Liberal Democratic support for preferential hiring on the shop floor and in the schoolroom—to make up for past discrimination—has enabled a conservative Republican Party to lay claim to the cause of equal opportunity, once the rallying cry of the civil-rights movement. In the wake of sustained group and individual conflicts over rights, preferences, and government benefits, an egalitarian populism of the right has emerged, one so strong that it was not only accessible to George C. Wallace in 1968 but remained available twenty years later to a scion of the old guard of the Northeast, George Herbert Walker Bush. Conservative populism has permitted the Republican Party to replace in the minds of many voters the idea of an "establishment" ruled by business interests with a hated new liberal establishment, adversarial to the common man: an elite—of judges, bureaucrats, newspaper editors, ACLU lawyers, academics, Democratic politicians, civil-rights and feminist leaders—determined to enact racially and socially redistributive policies demanding the largest sacrifices from the white working and lower-middle classes.

The new polarization drives a wedge right through the heart of the old Democratic presidential coalition, and threatens to undermine genuine advances in racial equality.

This new polarization drives a wedge right through the heart of the old Democratic presidential coalition, and threatens to undermine the genuine advances in racial equality which have occurred in the years since the passage of the 1964 Civil Rights Act. Race relations in America are, in fact, moving on two tracks. On one there has

been an extraordinary integration of the races, a striking expansion of the black middle class, and a powerful contribution from blacks to the mainstream culture. American society is undergoing a transformation that may ultimately destroy many of the racial stereotypes that drive prejudice. In the years before the outbreak of the Second World War, 73 percent of all black college graduates became ministers or teachers, almost all serving exclusively black constituencies. In 1940 only 187,520 blacks held white-collar jobs, and over 100,000 of them were clergymen, teachers, or the owners of generally small, ghetto-based retail stores producing marginal incomes. By 1990, 1.91 million blacks held managerial and professional jobs. From 1950 to 1990 the black population doubled but the number of blacks holding white-collar jobs increased by 920 percent.



On the second track, racial progress has run into major roadblocks: crime, welfare dependency, illegitimacy, drug abuse, and a generation—disproportionately black—of young men and women unwilling either to stay in school or to take on menial labor, a group that has collided with a restructuring of the American economy and a dramatic loss of well-paid entry-level jobs. The worsening of the symptoms of social dysfunction over the past three decades has become a driving force in politics, for the symptoms are perceived as an unacceptable cost of liberalism not only in the neighborhoods of southwest Chicago but also, increasingly, in the more affluent sections of suburbia and in the business cores of cities.

A New Lease on Prejudice

LIBERAL ELITES HAVE HAD MAJOR DIFFICULTY recognizing the costs both of racial conflict and of the broader rights revolution in behalf of groups as diverse as women, the mentally disabled, prison inmates, and immigrants from developing countries. Liberal elites have in addition disregarded the effects of burdensome taxes on working-class and middle-class voters, who may see themselves as being forced to finance a revolution challenging their own values and often undermining their hard-won security. Democratic liberalism has shown a consistent reluctance to confront the inherent distributional conflicts imbedded in liberal policies. After the 1984 election the Democratic National Committee commissioned a $250,000 voter study by CRG Communications, only to quash its release because it made explicit controversial sources of dissent from liberal orthodoxy. The study, drawn from a poll of 5,000 voters and thirty-three focus groups, found that Democratic defectors among white urban ethnics and white southern moderates believed that

> the Democratic Party has not stood with them as they moved from the working to the middle class. They have a whole set of middle-class economic problems today, and their party is not helping them. Instead it is helping the blacks, Hispanics and the poor. They feel betrayed. . . . [These voters] view gays and feminists as outside the orbit of acceptable social life. These groups represent, in their view, a social underclass. . . . [White urban ethnics] feel threatened by an economic underclass that absorbs their taxes and even locks them out of the job, in the case of affirmative action. They also fear a social underclass that threatens to violate or corrupt their children. It is these underclasses that signify their present image of the Democratic Party. . . . The Democrats are the giveaway party. Giveaway means too much middle-class money going to blacks and the poor.

In some communities, such as the white working-class suburbs of Detroit, positive assessments of the Democratic Party have been washed out altogether by anger and discontent that are open, unabashed, and extremely harsh. Voters from such communities have been crucial to the outcome of presidential elections for the past two

decades—they are the silent majority of the 1970s and the Reagan Democrats of the 1980s. Their votes expanded the Republican coalition to produce election-year majorities, and their abandonment of the Democratic Party in presidential elections undermined the coalition of the have-nots and affirmed the ascendancy of a coalition of the haves, as disaffected moderate-income white voters joined forces with traditional Republicans. The views of working-class defectors from the Democratic Party were examined in a 1985 study of suburban Detroit by Stanley Greenberg, the president of the Analysis Group, a Democratic polling firm. The study found that

> these white Democratic defectors express a profound distaste for blacks, a sentiment that pervades almost everything they think about government and politics. Blacks constitute the explanation for their [white defectors'] vulnerability and for almost everything that has gone wrong in their lives; not being black is what constitutes being middle class; not living with blacks is what makes a neighborhood a decent place to live. . . . These sentiments have important implications for Democrats, as virtually all progressive symbols and themes have been redefined in racial and pejorative terms. . . .
>
> The special status of blacks is perceived by almost all of these individuals as a serious obstacle to their personal advancement. Indeed, discrimination against whites has become a well-assimilated and ready explanation for their status, vulnerability and failures.

The bitterness and anger of the white Detroit voters is one consequence of a central tragedy of the past twenty-five years: the drive to achieve racial equality and the striking advances of the black middle class have coincided with a significant worsening of social dysfunction in the bottom third of the black community. Social dysfunction—crime, welfare dependency, joblessness, and illegitimacy—wreaks havoc, crushing recognition of the achievements of liberalism. When it is disproportionately associated with one group or race, social dysfunction assaults efforts to eliminate prejudice. Gordon W. Allport wrote in *The Nature of Prejudice*,

> Prejudice . . . may be reduced by equal status contact between majority and minority groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports . . . and provided it is of the sort that leads to the perception of common interests and common humanity between members of the two groups.

The contact between whites and the black underclass has routinely violated every standard necessary for the breakdown of racial stereotypes. Most white contact with the underclass is through personal experience of crime and urban squalor, through such experience related by friends and family, or through the daily reports about crime, drugs, and violence which appear on television and in newspapers. The news includes, as well, periodic reports on out-of-wedlock births, welfare fraud, drug-related AIDs, crack babies, and inner-city joblessness.

"The stereotype is not a stereotype anymore," says Kenneth S. Tollett, a black professor of education at Howard University. "The behavior pattern in the underclass is not stereotypical in the pejorative sense, but it is a statement of fact. A stereotype is an overgeneralization, 'This is the way people are,' and then we say all are like that. The behavior of black males in the underclass is now beginning to look like the black stereotype. The statements we have called stereotypes in the past have become true."

Social dysfunction, and crime in particular, have tragically served over the past two and a half decades to reinforce racial prejudice. Statistics suggest the widespread problems among the black underclass.

In a nation that is 12 percent black and 84 percent white, there were in 1986, according to the Department of Justice, more black prison inmates than white or Hispanic. There were in 1988, according to the Department of Health and Human Services, more black welfare recipients than white. By the late 1980s, according to the Bureau of the Census, a majority of black families were headed by single or separated women. At the same time, according to the National Center for Health Statistics, more than 60 percent of all black children were born out of wedlock. Among black male high school dropouts aged twenty to twenty-four, according to the Bureau of Labor Statistics, the proportion who had not worked at all during the previous year rose from 15.1 percent in 1974 to a staggering 39.7 percent in 1986. The comparable figures for young white dropouts were 9.1 percent in 1974 and 11.8 percent in 1986, and for young Hispanic dropouts 8.8 percent and 9.6 percent. According to figures compiled by the Department of Justice in criminal-victimization surveys from 1979 to 1986—the surveys considered by law-enforcement professionals to contain the most reliable data on race—an annual average of 44.3 out of every 1,000 blacks were victims of a violent crime, with much higher rates in very poor areas, as compared with 34.5 out of every 1,000 whites. At the same time, however, a far higher percentage of the crimes committed by blacks than of the crimes committed by whites were interracial. In 1986 and 1987 whites committing crimes of violence—robbery, rape, and assault—chose white victims 97.5 percent of the time and black victims 2.5 percent of the time in those incidents in which the victim could identify the race of the offender. Blacks committing violent crimes chose white victims 51.2 percent of the time and black victims 48.8 percent of the time. For the specific crime of robbery the figures are similarly striking. In 1986–1987, of those robberies in which the race of the offender was identified by the victim, 95.1 percent of robberies committed by whites had white victims and 4.9 percent had black victims; 57.4 percent of robberies committed by blacks had white victims and 42.6 percent had black victims.

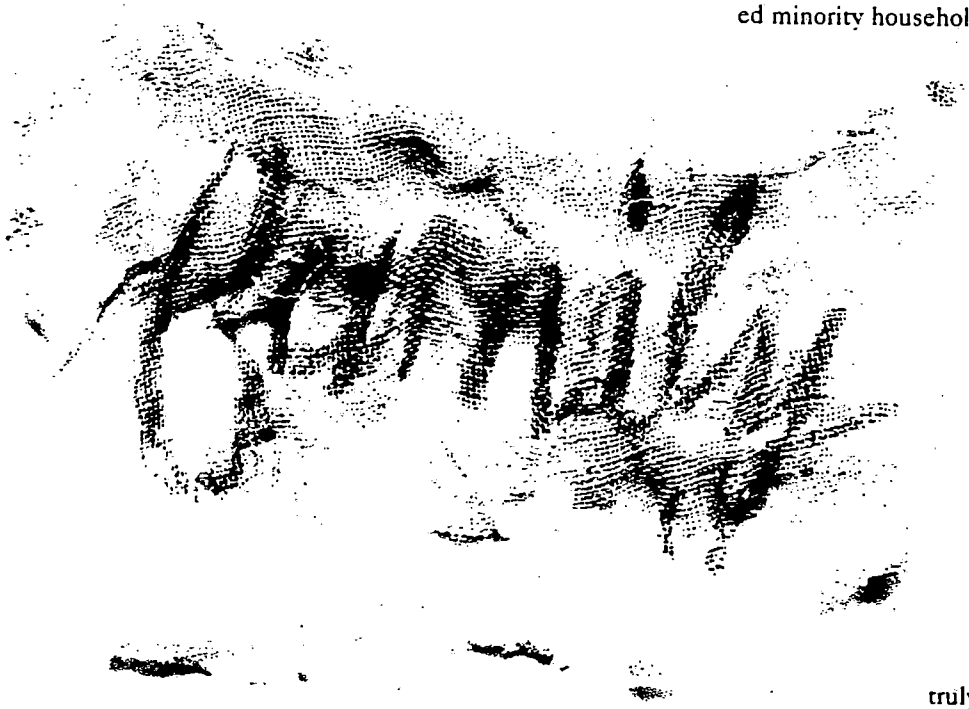
The Races Polarize Over What's Gone Wrong

VIOLENCE, JOBLESSNESS, DRUG ABUSE, AND FAMily disintegration have not only functioned to reinforce racial prejudice; they have also led to widely differing interpretations of what has gone wrong. Significant numbers of blacks, both middle-class and poor, see malevolent white power behind the disruption and dislocation in black neighborhoods. Take drug abuse. "It's almost an accepted fact," says Andrew Cooper, the publisher of the *City Sun*, a black weekly Brooklyn newspaper, echoing ideas often heard on black radio talk shows and in other all-black forums. "It's a deep-seated suspicion. I believe it. I can't open my desk drawer and say, 'Here it [the evidence] is.' But there is just too much money in narcotics. People really believe they are being victimized by The Man. If the government wanted to stop it, it could stop it." Louis Farrakhan, the leader of the Nation of Islam, brought an entire auditorium of black politicians, intellectuals, and organizers—men and women on the left of the political spectrum, but by no means on the outer fringes—to their feet during a 1989 speech in New Orleans which clearly captured elements of a black world view. He said,

> The black man and woman in America is of no further use to the children of our former slavemasters and when a thing loses its use or utility, it loses its value. If your shoes wear out, you don't keep them around; if an old dress becomes old, you don't keep it around. Once it loses utility, you move to get rid of it. . . . We cannot accept the fact that they think black people have become a permanent underclass. . . . If we have become useless in a racist society, then you must know that not public policy but a covert policy is being already formulated to get rid of that which is useless, since the economy is going down and the world is going down. Follow me, brothers and sisters. According to demographers, if the plummeting birth rate of white people in America continues, in a few years it will reach zero population growth. As for blacks, Hispanics, and Native Americans, if their present birth rate continues, by the year 2080, demographers say, blacks, Hispanics, and Native Americans will conceivably be 50 percent or more of the United States population. . . . If things continue just birthwise, we could control the Congress, we could control the Supreme Court, we could control state legislatures, and then 'Run, Jesse, run,' or 'Run, Jesse Junior, run,' or 'Run, Jesse the Third, run.'"

The emergence of predominantly black underclass neighborhoods rife with the worst symptoms of social pathology has proved to be one of the most disturbing developments in the United States, both for city residents and for residents of surrounding areas. In his book *Canarsie*, the Yale sociologist Jonathan Rieder described the climate of opinion he found in the late seventies in one of Brooklyn's white urban ethnic enclaves:

> Canarsie's image of ghetto culture crystalized out of all the visual gleanings, fleeting encounters, and racist presumptions. Lower-class blacks lacked industry, lived for momentary erotic pleasure, and, in their mystique of soul, glorified the fashions of a high-stepping street life. The hundreds of thousands of female-headed minority households in New York City, and the spiraling rate of illegitimate births, reinforced the impression that ghetto women were immoral. . . . When provincial Jews and Italians recoiled from the riven families of the ghetto, they were prisoners of ancient notions of right as well as vituperative passion. "The blacks have ten kids to a family," the Italian wife of a city worker observed. . . . "Bring up a few, give them love and education." . . . It is hard to exaggerate the bewilderment Canarsians felt when they considered the family patterns of the ghetto. To be without a family in southern Italy "was to be truly a non-being, *un saccu vacante* (an empty sack) as Sicilians say, *un nuddu miscatu cu nenti* (a nobody mixed with nothing)."



The Values Barrier

THE INTENSITY OF PUBLIC REACTION TO THE world of the underclass has coincided with a larger conflict in America over values. This conflict has evolved, in complex ways, from one of the major struggles of the twentieth century: the struggle between so-called traditional values and a competing set of insurgent values. Traditional values generally have been seen to revolve around commitments to the larger community—to the family, to parental responsibility, to country, to the work ethic, to sexual restraint, to self-control, to rules, duty, authority, and a stable social order. The competing set of insurgent values, the focus of rights-oriented political ideologies, of the rights revolution, and of the civil-rights movement, has been largely concerned with the rights of the individual—with freedom from oppression, from confinement, from hierarchy, from authority, from stricture, from repression, from rigid rule-making, and from the status quo.

On a level essentially ignored by liberal elites—but a level, nonetheless, of stark reality to key voters—the values debate has become conflated with racial politics. Among Democrats and liberals the stigmatization of racism in the 1960s had the unintended and paradoxical consequence of stigmatizing the allegiance of many voters to a whole range of fundamental moral values. In the late 1960s and early 1970s the raising of the "traditional values" banner over such issues as law and order, the family, sexual conduct, joblessness, welfare fraud, and patriotism was seen by liberals and blacks—with some accuracy—as an appeal to racist, narrow-minded, repressive, or xenophobic instincts, designed to marshal support for reactionary social policies. The conflation by the political right of values with attempts to resist racial integration, to exclude women from public life, and to discredit the extension of constitutional rights to minorities fueled an often bitter resistance by the left and by blacks to the whole values package.

The result was that liberal Democrats often barred from consideration what are in fact legitimate issues for political discourse, issues of fundamental social and moral concern which must be forthrightly addressed by any national candidate or party. This stigmatization as "racist" or as "in bad faith" of open discussion of values-charged matters—ranging from crime to sexual responsibility to welfare dependency to drug abuse to standards of social obligation—has for more than two decades created a *values barrier* between Democratic liberals and much of the electorate. Insofar as many voters feel that their cherished policies and practices have been routed, the values barrier has been a major factor in fracturing a once deeply felt loyalty to a liberal economic agenda.

When rank-and-file white voters characterize the value structure of the underclass as aberrant, white liberals are not alone in their angry response. In segments of the black community the response is often a wounded outrage so extreme that it precludes all debate.

Bernard Boxill, a black scholar at the University of North Carolina, has, for example, argued that the growing problems of the underclass may be used by the white community as "an excuse to undo the legal, social and economic advances made by the black middle class, plunge the country into a race war, and worst of all, be a pretext for genocide."

Dr. Frances Welsing, a black psychiatrist, was loudly applauded at a predominantly black "town meeting" organized and televised in 1989 by ABC-TV and Ted Koppel when she argued that whites bear responsibility for whatever disorders there may be in black ghettos:

> Racism is a behavior system that is organized because white people are a minority on the planet. . . . If we understand the white fear of genetic annihilation, which is why Willie Horton [the Massachusetts prisoner who committed rape and assault while on furlough] could be used as a very profound symbol by the Republican Party to win this election, then we will understand what is happening to the black male in this society. The black male is a threat to white genetic annihilation. And so he is profoundly attacked in this society.

Stigmatization as "racist" or as "in bad faith" of open discussion of values-charged matters has created a values barrier between liberals and much of the electorate.

The Roots of Our Race-Charged Politics

IN THE GULF BETWEEN FRANCES WELSING AND DAN Donahue one can see evidence of a political struggle that goes back to the 1960s. When one looks at recent political history through the prism of our current race-charged politics, familiar events take on a new significance. From the perspective of 1991, for example,

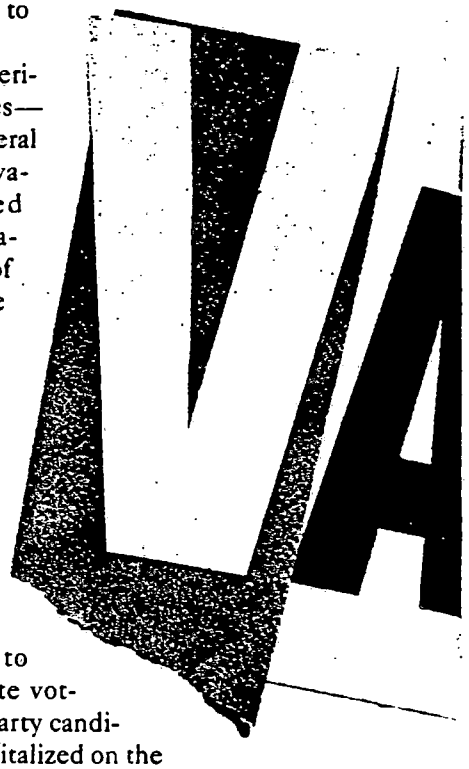
the presidential election of 1964 stands out as a turning point in the politics of race in the United States. That election forced race, already a volatile national issue, into the partisan competition between the Democratic and Republican parties. The 1964 contest pitted the Democrat Lyndon Johnson, the leading supporter of the recently passed Civil Rights Act (which granted full U.S. citizenship rights to blacks for the first time in history), against the Republican Barry Goldwater, an ideological conservative and a strong opponent of the bill. By Election Day, 1964, an exceptional 75 percent of the electorate knew that Congress had that year passed the bill, with a striking 96 percent of those voters aware that Johnson had backed the measure and 84 percent aware that Goldwater had opposed it.

The Democratic and Republican nominees' polarized positions on civil rights immediately transformed public perceptions of the two parties. Two years before the 1964 election, polls conducted by National Election Studies showed virtually no difference in the public assessment of whether the Democratic or the Republican Party would be "more likely to see to it that Negroes get fair treatment in jobs and housing." Of those polled in the 1962 survey, 22.7 percent identified the Democrats as more likely to protect black interests, 21.3 percent identified the Republicans, and the remaining 56 percent said either that there was no difference between the parties or that they had no opinion. By 1964, however, fully 60 percent identified the Democratic Party as more likely to help blacks get fair treatment in seeking jobs, and only seven percent identified the Republican Party—the party of Abraham Lincoln.

By 1964 the Democrats had become the party of racial liberalism and the Republicans had become the party of racial conservatism. It was the first and last presidential election in which racial liberalism was politically advantageous.

The event most strikingly associated with the decline in political support for Democratic liberalism was the riot that broke out on August 11, 1965, in the Watts section of Los Angeles. Blacks throwing rocks and bottles at policemen shouted, "Burn, baby, burn!" as television cameras rolled. By August 16, after the National Guard had been called in and order slowly restored, there were thirty-four dead, more than 1,000 injured, over 800 buildings damaged or destroyed, and nearly 4,000 arrests. Even Martin Luther King, Jr., the leader of black protests since the Montgomery bus boycott in 1955, was unprepared for Watts. Stunned by the scope of anger among rioters, and by their perception that the civil-rights movement had been largely irrelevant to improving conditions in the ghetto, King "was absolutely undone" after visiting Watts, his close associate Bayard Rustin recalled.

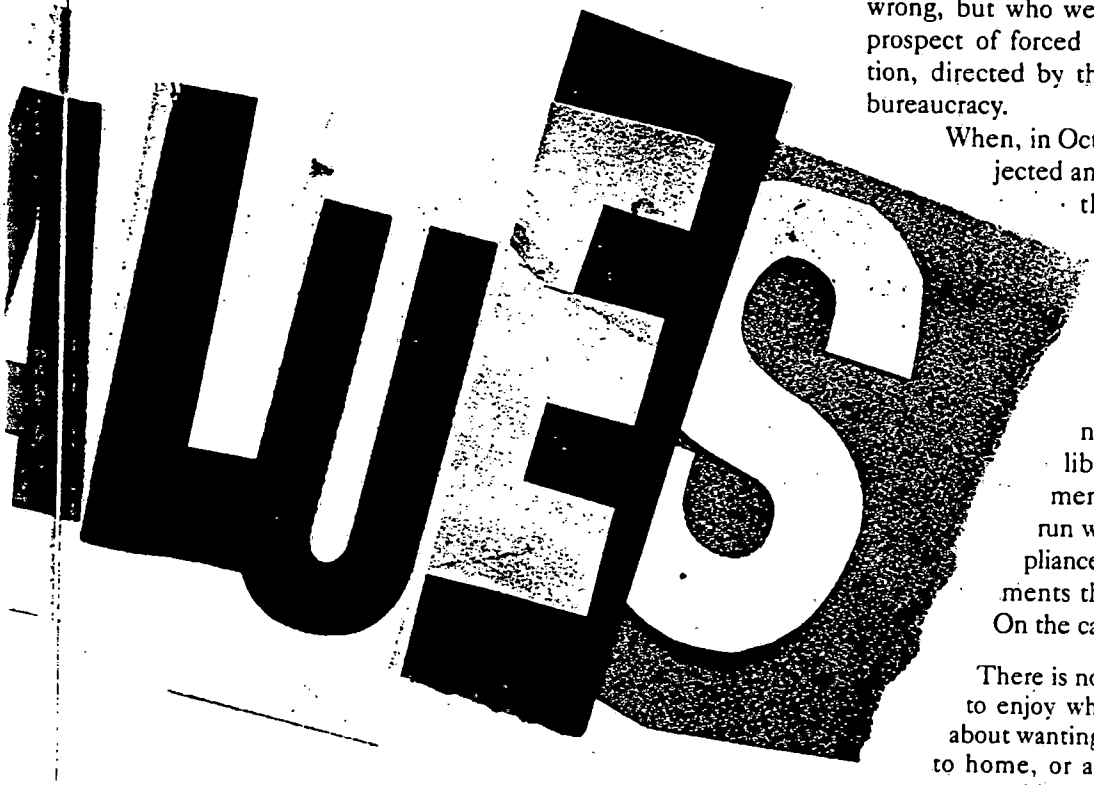
A succession of other violent eruptions followed over the next three years. According to the Kerner Commission, appointed to investigate the causes of rioting, in 1967 there were 164 "disorders," eight of them ranked as "major" on the grounds that they involved "many fires, intensive looting, and reports of sniping; violence lasting more than two days; sizeable crowds; and use of National Guard or federal forces as well as other control forces." More than eighty people were killed, nearly 90 percent of them black civilians and 10 percent policemen, firemen, and other public officials. More than three quarters of the deaths were in two cities, Detroit (forty-three) and Newark (twenty-three). During the five-year period 1964–1968, according to one estimate, 329 significant outbreaks of violence took place in 257 cities. Seventy-two percent of rioters in Newark surveyed by the Kerner Commission said they agreed with the statement "Sometimes I hate white people"—a finding painful to white liberals.



The sea change in American presidential politics—the replacement of a liberal majority with a conservative majority—involved the conversion of a relatively small proportion of voters: the roughly five to ten percent of the electorate, made up primarily of white working-class voters, empowered to give majority status to either political party. Alabama Governor George C. Wallace was the politician who showed the Republicans how to seize lower-income white voters. Running as a third-party candidate in 1968, Wallace capitalized on the huge defection of white Democrats, particularly in the South, as the Democratic Party formally repudiated segregation. He won just under 14 percent of the vote. Wallace and Nixon together that year won 57 percent of the vote, however, establishing what would become the conservative presidential majority. This majority carried every presidential election but one over the next twenty years—the exception being Southern Baptist Jimmy Carter's victory in the wake of Watergate, the worst Republican scandal in history.

The strength of Wallace's appeal in 1968 went beyond white backlash. Wallace defined a new right-wing populism, capitalizing on voter reaction to the emergence of racial, cultural, and moral liberalism. Wallace demonized an elite Democratic establishment, providing a desperately sought-after moral justification to those whites who saw themselves as victimized and displaced by the black

struggle for civil rights and by broader social change. For these voters, Wallace portrayed the civil-rights movement not as the struggle of blacks to achieve equality—a goal impossible to challenge on moral grounds—but as the imposition of intrusive "social engineering" on working men and women by a coercive federal government in the hands of a liberal cabal: lawyers, judges, editorial writers, government bureaucrats, and intellectuals. "They have looked down their noses at the average man on the street too long," Wallace told disaffected voters. "They've looked down at the bus driver, the truck driver, the beautician, the fireman, the policeman, and the steelworker, the plumber, and the communications worker, and the oil worker, and the little businessman, and they say, 'We've gotta write a guideline. We've gotta tell you when to get up in the morning. We've gotta tell you when to go to bed at night.'" Wallace laid the groundwork for the Republican assault



on "reverse discrimination." "You know who the biggest bigots in the world are—they're the ones who call others bigots," he declared at a Milwaukee rally, as he struggled to be heard over the shouts of protesters. In another campaign speech he said, "It's a sad day in the country when you can't talk about law and order unless they want to call you a racist. I tell you that's not true."

Perhaps most important for long-range Republican strategy, Wallace brought into mainstream presidential politics a new political symbol, a vilified Democratic establishment that replaced as an enemy of lower-income voters the Republican establishment of corporate America and the rich. Wallace effectively portrayed this Democratic establishment as bent on imposing a liberal, authoritarian, statist agenda on an unwilling electorate.

To voters resentful of the heavy hand of the new liberal establishment, Wallace said, "You are one man and one woman, and your thoughts are just as good as theirs."

Richard Nixon set out to win the Wallace vote. Nixon was among the first Republicans to understand how the changing civil-rights agenda could be manipulated to construct a new conservative majority. His strategy effectively straddled the conflict between increasing public support for the abstract principle of racial equality and intensified public opposition to government-driven enforcement mechanisms. Nixon found a message that encompassed the position of the growing majority of white Americans who had come to believe that the denial of basic citizenship rights to blacks was wrong, but who were at the same time opposed to the prospect of forced residential and educational integration, directed by the courts and the federal regulatory bureaucracy.

When, in October of 1969, the Supreme Court rejected an Administration attempt to postpone the desegregation of Mississippi's schools, Nixon declared, "We will carry out the law," but he stressed that he did "not feel obligated to do any more than the minimum the law required." The Court ruling, Nixon warned, should not be viewed by "the many young liberal lawyers [in the Justice Department] . . . as a carte blanche for them to run wild through the South enforcing compliance with extreme or punitive requirements they had formulated in Washington." On the campaign trail in 1972 Nixon declared,

> There is no reason to feel guilty about wanting to enjoy what you get and get what you earn, about wanting your children in good schools close to home, or about wanting to be judged fairly on your ability. Those are not values to be ashamed of; those are values to be proud of. Those are values that I shall always stand up for when they come under attack.

The Republican Racial Strategy

A CENTRAL IRONY OF THE NIXON ADMINISTRATION was that the development of a Republican alternative—"black capitalism"—to the traditional civil-rights agenda created a critical vulnerability for Democrats in the 1980s. Under black capitalism the federal government began actively to promote three racial-preference programs that would soon become con-

troversial: a minority contracting program known as "8-a," which set aside fixed percentages of federal contracts for minority-owned businesses; the Office of Minority Business Enterprise, established within the Department of Commerce to assist minority business in securing government contracts; and, most important, the so-called Philadelphia Plan, designed to increase black access to high-paying union jobs.

The Philadelphia Plan established the authority of the federal government to require companies doing business with the government to set up "goals and timetables" for the hiring and promotion of minority members. The plan set specific percentage "ranges" for blacks and other minority groups for craft-union jobs. For example, plumbers and pipefitters, of whom only twelve out of 2,335 in Philadelphia were black (0.5 percent), were given a hiring goal of five to eight percent in 1970, a range that would rise to 22 to 26 percent by 1973. The goals-and-timetables mechanism was incorporated in 1970 into the regulations governing all federal procurement and contracting—affecting a universe of corporations that employed more than a third of the nation's work force.

Nixon in 1969 did not anticipate that the affirmative-action provisions of his Philadelphia Plan would become, in the course of the next twenty years, essential to a Republican strategy of polarizing the electorate along lines of race—and thus be vital to constructing a presidential partisan realignment. It did not take him long to learn, however: by the 1972 election Nixon was campaigning against the quota policies that his own Administration had largely engendered.

It was Nixon's re-election campaign that developed a relatively comprehensive Republican racial strategy stressing whenever possible the costs of remedies for discrimination, especially in the cases of busing and affirmative action. On March 17, 1972, Nixon escalated his assault on busing. The school bus, "once a symbol of hope," had become a "symbol of social engineering on the basis of abstractions," he said. Seeking to reap political rewards from the growing stockpile of blue-collar resentment, Nixon turned against his own Philadelphia Plan: "When young people apply for jobs . . . and find the door closed because they don't fit into some numerical quota, despite their ability, and they object, I do not think it is right to condemn those young people as insensitive or even racist."

The Democrats Become a White-Collar Party

IN DEVISING A POLITICAL STRATEGY FOR CAPTURING white working-class and southern voters, the Nixon Administration in 1972 would have had difficulty designing a scenario more advantageous to the Republicans, and more damaging to the Democratic Party, than the one the Democrats devised for themselves. This scenario grew out of a seemingly minor development at the 1968 Democratic convention. As a token gesture of appeasement to the forces of Eugene McCarthy and Robert Kennedy, Democratic Party regulars allowed the creation of a special Commission on Party Structure and Delegate Selection, to ensure that "all feasible efforts have been made to assure that delegates are selected through party primary, convention, or committee procedures open to public participation within the calendar year of the National Convention."

No one, neither Democratic Party regulars nor the press, had any notion of the scope of what had been set in motion. "There was not much attention to the Rules Committee reports," Max Kampelman, one of Hubert Humphrey's major strategists, recalled later. "Our objective was to get a nominee. . . . We said to ourselves, if you are going to *study* it, you can control it. If you get the nomination, you'll have control of the DNC [Democratic National Committee]. If you have the DNC, then you'll control any study. A study commission could be a way of harmonizing the issue." Few political judgments have proved more incorrect.

The liberal-reform wing of the Democratic Party—in part made up of veterans of the civil-rights and student anti-war movements—dominated the party-structure commission and achieved a radical alteration of the presidential-delegate selection process. The new rules shifted the power to nominate presidential candidates from the loose alliance of state and local party structures, which had in the past been empowered to use their control of the party to pick delegates, to the universe of activists, often rights-oriented liberal reformers, who were now granted direct access to the machinery of delegate selection. "Before reform," Byron Shafer wrote in his book describing the party rules changes, *Quiet Revolution*,

> there was an American party system in which one party, the Republicans, was primarily responsive to white-collar constituencies and in which another, the Democrats, was primarily responsive to blue-collar constituencies. After reform, there were two parties each responsive to quite different white-collar coalitions, while the old blue-collar majority within the Democratic Party was forced to try to squeeze back into the party once identified predominantly with its needs.

In other words, those who unquestionably lost power in the Democratic presidential-nomination process were the white working- and lower-middle-class voters who were already leaving the party in droves because they felt the heaviest burdens of the civil-rights revolution had been placed on their shoulders.

Party reforms produced a substantive ideological upheaval. Before 1972, Democratic presidential delegates were only slightly more liberal than the public at large, according to delegate surveys, while Republican delegates were considerably more conservative than the electorate. Delegates to the 1972 Democratic convention,

however, were significantly further to the political left of the electorate at large than the Republican delegates that year were to the right.

No development better summarizes the shift in intra-party power than the decision by the McGovern forces at the 1972 convention to oust the fifty-nine-member Cook County delegation under the control of Chicago Mayor Richard Daley. Since 1932 the Chicago organization had been more important to the success or failure of Democratic presidential candidates than any other city machine. Without Daley in 1960, for example, John F. Kennedy would not have carried Illinois by an 8,858-vote margin.

The Cook County delegation, elected in a March 21 Illinois primary, was vulnerable to challenge because Daley's machine had slated candidates in closed meetings, and because the composition of the Chicago delegation did not include the required proportions of women and blacks.

Pro-McGovern reformers successfully voted out the Daley delegates and replaced them with a slate "chosen no one knew quite how," according to Theodore H. White. White wrote,

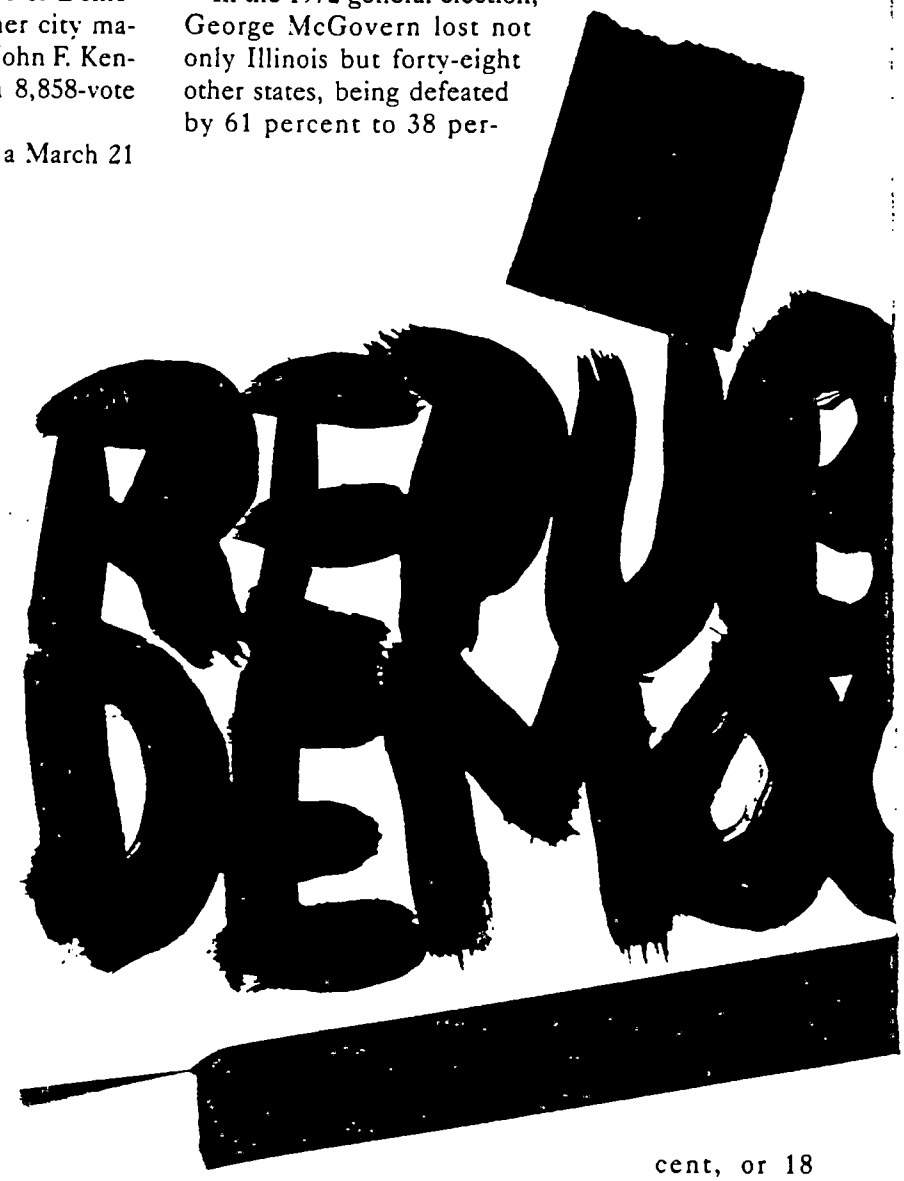
> In the 1st Congressional District of Chicago, for example, a group of people had met at the home of one James Clement and decided that only ten of those present might vote for an alternate to Mayor Daley's slate; those ten had chosen 7 delegates, including the Reverend Jesse Jackson. This rival hand-picked alternate slate offered the exact proportion of women, blacks and youth required by the McGovern reform rules. Yet the elected slate in the 1st Congressional had been voted in by the people of Chicago, and these had not.

In an open letter to Alderman William Singer, the leader of the Chicago reformers, the *Chicago Sun-Times* columnist Mike Royko wrote,

> I just don't see where your delegation is representative of Chicago's Democrats. . . . About half of your delegates are women. About a third of your delegates are black. Many of them are young people. You even have a few Latin Americans. But as I looked over the names of your delegates, I saw something peculiar. . . . There's only one Italian there. Are you saying that only one out of every 59 Democratic votes cast in a Chicago election is cast by an Italian? And only three of your 59 have Polish names. . . . Your reforms have disenfranchised Chicago's white ethnic Democrats, which is a strange reform. . . . Anybody who would reform Chicago's Democratic Party by dropping the white ethnic would probably begin a diet by shooting himself in the stomach.

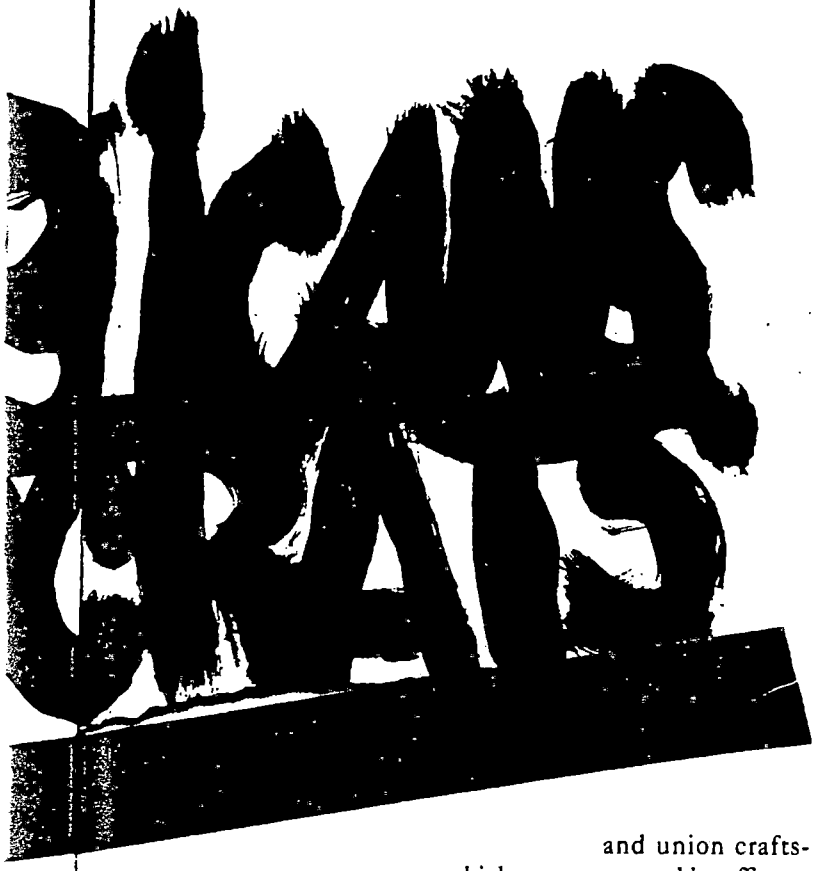
After the credentials committee voted seventy-one to sixty-one to oust the Daley delegation, Frank Mankiewicz, a spokesman for the McGovern campaign, dryly noted, "I think we may have lost Illinois tonight."

In the 1972 general election, George McGovern lost not only Illinois but forty-eight other states, being defeated by 61 percent to 38 percent, or 18 million votes. For the long-run future of the capacity of the Democratic Party to nominate and elect Presidents, the central issue was not just the magnitude of McGovern's defeat. It was the inability of the Democratic Party to absorb competing factions and to mediate the differences among them. The new rules removed from the presidential-nomination process those white elected and party officials who were closer to the racial and cultural conflicts plaguing the party than the liberal reformers who dominated the proceedings. Among those who did not attend the



1972 convention were 225 of 255 Democratic congressmen, the Democratic mayors of Los Angeles, Detroit, Boston, Philadelphia, and San Francisco, Mayor Daley and his Chicago loyalists, and uncounted city councilmen, state legislators, and leaders of Democratic ward organizations.

These leaders represented white voters who were on the front lines of urban housing integration; who were the subjects of busing orders; who were competitors for jobs as policemen and firemen



and union craftsmen which were governed by affirmative-action consent decrees; who regarded as incomprehensible many liberal Supreme Court decisions on criminals' rights, abortion, sexual privacy, school prayer, busing, and obscenity. These voters and their political representatives were, and still are, largely relegated to peripheral status in the Democratic presidential-primary process. With the withdrawal of socially conservative white voters from the nomination process, Democratic presidential candidates have negotiated that process in the context of an artificially liberal primary electorate that puts the candidates outside the ideological mainstream and provides them with virtually no training in the kinds of accommodation and bargaining essential to general-election victory.

The Civil Rights Agenda Becomes Redistributive

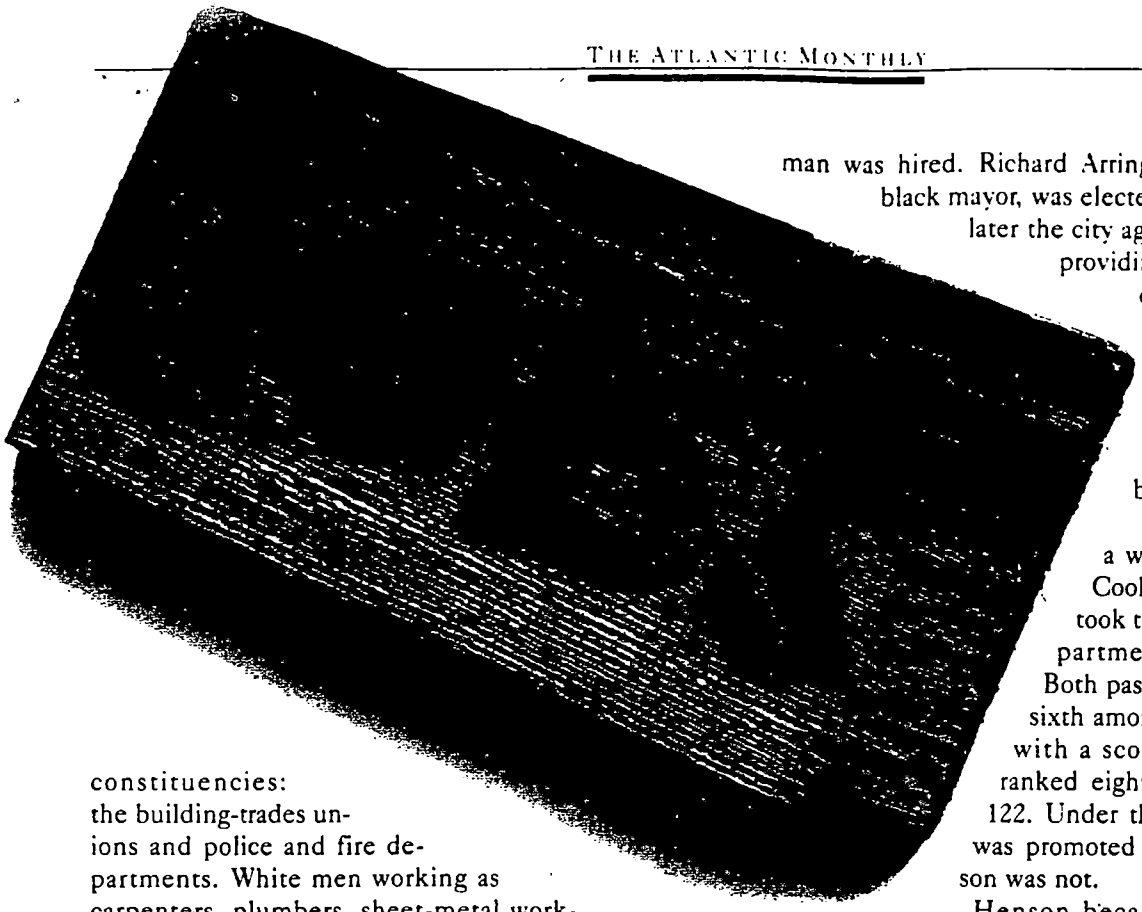
As the white working-class voters who had formed the core of the New Deal coalition began to lose clout within the Democratic Party, the economy began to falter. Steady economic growth, which had made redistributive government policies tolerable to the majority electorate, came to a halt in the mid-1970s. With stagnation the threat to Democratic liberalism intensified. Just as the civil-rights movement reached its height, high-paying union jobs and big-city patronage—which had served to foster upward mobility for each succeeding immigrant generation—began to dry up. Many blacks lost even a toehold on the ladder, while whites slipped down, sometimes just a rung, sometimes all the way to the bottom.

The end of vigorous post–Second World War economic growth came in 1973. Hourly earnings, which had grown every year since 1951 in real, inflation-adjusted dollars, fell by 0.1 percent in 1973, by 2.8 percent in 1974, and by 0.7 percent in 1975. Weekly earnings fell more sharply, by 4.1 percent in 1974 and by 3.1 percent in 1975. Median family income, which had grown from $20,415 (in 1985 inflation-adjusted dollars) in 1960 to $29,172 in 1973, began to decline; family income fell to $28,145 in 1974 and then to $27,421 in 1975.

In a whipsaw action the middle-class tax burden rose with inflation while the economy and real income growth slowed. The tax system was losing its progressivity, placing a steadily increasing share of the cost of government on middle- and lower-middle-class voters, vital constituencies for the Democratic Party. In 1953 a family making the median family income was taxed at a rate of 11.8 percent, while a family making four times the median was taxed at 20.2 percent, nearly double. By 1975 the figures had become 22.7 percent for the average family and 29.5 percent for the affluent family. In other words, for the affluent family the tax burden increased by 46 percent from 1953 to 1976, while for the average family it increased by 92.4 percent.

As the job market, income patterns, and growing pressure from many groups for spending on the poor created a competition for government funds in which there were more losers than winners, the civil-rights agenda itself became increasingly redistributive. In order to remedy past and present discrimination in both employment and education, the courts and the federal regulatory structure turned to tough affirmative-action policies. Federal directives and regulations—developed in part by the Equal Employment Opportunity Commission and endorsed by the Supreme Court in 1971 in *Griggs* v. *Duke Power Co.* and in later decisions—sharply restricted hiring and promotion procedures that adversely affected blacks.

The most aggressive efforts to provide jobs for blacks were directed at the most besieged white Democratic



constituencies: the building-trades unions and police and fire departments. White men working as carpenters, plumbers, sheet-metal workers, iron workers, steamfitters, cops, and firemen became the focus of the anti-discrimination drive waged by the Civil Rights Division of the Justice Department.

The dilemma inherent in using racial preference to remedy past discrimination is sharply reflected in Justice William Brennan's 1976 majority opinion upholding the award of retroactive seniority to blacks in *Franks* v. *Bowman Transportation Co., Inc.*, and in the dissenting opinion of Justice Lewis Powell.

Brennan wrote that retroactive seniority was essential for the victim of discrimination, because without it he

> will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been, in respect to entitlement to these benefits, his inferiors.

Powell, on the other hand, contended that the award of retroactive seniority would penalize "the rights and expectations of perfectly innocent employees. The economic benefits awarded discrimination victims would be derived not at the expense of the employer but at the expense of other workers."

The intensity of the conflict over affirmative action can be seen in less abstract terms in Birmingham, Alabama. Not until 1968—103 years after the end of the Civil War—did the Birmingham fire department hire its first black fireman. Throughout all those years blacks were systematically denied the opportunity not only of employment but also of building seniority and learning the promotional ropes. Legal proceedings were initiated against the city in 1974, the year the second black fireman was hired. Richard Arrington, Birmingham's first black mayor, was elected in 1979, and two years later the city agreed to a consent decree providing that every white hire or promotion would be matched, one for one, by a black hire or promotion, as long as blacks were available who had fulfilled basic test requirements.

In 1983 James Henson, a white fireman, and Carl Cook, a black fireman, both took the Birmingham Fire Department test for lieutenant. Both passed, but Henson ranked sixth among all who took the test, with a score of 192, while Cook ranked eighty-fifth, with a score of 122. Under the consent decree Cook was promoted to lieutenant and Henson was not.

Henson became part of a group of whites attempting to challenge the consent degree. He argued, "I can understand that blacks had been historically discriminated against. I can also understand why people would want to be punitive in correcting it. Somebody needs to pay for this. But they want me to pay for it, and I didn't have anything to do with it. I was a kid when all this went on."

Cook countered, "Say your father robs a bank, takes the money and buys his daughter a Mercedes, and then buys his son a Porsche and his wife a home in the high-rent district. Then they discover he has embezzled the money. He has to give the cars and house back. And the family starts to cry: 'We didn't do anything.' The same thing applies to what the whites have to say. The fact is, sometimes you have to pay up. If a wrong has been committed, you have to right that wrong."

The Birmingham case represents an extreme: pitting white and black workers against each other in a competition for government-controlled jobs and employment benefits. Over time these racial divisions reverberated in Birmingham's political system. Once, every elected official in this city was a Democrat; now racial conflict has begun to translate into a local partisan realignment. By the end of the 1980s Jefferson County, which encompasses Birmingham, had its eighteen seats in the state House of Representatives split between blacks and whites. In partisan terms there were eight black Democrats, one white Democrat, and nine white Republicans. Among the white Republican state representatives was Billy Gray, a former president of the Firefighters Union. Race had become central to establishing partisan difference.

The same zero-sum element of affirmative action in employment is applicable to higher education. "We are committed to a program of affirmative action, and we want to make the university representative of the population of the state as a whole," James A. Blackburn, the dean of admissions at the University of Virginia, said in 1988. "That means fewer spaces for the traditional mainstream white students who have come here from around the country. . . . If you were looking at the academic credentials, you would say Virginia has it upside down. We take more in the groups with weaker credentials and make it harder for those with stronger credentials."

Reagan and Race

EXPLOSIVE FORCES—STAGNANT INCOMES, DECLINING numbers of manufacturing jobs, inflation-driven increases in marginal tax rates, sharply accelerating welfare dependency, skyrocketing crime, soaring illegitimacy, and affirmative-action competition for jobs and college placement—began to reach the point of combustion in the mid-to-late 1970s. Democrats failed to recognize the threat these forces represented; leaders of the party were given false comfort by the belief that Watergate had done irreparable harm to the Republicans.

Nixon's re-election campaign developed a relatively comprehensive Republican racial strategy stressing whenever possible the costs of remedies for discrimination.

The importance of race in the chain of events that brought Ronald Reagan to the White House—from the Great Inflation of the 1970s to the California tax revolt—cannot be overestimated. Reagan, echoing Goldwater from sixteen years before, strengthened the image of the Republicans as the party of racial conservatism. Under Reagan in 1980 the percentage of voters who said the Republican Party was "not likely" to help minorities shot up to 66 percent (from 40 percent in 1976), while those who said that the party would help minorities collapsed to 11 percent (from 33 percent). Unlike Goldwater in 1964, however, Reagan in 1980 demonstrated that racial conservatism was no longer a liability—that in fact it was a clear asset—as his party made gains at every level of electoral competition from state legislative seats to the White House.

Under Reagan the Republican Party in 1980 was able to stake out a conservative civil-rights stand that won strong majority support. Advocacy of "equal opportunity"—the original clarion call of the civil-rights movement—became the center-right position, the core of the new conservative egalitarian populism. Republican and Democratic differences over what "equal opportunity" meant reflected, in part, differences in the opinions of whites and blacks. By the 1980 election the ideological divergence had extended beyond issues of civil rights to basic questions about the role and responsibilities of the federal government. In 1980 blacks who believed that it was the responsibility of government to provide jobs outnumbered those who contended that "government should just let every person get ahead on his own" by a margin of 70–30, according to National Election Studies poll data. Whites, however, split in the opposite direction, contending by a 62–38 margin that government should just let "everyone get ahead on his own" rather than guaranteeing work.

Responses to this question also revealed the extent to which ideology, voting patterns, and race had become commingled. In addition to polarizing blacks and whites, the question was found to polarize Reagan and Carter voters, with Carter getting 80 percent of those who most strongly supported government intervention to provide work, and Reagan winning 79 percent of those most strongly opposed to such intervention.

In a parallel split, Carter received 93 percent of the vote from those citizens, white and black, who most strongly supported government efforts "to improve the social and economic position of blacks," while Reagan got 71 percent of those who felt most adamantly that "the government should not make any special effort to help because they should help themselves."

Race, ideology, and partisanship had become inextricably linked, a linkage that empowered the Republican Party in its new populism. Lee Atwater, who ran southern operations for the 1980 campaign and managed George Bush's 1988 campaign, has argued, "In the 1980 campaign we were able to make the establishment, insofar as it is bad, the government. In other words, big government was the enemy, not big business. If the people are thinking that the problem is that taxes are too high and government interferes too much, then we are doing our job. But if they get to the point where they say the real problem is that rich people aren't paying taxes, that Republicans are protecting the realtors and so forth, then

I think the Democrats are going to be in pretty good shape. The *National Enquirer* readership is the exact voter I'm talking about. There are always some stories in there about some multimillionaire that has five Cadillacs and hasn't paid taxes since 1974, or so-and-so Republican congressman hasn't paid taxes since he got into Congress. And they'll have another set of stories of a guy sitting around in a big den with liquor saying so-and-so fills his den with liquor using food stamps." So what determines whether conservative or liberal egalitarianism is ascendant, Atwater says, is "which one of those establishments the public sees as a bad guy."

Reagan focused on the right-wing populist strategy described by Atwater, playing on the combustible mix of race, big government, and white working-class anger. One of Reagan's favorite anecdotes was the inflated story of a Chicago "welfare queen" with "eighty names, thirty addresses, twelve Social Security cards" whose "tax-free income alone is over $150,000." The food-stamp program, in turn, was a vehicle to let "some young fellow ahead of you buy T-bone steak" while "you were standing in a checkout line with your package of hamburger."

Such implicitly race-laden images, and the values conflict associated with welfare and food stamps, furthered the Republican Party's efforts to expand beyond its traditional base and establish a sustained policy majority—which supported the first major retrenchment of the liberal government policies of the 1930s and the 1960s, ranging from assaults on labor to a broad attempt to dismantle the civil-rights regulatory structure and to overturn court rulings favoring minorities. In direct contrast to the "bottom-up" coalition of the New Deal Democratic Party, the new Republican presidential majority was—and is—a "top-down" coalition.

What "Fairness"—to Whom?

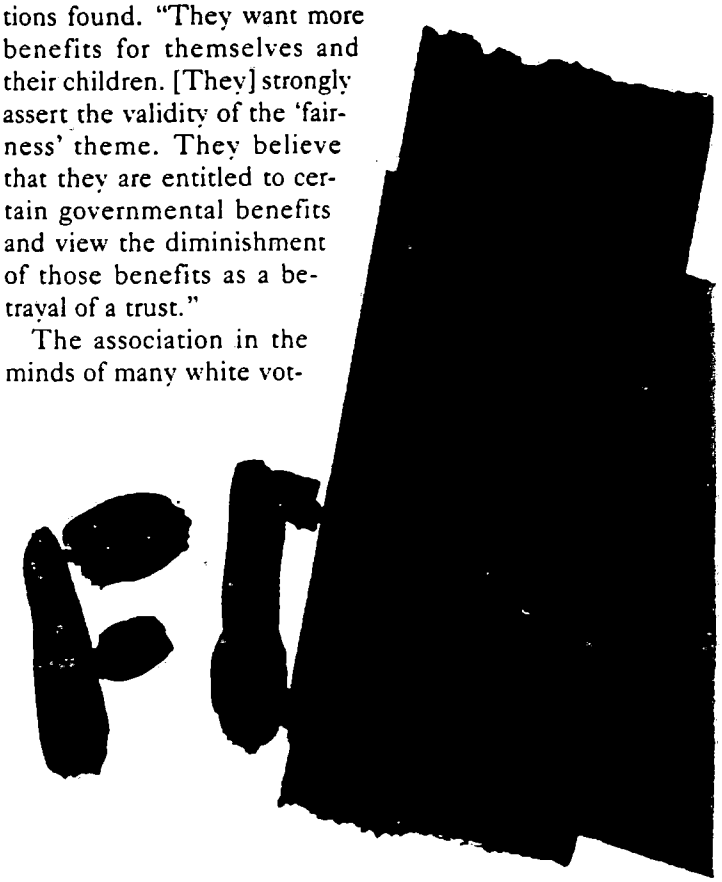
WHILE THE REAGAN ADMINISTRATION REPEATEDLY stressed the costs to white America of civil-rights enforcement, especially affirmative-action remedies, the Democratic Party, deliberately or inadvertently, continued to find itself identified with those costs. Throughout the 1984 campaign Walter Mondale was repeatedly enmeshed in negotiations with Jesse Jackson, with organized labor, with feminist groups, and, most damaging of all, with those seeking to raise taxes to fuel what many voters saw as an intrusive federal government. The vulnerability of the Democratic Party was reflected in the deeply hostile public reaction to Mondale's proposal to raise $30 billion in new revenues to "promote fairness."

The Democratic "fairness" message in 1984 was viewed by a crucial sector of the white electorate through the prism of race. The Analysis Group, reporting on the views of white Democratic defectors in Macomb County, Michigan, found that

> conventional Democratic themes, like opportunity and fairness, are now invested with all the cynicism and racism that has come to characterize these sessions [focus groups]. In effect, the themes and Party symbols have been robbed of any meaning for these Democratic defectors. On hearing the term "fairness," these voters recall, on the one hand, "racial minorities" or "some blacks kicking up a storm," and on the other hand, "only politics" or politicians who are "lying." It never occurred to these voters that the Democrats were referring to the middle class.

Similar views abound among white voters in such communities as Boston, Philadelphia, New Orleans, Chicago, and rural East Texas. These views are particularly devastating to the Democratic Party because fairness has become a central Democratic theme. The 1980 Democratic platform declared, "In all of our economic programs, the one overriding principle *must be fairness*." The platform of four years later asserted, "A nation is only as strong as its commitment to justice and equality. Today, *a corrosive unfairness* eats at the underpinnings of our society." (Emphases added.)

In addition, fairness remains a strong and legitimate issue for the legions of black Democratic voters. "The issues that concern working-class minorities comprise the traditional 'fairness' agenda of jobs, housing, welfare, and education," the voter study by CRG Communications found. "They want more benefits for themselves and their children. [They] strongly assert the validity of the 'fairness' theme. They believe that they are entitled to certain governmental benefits and view the diminishment of those benefits as a betrayal of a trust."



The association in the minds of many white vot-

ers of "fairness" with "fairness to minorities" has made it very difficult for the Democratic Party to capitalize on the striking increase in the disparity of income over the past decade not only between rich and poor but also between the working and lower-middle classes and the rich. During the 1980s the top one percent saw after-tax family income grow by 87 percent, from $213,675 in 1980 to $399,697 in 1990 (both figures in 1990 dollars); families just above the median, in the sixth decile, saw their after-tax income grow by only three percent, from $25,964 in 1980 to $26,741 in 1990.

In the 1988 election no one knew better than Michael Caccitolo, the Republican committeeman of Chicago's 23rd Ward, the difficulty of the Democratic Party's struggle to revive the issue of fairness among the once-Democratic voters of southwest Chicago. "Every night I sit at home and watch the news," he said. "I see Jesse [Jackson] up there talking about 'black empowerment, our people,' and that's sending a message out there that no Democratic precinct captain can possibly overcome. When the Dan Ryan [Expressway] was being built, the old lady from Operation Push [Rev. Willie Barrow, at that time the president of Jackson's Operation Push] comes out and says, 'We are going to close the Dan Ryan down unless we get more blacks on construction.' The people in the neighborhood remember that. Nobody threatened to close the Dan Ryan down to get Polish people on. And they [city and state officials] backed down and they gave a bunch of black guys entry-level jobs. And look who they threw off and got sent back to the neighborhood and told, 'Get on unemployment.' All it takes is two or three of them. Would you define them as Republican precinct captains? No. Is it advantageous for the Republicans to watch a guy like that sitting in a tavern drinking his beer and telling the story about how he got bumped? And then all of a sudden it's six o'clock and [on TV] it's Jesse. It's bad and it ain't going to get better."

The Signal of "Crime"

IN 1988 THE BUSH CAMPAIGN ASSEMBLED AND DEployed a range of symbols and images designed to tap into voters' submerged anxieties about race, culture, rights, and values—the anxieties that had helped to fuel the conservative politics of the post-civil-rights era. The symbols of the Bush campaign—Willie Horton, the ACLU, the death penalty, the Pledge of Allegiance, the flag—and rhetoric such as "no new taxes," the "L-word," and "Harvard boutique liberal" conjured up the criminal defendants'- and prisoners'-rights movements, black crime, permissive liberal elites, a revenue-hungry state, eroding traditional values, tattered patriotism, and declining American prestige.

Willie Horton represented, for crucial sectors of the electorate, the consequences of an aggressively expansive liberalism—a liberalism running up against majority public opinion, against traditional values, and, to a certain degree, against common sense. Horton came to stand for liberalism's blurring of legitimate goals, such as helping prisoners judged suitable for rehabilitation (prisoners, for example, without long records of violence), with the illegitimate goal, in the majority view, of "coddling" violent and dangerous criminals whom much of society judges irredeemable.

Republican strategists recognized that the furloughing of Willie Horton epitomized an evolution of the far-reaching rights movement, an evolution resented and disapproved of by significant numbers of voters. These voters saw crime as one of a number of social and moral problems aggravated by liberalism. The evolving rights movement was seen as extending First Amendment privileges to hard-core pornography, as allowing welfare recipients to avoid responsibility for supporting their children, as fostering drug use, illegitimacy, homosexual promiscuity, and an AIDS epidemic. All these led, in turn, to demands on taxpayers to foot skyrocketing social-service and health-care bills.

"Crime" became a shorthand signal, to a crucial group of white voters, for broader issues of social disorder, evoking powerful ideas about authority, status, morality, self-control, and race. "On no other issue is the dividing line so clear, and on no other issue is my opponent's philosophy so completely at odds with mine, and I would say with the common-sense attitudes of the American people, than on the issue of crime," Bush declared in an Oc-

tober 7, 1988, campaign speech to police officers in Xenia, Ohio, adding,

> There are some—and I would list my opponent among them—who have wandered far off the clear-cut path of common sense and have become lost in the thickets of liberal sociology. Just as when it comes to foreign policy, they always "Blame America First," when it comes to crime and criminals, they always seem to "Blame Society First.". . . [Criminal justice under Dukakis is] a "Twilight Zone" world where prisoners' "right of privacy" has more weight than the citizen's right to safety.

The Racial Chasm

THE DIVISIVE POWER OF RACE AND RACE-INFUSED preoccupations with values, class, and social disorder endured throughout the 1980s, reverberating across the electorate. Differences of opinion between blacks and whites intensified over the decade. A 1989 voter study conducted by KRC Research and Consulting for Democrats For the 90's, a private organization affiliated with the Democratic Party, revealed the extent to which key white Democratic voters "take issue with the Democratic rhetoric of representing the 'middle class and the poor.' These [voters] perceive themselves to be neither rich nor poor, and they do not like being referred to in the same breath as 'the poor.' They describe themselves as 'working people.'" Black urban Democratic voters, conversely, "feel that the country and the Democratic Party are increasingly racist and that the party cares little for their needs and interests."

Divisions between the races have emerged on a host of fronts. On the basic question of whether judges and courts treat whites and blacks evenhandedly, 56 percent of white New Yorkers in a 1988 WCBS–*New York Times* poll said they believed that the system was fair and 27 percent said the system favored one race over another, with that 27 percent evenly split between those who saw black favoritism and those who saw white favoritism. Among black New Yorkers only 30 percent saw the system as fair, and 49 percent saw it as unfair, with the overwhelming majority of those who perceived unfairness seeing a bias in favor of whites.

Such highly controversial cases as the 1987 allegations of rape by Tawana Brawley and the 1984 shooting by the "subway vigilante" Bernhard Goetz of four black teenagers provoked sharply divergent views from blacks and from whites. After a grand jury determined in 1988 that Brawley had fabricated her story, 73 percent of white New Yorkers polled by WCBS–*New York Times* said she lied, while only 33 percent of blacks were prepared to make that judgment (18 percent said she told the truth, 14 percent said she didn't know what happened to her, and 35 percent were unwilling to express an opinion). In the case of Goetz, the WCBS–*New York Times* poll found in 1985 that the proportion of whites describing themselves as supportive of the shooting, relative to those who were critical, was 50–37, as compared with 23–59 among blacks. Whites felt that Goetz was innocent of attempted murder by a margin of 47–18 (with the rest undecided), while blacks said that he was guilty by a margin of 42–19. (Hispanics sided more with whites than with blacks, favoring innocence over guilt at 41–23.)

Underlying these differences in public opinion is a profound gulf between blacks and whites over the cause of contemporary differences between the races. In seeking to clarify these differences of opinion, Ron Walters, a black political scientist at Howard University, has argued that the fundamental issue in the contemporary politics of race is "Who is responsible for our condition?" He says, "Once you draw the line on that, you draw the line on a lot of other race-value issues. Whites see blacks as generally responsible for their own situation, which means that whites refuse to take responsibility. Blacks see it differently. They believe there ought to be a continuing assumption of responsibility for their condition by the government, in addition to what they do for themselves. And therein lies a lot of the difference."

This racially loaded confrontation over the issue of responsibility, both historical and contemporary, is perhaps best illustrated by the views of the political analysts Roger Wilkins and Patrick Buchanan. Wilkins, a black professor of history at George Mason University and a well-known commentator who served as an assistant attorney general in the Johnson Administration and was an editorial writer for *The New York Times* and *The Washington Post*, has written,

> The issue isn't guilt. It's responsibility. Any fair reading of history will find that since the mid-seventeenth cen-

BONSAI

Old man, precarious
on splayed feet,

leaning over the rim
of the known world,

gnarled, angled
(as we imagine age),

short of breadth,
he speaks of the past,

knowing in his roots
many tall stories.

—*Leonard Cochran*

tury whites have oppressed some blacks so completely as to disfigure their humanity. Too many whites point to the debased state of black culture and institutions as proof of the inferiority of the blacks they have mangled. . . . [The logical implication] is simple: black people simply need to pull up their socks. That idea is wrong and must be resisted. . . . Like it or not, slavery, the damage from legalized oppression during the century that followed emancipation, and the racism that still infects the entire nation follow a direct line to ghetto life today.

On the other side, Buchanan, an Irish Catholic who was a ranking conservative strategist for the Nixon and Reagan administrations and remains a widely followed political columnist and television commentator of the hard right, has written,

> Why did liberalism fail black America? Because it was built on a myth, the myth of the Kerner Commission, that the last great impediment to equality in America was 'white racism.' That myth was rooted in one of the oldest of self-delusions: It is because you are rich that I am poor. My problems are your fault. You owe me!
>
> There was a time when white racism did indeed block black progress in America, but by the time of the Kerner Commission ours was a nation committed to racial justice. . . .
>
> The real root causes of the crisis in the underclass are twofold. First, the old character-forming, conscience-forming institutions—family, church, and school—have collapsed under relentless secular assault; second, as the internal constraints on behavior were lost among the black poor, the external barriers—police, prosecutors, and courts—were systematically undermined. . . .
>
> What the black poor need more than anything today is a dose of the truth. Slums are the products of the people who live there. Dignity and respect are not handed out like food stamps; they are earned and won. . . .
>
> The first step to progress, for any group, lies in the admission that its failures are, by and large, its own fault, that success can come only through its own efforts, that, while the well-intentioned outsider *may* help, he or she is no substitute for personal sacrifice.

Can America Afford Affirmative Action?

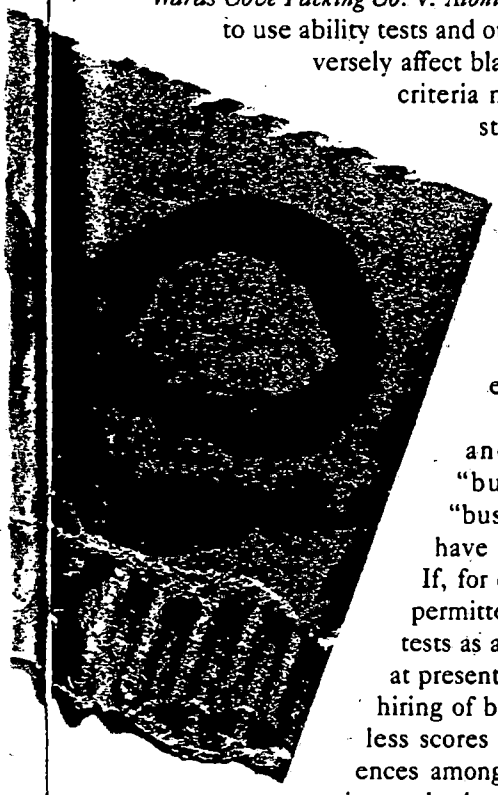
THE CONFLICT REPRESENTED BY WILKINS AND Buchanan is driven not only by a fundamental difference over values and responsibility but also by economic and demographic forces. These forces are helping to make the political struggle for public resources and benefits increasingly bitter and increasingly irreconcilable. In many respects these forces are working in tandem to make the process of incorporating new groups into the mainstream of American society more difficult. They include the globalization of the economy, the growing disparity between the wages paid to the college-educated and the wages paid to those with a high school diploma or less, the drop in college entry by blacks, and the emergence of a suburban voting majority.

The globalization of the economy constitutes a fundamental attack on the mechanisms traditionally relied upon to integrate new untrained and poorly educated groups into the mainstream of American life. Before the internationalization of manufacturing, policies and practices ranging from widespread political patronage to legislation creating the pro-union National Labor Relations Board forced the incorporation of immigrant groups into the work force.

The threat represented by overseas competition has

thrust American companies into a battle for survival in which there is little or no room to accommodate the short-term costs of absorbing blacks and other previously excluded minority groups into the labor force. And while affirmative action performs for blacks and other minorities the same function that patronage performed for waves of immigrants from Ireland and southern Europe, it also imposes costs that place American companies at a disadvantage in international competition.

These costs lie at the core of the debate over the civil-rights bill of 1991. Although the issue of quotas has dominated public discussion of the civil-rights bill, the real battle is over legislating the precise cost to companies that affirmative-action programs will involve. In an attempt to overturn recent conservative rulings by the Supreme Court (now dominated by Republican appointees), the Democratic leadership of Congress has proposed legislation strictly limiting the use of ability tests and other hiring procedures with potentially discriminatory impact, even in the absence of discriminatory intent. If hiring or promotion procedures are found to have "adverse impact" on blacks—that is, if disproportionately more blacks (or other minorities) than whites are rejected—employers must demonstrate that such tests are essential for business operation and meet a stringent "business necessity" standard. The legislation would in effect overturn a 1989 Supreme Court decision, *Wards Cove Packing Co.* v. *Atonio*, that allowed companies to use ability tests and other hiring criteria that adversely affect blacks and Hispanics if such criteria met the far less stringent standard of "business justification." *Wards Cove* explicitly declared that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business."



Such seemingly arcane and legalistic phrases as "business necessity" and "business justification" can have profound consequences. If, for example, companies were permitted to use scores on ability tests as a hiring criterion, it would at present be a major setback to the hiring of blacks and Hispanics—unless scores were adjusted for differences among whites, blacks, Hispanics, and other groups (a scoring process termed "within-group scoring," "within-group adjustment," or "race-norming").

The importance of restricted ability testing for the employment prospects of blacks and Hispanics has been documented in two book-length studies, *Ability Testing* (1982) and *Fairness in Employment Testing* (1989), by the National Research Council. On almost all ability tests studied, the council found (without engaging the unresolved issue of causes), blacks scored substantially below whites, and Hispanics scored somewhere in between. One study found, for example, that on average, if hiring were done strictly on the basis of ability-test scores, an employer selecting from a pool of 100 whites and 100 blacks would take only three blacks in the first twenty-three applicants chosen, and only six blacks in the first thirty-six. The differences in test-score results are reduced, but remain substantial, for blacks and whites of similar income and education.

The contemporary conflict over affirmative action is rooted in the issue of test scores. Everywhere from college admissions to hiring for jobs, tests have become a primary instrument for determining personal status, income, and security. On one side of the debate it is argued that the unrestricted use of ability tests imposes an extraordinary burden on blacks, Hispanics, and other minorities; on the other that prohibiting ability testing imposes costs on the economy in terms of lost productivity and efficiency.

The New Segregation

WHILE LOW-SKILL, ENTRY-LEVEL JOBS HAVE moved overseas to low-wage countries, the domestic job market has changed in ways that work to enlarge, rather than to lessen, disparities in the incomes of whites and of blacks. The growing demand for college-educated workers and the decline in demand for low-skill manual workers have in recent years substantially changed wage patterns.

From 1975 to 1988 the average earnings of entry-level workers with college or more-advanced degrees rose from about 130 percent to about 180 percent of the earnings of workers with high school diplomas. This shift was inherently damaging to blacks: in 1988, 13.1 percent of blacks between the ages of twenty-five and thirty-four had college degrees, as compared with 24.5 percent of whites.

Compounding this disparity is a second development: just as the value of a college education has skyrocketed, the percentage of blacks between the ages of eighteen and twenty-four who go on to college and get a degree has fallen. From 1976 to 1988 the percentage of blacks aged eighteen to twenty-four enrolled in college fell from 22.6 to 21.1, while the percentage of whites rose from 27.1 to 31.3.

The effect of these two trends has been to undermine what was a powerful drive toward economic and educational equality between the races. In the ten years immediately following the passage of the 1964 Civil Rights Act, the economy pushed the earnings of both blacks and whites who were in the work force steadily upward.

There was a strong convergence of shared prosperity and growing racial equality. From 1963 to 1973 average weekly earnings for everyone grew from $175.17 to $198.35, in 1977 inflation-adjusted dollars. As wages rose for whites and blacks, income differentials were sharply reduced: from 1963 to 1977–1978 the difference between black and white wages dropped from the 45 percent range down to the 30 percent range, a drop of about one percentage point a year. For younger, well-educated workers the gap had almost disappeared by the mid-1970s.

Starting in the late 1970s and continuing into the early 1980s, however, the situation began to change radically. While the income of college graduates continued to rise, the income of high school graduates began to fall. At the same time that the so-called "college wage premium" rose, the wage levels for job categories that employ disproportionately more whites (professionals, managers, and sales personnel) grew substantially faster than wage levels for those categories employing disproportionate numbers of blacks (machine operatives and clerical, service, and household workers).

The result has been a striking shift in racial wage patterns. Starting at the end of the 1970s the convergence between the incomes of working blacks and whites—a convergence that had the potential in the long run to enlarge the economic common ground between the races—came to a halt. In the late 1970s black wages abruptly stopped catching up to white wages, with the differential stagnating at roughly 30 percent.

For a Democratic Party seeking to build a majority coalition aligning the interests of blacks and whites, this was a grave blow. The failure of the trend toward wage equality to continue has encouraged the conflict between black and white world views, in which black gains are seen as a cost to whites, and white advantages are seen as a manifestation of racism.

Race and the Suburbs

JUST AS WAGE AND EDUCATION PATTERNS ARE WORKING to undermine what was a trend toward economic equality between the races, the dominant demographic trend in the nation—suburbanization—is working to intensify the geographic separation of the races, particularly of whites from poor blacks.

The 1992 election will be the first in which the suburban vote, as determined from U.S. Census data, will be an absolute majority of the total electorate. From 1968 to 1988 the percentage of the presidential vote cast in suburbs grew from 35.6 percent to 48.3 percent, and there will be a gain of at least two percent by 1992 under current trends.

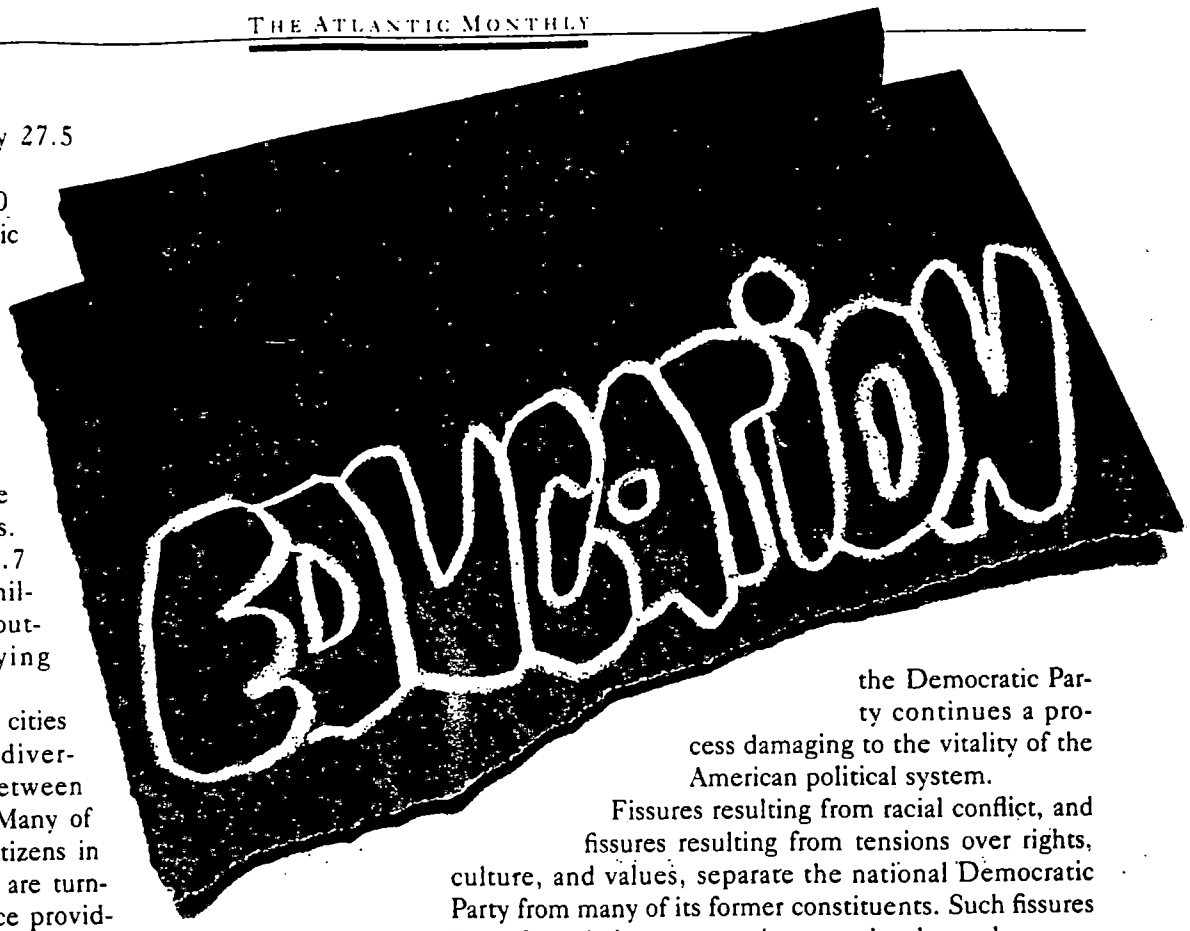
Suburban growth will in all likelihood profoundly change national politics, and will further deepen schisms between the public-policy interests of the two races. Although opinion polls show increasing support for government expenditures on education, health, recreation, and a range of other desired public services, a growing percentage of white voters are discovering that they can become fiscal liberals at the local *suburban* level while remaining conservative about federal spending. These voters can satisfy their need for government services through increased local expenditures, guaranteeing the highest possible return to themselves on their tax dollars, while continuing to demand austerity at the federal level. Suburbanization has permitted whites to satisfy liberal ideals revolving around activist government while keeping to a minimum the number of blacks and poor people who share in government largesse.

"Crime" became a shorthand signal for broader issues of social disorder, evoking powerful ideas about authority, status, morality, self-control, and race.

For example, the residents of Gwinnett County, Georgia, which is one of the fastest-growing suburban jurisdictions in the United States, heavily Republican (76 percent for Bush), affluent, and predominantly white (93.6 percent)—have been willing to tax and spend on their own behalf as liberally as any Democrats. County voters have in recent years approved a special recreation tax; all school, library, and road bond issues; and a one percent local sales tax.

The accelerated growth of the suburbs has made it possible for many Americans to pursue certain civic ideals (involvement in schools, cooperation in community endeavors, a willingness to support and to pay for public services) within a smaller universe, separate and apart from the consuming failure (crime, welfarism, decay) of the older cities.

If a part of the solution to the devastating problems of the underclass involves investment in public services, particularly in the public school systems of the nation's major cities, the growing division between city and suburb lessens white self-interest in making such an invest-



ment. In 1986 fully 27.5 percent of all black schoolchildren, and 30 percent of all Hispanic schoolchildren, were enrolled in the twenty-five largest central-city school districts. Only 3.3 percent of all white students were in these same twenty-five districts. In other words, 96.7 percent of white children are educated outside these decaying school systems.

Even within major cities there is a growing divergence of interest between blacks and whites. Many of the more affluent citizens in racially mixed cities are turning to private service providers, including independent and parochial schools, private police and security services, proliferating private recreational clubs, and private transportation companies.

The End of the Democratic Party?

IN POLITICAL TERMS RACE CLEARLY REMAINS A REpublican trump card, while racial fissures within the Democratic Party leave it weakened and vulnerable.

On a broad strategic scale the Republican Party over the past two years has taken steps to capture the fairness issue and to defuse charges of Republican racism, initiating an aggressive drive to win the support of affluent blacks and even running, on occasion, fully competitive black candidates. Income trends in the black community suggest a reservoir of prospective Republican support: the income of the top fifth of black families has over the past two decades been growing at a significantly faster rate than the income of the top fifth of white families. Trends among the well-to-do of both races have led to increasing racial equality of income, in sharp contrast to trends among the least affluent blacks and whites: the bottom fifth of the black community is falling steadily further behind the bottom fifth of the white community.

Insofar as the Republican drive to win support among affluent middle-class blacks is successful, and insofar as the party is able to insulate itself from charges of racism, it will further isolate the national Democratic Party as the party of poor, underclass black America. The isolation of the Democratic Party continues a process damaging to the vitality of the American political system.

Fissures resulting from racial conflict, and fissures resulting from tensions over rights, culture, and values, separate the national Democratic Party from many of its former constituents. Such fissures have forced the party to increase its dependence on special interests in order to maintain its congressional majority.

Without the resource of plurality voter loyalty, Democratic members of the House of Representatives—the seemingly unshakable bastion of Democratic power in Washington—have come to rely increasingly on an essentially corrupt system of campaign finance, on the perquisites of incumbency, on pork-barrel spending, and on the gerrymandering of districts in order to thwart continuing demographic and ideological shifts favoring their opponents.

As recently as the mid-1970s the Democratic Party was able to portray itself as the party of political reform, battling a Republican Party dominated by moneyed interests. Now Democrats in the House of Representatives are more dependent on institutionalized special-interest groups than are their Republican adversaries. In 1990 the majority—52.6 percent—of the campaign contributions received by Democratic incumbent House members running for re-election came from political-action committees, while the percentage of support from individual donors represented a steady decline, from 44.8 percent in 1984 to 38.0 percent in 1990. Republican House incumbents, in contrast, received 50.9 percent of their financial support from individuals in 1988, and 41.1 percent from PACs, in a pattern virtually the mirror image of the Democrats'. In 1988 not only did labor PACs follow tradition by giving far more to Democratic House incumbents ($16.7 million) than to Republican incumbents ($1.9 million), but corporate PACs—the contemporary version of "mon-

eyed interests"—gave more money to Democratic House incumbents ($15.7 million) than to their Republican counterparts ($13.5 million). While helpful to incumbents in the short term, this kind of contribution pattern weakens any claim the Democratic Party may make to provide popular representation.

The Democratic reliance on special interests in fact extends beyond Congress to a second party stronghold, the nation's major cities. The public's ability to direct essential services—most important, the public school system—has been lost in varying degrees to institutionalized bureaucracies. Within urban school systems faced with declining tax bases and lessened federal support, associations and unions representing teachers, principals, administrators, clerical staff, custodians, carpenters, and security guards have become politically influential in protecting their members' tenure while carefully limiting their responsibility for meeting the larger goal—that of producing well-educated students.

Democratic vulnerability on this terrain is perhaps nowhere better reflected than in Detroit—possibly the most Democratic municipality in the nation, a city with one of the nation's worst school systems and perhaps the worst delivery of public services. In recent years Detroit voters elected a black Republican school-board president and a black Republican city councilman. Both were elected on platforms of promises to break through bureaucratic ossification and revive competitive market forces, through parental choice in school assignments, through private alternatives to public services, and through the transfer of power and responsibility from administrators downtown to principals and teachers in the trenches.

The congressional wing of the Democratic Party has become locked into an alliance with the forces of reaction—with interests and bureaucracies conducting largely futile efforts to resist, among other things, the consequences of international economic change. The Democratic Party has, in many respects, discovered that survival depends on the creation of a congressional party entrusted by the people to look after parochial interests—from water projects to rice subsidies to highways to health care for the elderly. However, to the degree that presidential elections have become referenda on the nexus of social, moral, racial, and cultural issues in the broadest sense, the Democratic Party has in five of the past six elections been at a competitive disadvantage.

The losers in this process are not only the Democratic Party and liberalism but also the constituencies and alliances they are obliged to represent. The fracturing of the Democratic coalition has permitted the moral, social, and economic ascendance of the affluent in a nation with a strong egalitarian tradition, and has permitted a diminution of economic reward and of social regard for those who simply work for a living, black and white. Democratic liberalism—the political ideology that helped to produce a strong labor movement, that extended basic rights to all citizens, and that has nurtured free political and artistic expression—has lost the capacity to represent effectively the allied interests of a biracial, cross-class coalition. Liberalism, discredited among key segments of the electorate, is no longer a powerful agent of constructive change. Instead, liberal values, policies, and allegiances have become a source of bitter conflict among groups that were once common beneficiaries of the progressive state.

The failures of Democratic liberalism pose a larger problem. With the decline of liberal hegemony, conservatism has gained control over national elections and, to a significant degree, over the national agenda. No matter what its claims, conservatism has served for much of the twentieth century as the political and philosophical arm of the affluent. Entrusting the economic interests of the poor and the working class to such a philosophy risks serious damage to both groups.

That conservatism represents the interests of the well-to-do is to be expected—and even respected—as part of the system of representation in American democracy. A far more threatening development is that as liberalism fails to provide effective challenge, the country will lack the dynamism that only a sustained and vibrant insurgency of those on the lower rungs can provide. Such an insurgency, legitimately claiming for its supporters an equal opportunity to participate and to compete and to gain a measure of justice, is critical, not only to the politics and the economics of the nation but also to the vitality of the broader culture and to democracy itself.

Over the past twenty-five years liberalism has avoided confronting, and learning from, the experience of voter rejection, as institutional power and a sequence of extraneous events—ranging from Watergate to the 1981–1982 recession—have worked to prop up the national Democratic Party. For the current cycle to reach closure, and for there to be a breakthrough in stagnant partisan competition, the Democratic Party may have either to suffer a full-scale domestic defeat, including (to deal in the extremes of possibility) loss of control of the Senate and the House, or at the very least to go through the kind of nadir—intraparty conflict, challenge to ideological orthodoxy, in short, a form of civil war—experienced by the Republican Party and the right in the 1960s. The original strength of Democratic liberalism was its capacity to build majorities out of minorities—a strength that comes only from a real understanding of what it means to be out of power, from direct engagement in the struggle to build a majority, and from an understanding of what is worth fighting for in this struggle. Recapturing the ability to build a winning alliance requires learning the full meaning of defeat, and developing a conscious awareness of precisely what the electorate will support politically, what it will not, and when—if ever—something more important is at stake. □

THE WHITE HOUSE
WASHINGTON

July 11, 1991

NOTE FOR THE CHIEF OF STAFF:

Please find attached a letter from Senator Danforth which the President asked be sent directly to him and treated as a private communication.

Thank you.

Phillip D. Brady

UNITED STATES SENATE
WASHINGTON, D. C.

JOHN C. DANFORTH
MISSOURI

July 10, 1991

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

Dear Mr. President:

Many thanks for your phone call and for your willingness to visit with me about the civil rights legislation when you return from Europe. I think we are now at the point where the resolution of one policy question is the key to concluding the civil rights debate. Here is the question:

Should it be lawful for an employer to use job qualifications which are unrelated to ability to perform the job and which have the effect of screening women or minorities from employment?

Examples of such job qualifications might include the possession of a high school diploma as a condition of employment as a janitor, or a rule that an employer will not hire single parents. In both cases, the qualifications would be unrelated to ability to perform the job, and would have the practical effect of screening out minorities or women.

Exactly this question was decided by the Supreme Court in the case of Griggs v. Duke Power Co. In Griggs, the Court held that an employer could not require a high school diploma as a qualification for a job where the diploma had no relationship to ability to perform the job and where the practical effect was to screen out blacks. This remained the law from 1971 until the Supreme Court decided the Wards Cove case in 1989.

Throughout the lengthy discussions of the civil rights legislation, the Administration has taken the position that we should restore the Griggs decision. In fact, the Administration has said that the exact

wording of Griggs should be included in the statutory language. Both Republican and Democratic Senators who have been working on the legislation have accepted the Griggs language insisted on by the Administration.

EEOC Chairman, Evan Kemp, has stated that an employer's requirement of academic credentials might further the Administration's education program. However, such a policy, even if justified on the basis of education, would contradict Griggs unless the academic credentials are related to ability to perform the job. To endorse such a policy would be viewed as a negative statement on civil rights and a reversal of the Administration's support of the Griggs case.

Mr. President, if you agree that the Griggs case was decided correctly, and that qualifications unrelated to ability to perform the job should not be lawful where they are used to screen women or minorities from employment, I believe we are a short step from reaching a successful conclusion to the civil rights debate.

Sincerely,

U.S. Chamber of Commerce

LEGISLATIVE AND POLITICAL AFFAIRS

1615 H Street, N.W. Washington, D.C. 20062 202/463-5600 Fax 202/887-3430

Ted Maness
Senate Liaison

THE CHIEF of STAFF has seen

July 31, 1991

The Honorable John H. Sununu
Chief of Staff to the President
First Floor, West Wing
The White House
Washington, D.C. 20500

Dear Govenor Sununu:

The enclosed U.S. Chamber of Commerce letter, with attachment, was recently sent to the full Senate. The Chamber remains firmly committed to the President's bill and opposed to S. 1407, S. 1408 and S. 1409.

Sincerely,

Ted Maness

U.S. Chamber of Commerce

LEGISLATIVE AND PUBLIC AFFAIRS

1615 H Street, N.W. Washington, D.C. 20062 202/463-5406 Fax 202/463-3173

July 26, 1991

Donald J. Kroes
Vice President

The Honorable Brock Adams
United States Senate
Washington, D.C. 20510

Dear Senator Adams:

As you know, last month the House passed H.R. 1, the Civil Rights Act of 1991. The vote, 273-158, is insufficient to override a promised veto. The U.S. Chamber of Commerce urged opposition to H.R. 1 because, among other things, it called for complete revision of the 20-year-old definition of "business necessity" articulated by the Supreme Court in Griggs v. Duke Power Co. It also introduced an entirely new damages provision allowing jury trials and unlimited punitive and compensatory damages in addition to the "make-whole" relief already provided in Title VII. These provisions, combined with other objectionable sections, certainly would have forced an employer to make decisions based upon the number of covered individuals in his work force. The bill's antiquota language was virtually meaningless in light of its definition of "quota." H.R. 1 failed to meet the stated objectives of its proponents and promised only a bonanza for lawyers.

Senator Danforth has introduced a series of bills, S. 1407, S. 1408, and S. 1409, with the expressed hope of striking a balance between proponents and opponents of H.R. 1. The Chamber commends Senator Danforth for his efforts to forge a compromise on this difficult and critical issue. However, these proposals, like H.R. 1, remain very troublesome. Among the concerns the Chamber has with the Danforth proposals are the following:

- Despite the fact that "business necessity" is now defined as it was in Griggs, a plaintiff can still allege in a general way that all or some of the employer's practices caused a disparity. This violates a basic tenet of American jurisprudence -- that the plaintiff not only show he suffered a harm, but also what, in particular, caused the harm.

- Although the Danforth proposal says that nothing in the bill "requires or encourages an employer to adopt ... quotas," this language does nothing to alleviate the problem of quotas. The Chamber never claimed that these or any other civil rights proposals would require quotas, only that quotas would be the

result. Forced to choose between hiring by a de facto quota system or facing the prospect of extended, frequent, and expensive lawsuits, employers will take the quotas option every time.

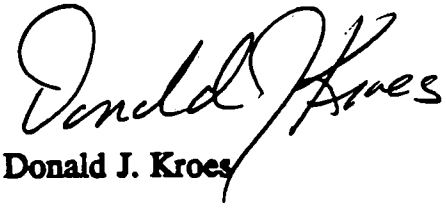
- Jury trials are still available under the Danforth proposal. Although Senator Danforth is to be commended for trying to limit available damages, two problems remain. First, there exist loopholes in the language that allow damages to exceed the cap. Second, one only has to look at medical malpractice and product liability cases to know what happens when these cases go to a jury.

To explain our concerns in greater detail, particularly the "group of practices" problem, attached is an analysis prepared by James C. Paras. Mr. Paras is a senior partner in the San Francisco office of Morrison and Foerster and has extensive experience in employment law.

Again, the efforts of Senator Danforth to strike a compromise on this issue are appreciated. However, the Chamber strongly believes that the proposal set forth by the Bush Administration, and embodied in Senator Dole's bill, S. 611, addresses the concerns of both the proponents and opponents of the civil rights bill that was passed by the House this year.

Thank you for your consideration of our views. If I can provide further information, please do not hesitate to contact me.

Sincerely,



Donald J. Kroes

Attachment

MORRISON & FOERSTER

LOS ANGELES
ORANGE COUNTY
WALNUT CREEK
PALO ALTO
DENVER

ATTORNEYS AT LAW

345 CALIFORNIA STREET
SAN FRANCISCO, CA 94104-2675
TELEPHONE (415) 677-7000
TELEFACSIMILE (415) 677-7522
TELEX 34-0154 MRSN FOERS SFO

NEW YORK
WASHINGTON, D.C.
LONDON
HONG KONG
TOKYO

DIRECT DIAL NUMBER

(415) 677-7087

July 22, 1991

Peter J. Eide, Esq.
Manager, Labor Law
Labor & Human Resources Department
U.S. Chamber of Commerce
1615 H Street, N.W.
Washington, D.C. 20062

Dear Peter:

At your request, we have reviewed Senator Danforth's recently-introduced civil rights bills (S 1407, S 1408 and S 1409) and have concluded that, although they constitute an improvement over the provisions contained in HR 1, they still do not resolve certain fundamental problems that have been at the heart of the controversy surrounding earlier legislative proposals. More specifically, it has been the contention of the proponents of civil rights reform that legislation is needed to restore the law to the state at which it existed prior to the Supreme Court's 1988-89 term. Senator Danforth's bills, as is the case with the recently passed House bill, do not merely seek a restoration of preexisting law. Instead, they contain provisions that would constitute a major expansion of the civil rights laws, under any interpretation accepted by the Supreme Court during the last two and one-half decades. No justification for such an expansion of the civil rights laws has ever been offered or established.

Although S 1407 and S 1409 retain several features to which we have previously stated our objections, e.g., the unwise injection of compensatory/punitive damages and jury trials into Title VII cases and the wholly unnecessary reversal of Justice Brennan's mixed-motive decision in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), our principal concern remains the modified disparate impact analysis that would be created by S 1408.

In analyzing the disparate impact language in S 1408, it is useful to recall specifically what the Supreme Court held in Griggs v. Duke Power Co., 401 U.S. 424 (1971). First, the Court noted that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress proscribed." Id. at 431. With this in mind, the Court concluded that Title VII requires "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Id. In Griggs and each succeeding Supreme Court disparate impact case, the Court required a plaintiff to identify and establish a causal relationship between each specific challenged practice and the alleged disparate impact in order to establish a prima facie case. See, e.g., New York City Transit Authority v. Beazer, 440 U.S. 568, 548 (1979) ("A prima facie violation of the Act may be established by statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities."). Once such a prima facie showing is made, the defendant has been required to show that each specific practice challenged by plaintiff has "a manifest relationship to the employment in question." Griggs, 401 U.S. at 423.

Unlike Griggs and its progeny, S 1408 fails to require a plaintiff to prove that any specific employment practice caused, or even significantly contributed to, an imbalance in the workforce. Instead, under Section 3 of S 1408 a plaintiff may, and in the typical case would, subject an entire "decision-making process" to a disparate impact attack.

As written, S 1408 in effect states that a plaintiff must show a causal relationship between a specific employment practice or practices and an underlying workforce imbalance, unless plaintiff cannot satisfy this basic element of proof. This renders the specific identification and causation "requirement" of S 1408 entirely illusory. The elimination of the specific identification and causation requirement from established Title VII law shifts the focus solely to an employer's bottom line statistics. It is at this point that the threat of quotas, however described, becomes manifest.

In a widely cited case, the Fifth Circuit persuasively rebuffed an effort to convert disparate impact analysis from an evaluation of specific practices to an evaluation of an employer's employment statistics alone. In Pouncy v. Prudential Insurance Co. of America, 668 F.2d 795 (5th Cir. 1982), the court reiterated that a prima facie case of disparate impact requires "identification of a neutral employment practice coupled with proof of its discriminatory impact." Id. at 800. The court concluded that "[t]he discriminatory impact model of proof . . . is not, however, the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." Id. The reason for this conclusion is a consideration of basic fairness within the context of the litigation process. "We require proof that a specific practice results in a discriminatory impact on a class in an employer's work force in order to allocate fairly the parties' respective burdens of proof at trial. The aggrieved party must prove a disparate impact due to the selection procedure. The employer then has the burden of proving that the selection procedure is justified by a legitimate business reason. . . . Identification by the aggrieved party of the specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy." Id. at 800-801.

Under S 1408, however, plaintiff will generally be free to challenge the entire employment process without identifying any specific practice that is allegedly an arbitrary obstacle to employment opportunities. Indeed, if neither the plaintiff nor the defendant can determine which factors may contribute to a bottom line imbalance, the employer may be found liable based solely upon that imbalance and the parties inability to determine, much less justify, the factors contributing to that imbalance. This is not only manifestly unfair, but a dramatic shift in Title VII law.

In summary, S 1408, as well as S 1407 and S 1409, fail to conform to the purposes allegedly underlying the push for civil rights legislation, i.e., a restoration of prior law. S 1408's repeal of the requirement that specific practices be shown to constitute arbitrary barriers to the advancement of protected groups, in particular, alters long-standing Supreme Court precedent. In short,

Senator Danforth's proposals suffer from the same defect as the bills introduced by the original proponents of this legislation. Contrary to their claim, the so-called Wards Cove amendments do not result in a return to Griggs, rather they constitute an unwarranted legislative expansion of adverse impact liability which can only result in making employers "quota conscious" in their employment decisions.

Very truly yours,

James C. Paras

Copy to Boyden/McClure

SLADE GORTON
WASHINGTON

730 HART SENATE OFFICE BUILDING
(202) 224-3441

TOLL FREE ISSUES HOTLINE
1-800-282-8095

TDD 202-224-8273

United States Senate

WASHINGTON, DC 20510-4701

COMMITTEES:

APPROPRIATIONS

COMMERCE, SCIENCE, AND TRANSPORTATION

INDIAN AFFAIRS

INTELLIGENCE

July 26, 1991

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

THE CHIEF of STAFF has seen

Re: Civil Rights

Dear John:

Last night during a vote on the Senate floor I approached Jack Danforth in order to compliment him on the way in which he has managed the Thomas nomination, after a 30 minute visit with the two of them in my office earlier in the afternoon. As I'm sure you know, I am strongly in support of Clarence Thomas and have already made a floor speech on his behalf, a copy of which I enclose.

As I approached, Senator Danforth was discussing the Civil Rights bill with Senator Chafee. Senator Danforth reported that he had had a one on one visit with the President, presumably yesterday, and that he had told the President that only one question with respect to the Civil Rights bill remained unresolved. He said that he had told the President that it was a policy matter which was relatively easy to decide.

As Senator Danforth characterized it, an employer should not be permitted to consider imposing qualifications greater than those necessary capably to perform the job in question, should hiring the more capable candidate create a racial or other imbalance. He said that he could not understand why anyone could argue that proposition, and Senator Chafee agreed.

I do not agree, and I cannot conceive that you do either. In fact, that seems to me to be as profoundly destructive a philosophy as any policy making body could impose upon American society.

The Army recruiting slogan is "Be all that you can be." The civil rights community slogan seems to be "Be the least that you can be and still get away with it." Presumably, under that proposal, if an employer had ten candidates for a job and seven were determined to be capable of performing it adequately, the

3206 JACKSON FEDERAL BUILDING
915 SECOND AVENUE
SEATTLE, WA 98174
(206) 553-0350

130 FEDERAL BUILDING
500 WEST 12TH STREET
VANCOUVER, WA 98660
(206) 696-7838

697 U.S. COURT HOUSE
W. 920 RIVERSIDE AVENUE
SPOKANE, WA 99201
(509) 353-2507

MORRIS BUILDING, ROOM 119
23 SOUTH WENATCHEE AVENUE
WENATCHEE, WA 98801
(509) 663-2118

employer would be required to hire the seventh best candidate if hiring any of the six better candidates would create a racial imbalance. It is a prescription for mediocrity, the further loss of American competitiveness, and bitter and justified resentment.

I also believe that it is a characterization which can be blown out of the water in the course of any debate. I hope that you will strongly encourage the President to reject it out of hand.

Sincerely,

SLADE GORTON
United States Senator

SG:v
Enclosure

SPEECH ON CLARENCE THOMAS
SENATOR SLADE GORTON

"I firmly insist that the Constitution be interpreted in a colorblind fashion. It is futile to talk of a colorblind society unless this constitutional principle is first established. ***

"I don't believe in quotas. America was founded on a philosophy of individual rights, not group rights. The civil rights movement was at its greatest when it proclaimed the highest principles on which this country was founded -- principles such as the Declaration of Independence, which were betrayed in

the case of blacks and other minorities."

These are the words of Judge Clarence Thomas who is black, the grandson of a sharecropper, educated in Catholic schools, a conservative.

He is decidedly <u>not</u> politically correct. And that is why he is now at the heart of the furious attacks upon him after his nomination for the Supreme Court.

What <u>is</u> politically correct? An administrator at the University of Pennsylvania redlined a student's phrase referring to her

"regard for the individual"

and added:

"the word 'individual' is a red flag phrase today which is considered by many to be racist."

The administrator went on to warn of the inequities that result from championing individual over group rights.

The "politically correct" believe that American society is sick. Their attitude is expressed clearly by Kirkpatrick Sale, the author of "The Conquest of Paradise: Christopher Columbus and The Columbian Legacy". He says that American civilization:

"*** is founded on a set of ideas that are fundamentally

pernicious, and they have to do with rationalism and humanism and materialism and nationalism and science and progress. These are, to my mind, just pernicious concepts."

If these are pernicious, consider then their opposites -- emotionalism, anti-intellectualism, incomprehensibiliity, sophistry, anti-humanism, anarchy, superstition and regression. These are -- to my mind-- pernicious concepts, and these are, indeed, the foundations, the walls, and the cornerstone of political correctitude.

William Phillips, for more than 50 years the editor of the Partisan

Review, and hardly a right-winger, summarizes this "politically correct" philosophy as

> "*** a vague but inauthentic radical outlook [that] still dominates the culture of the academy, the media, and the educated classes.***
>
> [That culture includes] a belief in a widespread relativism in moral, political, and philosophical matters; *** a general rejection of the existing social system; a radical revision of academic curricula; with an atmosphere of leftism and anti-Americanism permeating the whole."

The "politically correct" reject the concept of individual rights and believe that one's race, gender, ethnic background, sexual preference and the like are more important than our common humanity or American citizenship. They ignore or are indifferent to the fact that lesser tribalism has destroyed half the emerging nations in Africa and is about to destroy Yugoslavia -- has divided Canada and is at the root of the ethnic hatreds and divisions that so plague Eastern Europe and the Soviet Union. And <u>tribalism</u> is the future that the politically correct promise the United States.

Because he does not share their terribly destructive views the "politically correct" seek to destroy Clarence Thomas. They fully understand that the next Supreme Court Justice will be a conservative -- at least as conservative as Clarence Thomas -- but they react to the prospect of a <u>black</u> conservative with special fury. Because Clarence Thomas, by his very life and attitudes, destroys the thesis upon which their culture has built its castles -- fortresses of division, mistrust and hatred. But the fact that the grandchild of a black sharecropper, who has felt, and continues to decry, racism in our

society, should nevertheless believe in the promises on which this nation was founded in 1776 --

> "that all men are created equal, and are endowed by their creator with certain unalienable rights" --

illustrates more clearly than a thousand essays the moral bankruptcy of the "politically correct."

For many reasons, not least his great courage and independence of mind, Clarence Thomas richly deserves to be confirmed by the Senate of the United States. He represents the redemption of the true promise of America, that all Americans <u>are</u> created free and equal and that any

American can surmount the circumstances of birth, to arise, like Clarence Thomas himself, with a sense of history and pride, and with eyes open to the light ahead.

# # #

JOHN C. DANFORTH
MISSOURI

COMMITTEES:
COMMERCE, SCIENCE, AND TRANSPORTATION
FINANCE
INTELLIGENCE

United States Senate

WASHINGTON, DC 20510-2502

DATE: 6/27/91

FAX TRANSMISSION SHEET

TO: Governor Sununu

FROM: Senator Jack Danforth

TOTAL NUMBER OF PAGES (INCLUDING COVER SHEET): _____

COMMENTS:

additions from last draft outlined in blue.

102D CONGRESS
1st SESSION

S. ____

To provide for damages in cases of intentional employment discrimination, and for other purposes.

IN THE SENATE OF THE UNITED STATES

June __, 1991

A BILL

To provide for damages in cases of intentional employment discrimination, and for other purposes.

BE IT ENACTED IN THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

SECTION I. SHORT TITLE.

This Act may be cited as the "Civil Rights and Remedies Act of 1991."

SEC. 2. FINDING AND PURPOSE.

(a) FINDING.-- Congress finds that additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace.

(b) PURPOSE.-- The purpose of this Act is to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace.

SEC. 3. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION

The Revised Statutes are amended by inserting after section 1977 the following new section:

"SECTION 1977A DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.

"(a) RIGHT OF RECOVERY.--

"(1) CIVIL RIGHTS.-- In an action brought by a complaining party under section 706 of the Civil Rights Act of 1964 (42 USC 2000e-5(e)) against a respondent who intentionally engaged in an unlawful employment practice prohibited under section 703 or 704 of the Act (42 U.S.C. 2000e-2, 2000e-3) ~~and engaged in the practice on the basis of the religion, or sex, or national origin of an individual, the complaining party~~, and provided that the

complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party—

"~~(A)~~ may recover the compensatory and punitive damages ~~described~~ as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.~~; and~~

~~"(B) may request that a court impose the equitable civil penalty described in subsection (c) against the respondent.~~

"(2) DISABILITY. -- In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a))) against a respondent who intentionally engaged in a practice that constitutes discrimination under section 102 of the Act (42 U.S.C. 12112), other than discrimination described in ~~paragraph (3)(A) or (5) of subsection (b) of the section,~~ subsection (b) paragraphs (3)(A), or other than discrimination described in subsection (b) paragraph (6)(except for practices intended to screen out individuals with disabilities), against an individual, the complaining party —

"~~(A)~~ may recover the compensatory and punitive damages ~~described~~ as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.~~; and~~

~~"(B) may request that a court impose the equitable civil penalty described in subsection (c) against the respondent.~~

"(3) ~~NOTICE. -- a complaining party who requests that a court impose an equitable civil penalty under subsection (c) shall provide notice of the request to the Chairman of the Equal Employment Opportunity Commission and the Secretary of Health and Human Services.~~ REASONABLE ACCOMMODATION AND GOOD FAITH EFFORT.-- In cases where a violation involves the provision of a reasonable accommodation pursuant to section 102(b)(5), damages may not be awarded where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business. New

"(b) COMPENSATORY AND PUNITIVE DAMAGES.--

(1) DETERMINATION OF PUNITIVE DAMAGES.-- ~~A complaining party may recover compensatory damages under subsection (a) if it is determined that the complaining party has demonstrated the existence of injury requiring compensation by clear and convincing evidence.~~ A complaining party may recover punitive damages under this subsection if the complaining party demonstrates that--

~~(A)~~ the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual; ~~, and~~

~~(B) the award of punitive damages is necessary to deter the respondent from engaging in such a discriminatory practice or discriminatory practices in the future.~~

(2) EXCLUSIONS FROM COMPENSATORY DAMAGES.-- Compensatory damages awarded under this section shall not include back pay, interest on back pay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

(3) LIMITATIONS.-- The sum of the amount of compensatory damages awarded under this section ~~against a respondent who is not a government, government agency, or political subdivision,~~ for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed --

(A) in the case of a respondent who has ~~more than~~ 100 or fewer employees in each of 20 or more calendar weeks in the current or preceding calendar year, [$50,000;] ~~and~~

(B) in the case of a respondent ~~not described in subparagraph (A),~~ who has more than 100 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, [$100,000;] and

(C) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, [$300,000.]

(4) ~~PREJUDGMENT INTEREST.-- The court described in paragraph (1) shall not award prejudgment interest to a complaining party on compensatory damages awarded under this section in an action in which the aggrieved individual is an~~

~~employee or applicant for employment described in section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(a)).~~ CONSTRUCTION.-- Nothing in the amendments made by this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).

New

"(c) ~~EQUITABLE PENALTY DETERMINATION.--~~

~~(A) IN GENERAL. A court shall impose an equitable civil penalty on a respondent under subsection (a) if the court finds that--~~

~~"(i) the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual; and~~

~~"(ii) the penalty is necessary to deter the respondent from engaging in such a discriminatory practice or such discriminatory practices in the future.~~

~~"(B) AMOUNT.-- The court shall impose an equitable civil penalty sufficient to deter the respondent from engaging in such a discriminatory practice or discriminatory practices in the future.~~

~~"(2) EQUITABLE CONSIDERATIONS.-- In making the finding described in paragraph (1)(A), a court may consider--~~

~~"(A) the nature of the discriminatory practice or practices that are the subjects of the action described in subsection (a);~~

~~"(B) the efforts of the respondent to instruct the managers, supervisors, and employees of the respondent about legal requirements regarding employment discrimination;~~

~~"(C) the nature of compliance programs, if any, established by the respondent to ensure that discriminatory practices do not occur in the workplace;~~

~~"(D) any lawful affirmative action undertaken by the respondent with respect to the group injured by the discriminatory practice or practices that are the subject of the action described in subsection (a);~~

~~"(E) the availability to the aggrieved individual of an internal grievance procedure or remediation policy established by the respondent;~~

~~"(F) whether the respondent made a prompt investigation of the discriminatory practice or discriminatory practices;~~

~~"(G) the efforts of the respondent to correct the discriminatory practice or practices; and~~

~~"(H) the size of the respondent and the effect of the equitable civil penalty on the economic viability of the respondent.~~

~~"(3) LIMITATIONS. The amount of an equitable civil penalty imposed under subsection (a) shall not exceed~~

~~"(A) in the case of a respondent who has more than 100 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $[insert amount]; and~~

~~"(B) in the case of a respondent not described in subparagraph (A), $[insert amount].~~

~~"(4) RECOVERY OF COSTS.~~

~~"(A) AWARD OF FEES. If a court imposes an equitable civil penalty in a case brought under this section the court shall award reasonable attorneys' and expert witness fees incurred by the complaining party in seeking the penalty.~~

~~"(B) RELATIONSHIP TO PENALTY. The court shall not subtract the amount of the fees described in subparagraph (A) from the amount of the equitable civil penalty imposed against a respondent under this section.~~

~~"(5) APPLICATION OF PROCEEDS OF PENALTY.~~

~~"(A) CORRECTION OF DISCRIMINATORY PRACTICES. If a court determines, in the discretion of the court, that an equitable civil penalty imposed under this section is needed to correct discriminatory practices at the place of employment, or in the community, in which the discriminatory practice described in subsection (a) occurred, the penalty shall be expended all or in part, as directed by the court, to correct the discriminatory practices. The penalty may be expended to undertake actions such as public awareness or education programs regarding discrimination on the basis of race, color, religion, sex, or national origin, in order to eliminate future discrimination.~~

~~"(B) TRUST FUND.--~~

~~"(i) FULL PAYMENT.-- If a court does not make the determination described in subparagraph (A), the penalty shall be deposited in the Equal Employment Enforcement Trust Fund, established in section 9511 of the Internal Revenue Code of 1986.--~~

~~"(ii) PAYMENT IN PART.-- If a court directs that part of the penalty shall be expended as described in subparagraph (A), the remainder of the penalty shall be deposited in the Fund.--~~

~~"(C) DETERMINATION.-- In making the determination described in subparagraph (A), the court may consider--~~

~~"(i) anti-discrimination and anti-harassment policies and procedures established by the respondent, prior to the practice that is the subject of the action described in subsection (a), to ensure that discriminatory practices would not occur;--~~

~~"(ii) corrective actions taken by the respondent on becoming aware of a claim that a discriminatory practice had occurred; and--~~

~~"(iii) policies and procedures established by the respondent after the claim to ensure that discriminatory practices do not occur again.--~~

~~"(d)~~ JURY TRIAL.--

"(1) IN GENERAL.-- ~~(A)~~ If a complaining party seeks compensatory ~~or punitive~~ damages under this section, any party may demand a trial by jury.

~~"(2) DETERMINATIONS.-- If a party requests a trial by jury in an action brought under this section--~~

~~"(A) the jury shall determine all factual issues related to liability; and--~~

~~"(B) if the determination described in subsection (b)(1) is made--~~

~~"(i), the jury shall determine the amount of compensatory damages awarded to the complaining party; and--~~

~~"(ii)~~ ~~(B)~~ The court shall not inform the

jury of the limitations described in subsection (b)(3).

"~~(c)~~ (d) DEFINITION.-As used in this section:

"(1) ~~AGGRIEVED INDIVIDUAL. The term 'aggrieved individual' means a person who has been subjected to a discriminatory practice.~~

"~~(2)~~ COMPLAINING PARTY.-The term 'complaining party' means--

"(A) in the case of a person seeking to bring an action under subsection (a)(1), a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

"(B) in the case of a person seeking to bring an action under subsection (a)(2), a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

~~"(3)~~ "(2) DISCRIMINATORY PRACTICE .-- The term 'discriminatory practice' means a practice described in paragraph (1) or (2) of subsection (a).".

~~"SEC. 4. EQUAL EMPLOYMENT ENFORCEMENT TRUST FUND.~~

~~(a) ESTABLISHMENT. Subchapter A of chapter 98 of the Internal Revenue Code of 1986 (relating to trust fund code) is amended by adding at the end the following new section:~~

~~SEC. 9511 EQUAL EMPLOYMENT ENFORCEMENT TRUST FUND~~

~~"(a) CREATION OF FUND. There is established in the Treasury of the United States a fund to be known as the Equal Employment Enforcement Trust Fund (referred to in this section as the 'Fund'), consisting of such amounts as may be appropriated or credited to the Fund as provided in this section.~~

~~"(b) TRANSFERS TO FUND. There are appropriated to the Fund amounts equivalent to the additional revenues received in the Treasury as the result of the amendments made by section 3 of the Civil Rights and Remedies Act of 1991.~~

~~"(c) EXPENDITURES.~~

~~"(1) PURPOSES.~~

~~"(A) CIVIL RIGHTS ENFORCEMENT. Fifty percent of the amounts in the Fund shall be available, to the~~

~~extent provided in appropriation Acts, for the purposes of making expenditures to carry out section 706 of the Civil 21 Rights Act of 1964 (42 U.S.C. 2000e-5).~~

~~"(B) FAMILY VIOLENCE PROTECTION. Fifty percent of the amounts in the Fund shall be available, to the extent provided in appropriation Acts, for the purposes of making expenditures to carry out section 303 of the Family Violence Prevention and Services Act (42 U.S.C. 10402).~~

~~"(2) PAYMENTS BASED ON ESTIMATES. Payments under paragraph (1) shall be made on the basis of estimates by the Secretary of the Treasury. Proper adjustments shall be made in amounts subsequently transferred to the extent prior estimates were in excess of or less than the amounts required to be transferred.".~~

~~(b) CONFORMING AMENDMENT. Subchapter A of chapter 98 of the Internal Revenue Code of 1986 is amended in the table of sections by adding at the end the following new item:~~

~~"Sec. 9511. Equal Employment Enforcement Trust Fund.".~~

Sec. 4. ATTORNEYS' FEES

The last sentence of Section 722 of the Revised Statutes (42 USC 1988) is amended by inserting ", 1981A" after "1981".

SEC. 5. COVERAGE OF CONGRESS AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) COVERAGE OF THE SENATE.--

(1) APPLICATION TO SENATE EMPLOYMENT.-- The rights and protections provided pursuant to the amendment made by this Act shall, subject to paragraphs (2) through (5), apply with respect to any employee in an employment position in the Senate and any employing authority of the Senate.

(2) INVESTIGATION AND ADJUDICATION OF CLAIMS.-- All claims raised by any individual with respect to Senate employment pursuant to the provision described in paragraph (1) shall be investigated and adjudicated by the Select Committee on Ethics, pursuant to S. Res. 338, 88th Congress, as amended, or such other entity as the Senate may designate.

(3) RIGHTS OF EMPLOYEES.-- The Committee on Rules and Administration shall ensure that Senate employees are informed of their rights under the provisions described in

paragraph (1).

(4) APPLICABLE REMEDIES.-- When assigning remedies to individuals found to have a valid claim under the provisions described in paragraph (1), the Select Committee on Ethics, or such other entity as the Senate may designate, shall to the extent practicable apply the same remedies applicable to all other employees covered by the provisions described in paragraph (1). Such remedies shall apply exclusively.

(5) EXERCISE OF RULEMAKING POWER.-- Notwithstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in paragraph (1) shall be within the exclusive jurisdiction of the United States Senate. The provisions of paragraphs (2), (3), and (4) are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the senate to change its rules, in the same manner, and to the same extent, and to the same extent, as in the case of any other rule of the Senate.

(b) COVERAGE OF THE HOUSE OF REPRESENTATIVES.--

(1) IN GENERAL.- Notwithstanding any other provision of law, the purposes of this Act shall, subject to paragraph (2), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(2) EMPLOYMENT IN THE HOUSE.--

(A) APPLICATION.-The rights and protections under the amendment made by this Act shall, subject to subparagraph (B), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) ADMINISTRATION.--

(i) IN GENERAL.-- In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii) RESOLUTION.-- The resolution referred to in clause (i) is House Resolution 15 of the One Hundred First Congress, as agreed to January 3, 1989, or any other provision that continues in effect the provisions of, or is a successor to, the Fair Employment Practices Resolution (House

Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988).

(C) EXERCISE OF RULEMAKING POWER.-- The provisions of subparagraph (B) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

(c) INSTRUMENTALITIES OF CONGRESS.--

(1) IN GENERAL.-- The rights and protections under the amendment made by this Act, shall, subject to paragraph (2), apply with respect to any employee in an employment position in an instrumentality of the Congress and any chief official of such an instrumentality.

(2) ESTABLISHMENT OF REMEDIES AND PROCEDURES BY INSTRUMENTALITIES. -- The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively.

(3) REPORT TO CONGRESS. -- The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) DEFINITION OF INSTRUMENTALITIES.-- For purposes of this section, instrumentalities of the Congress include the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Office of Technology Assessment, and the United States Botanic Garden.

SEC. 6. SEVERABILITY

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected.

religion, sex or national origin.

~~"(2) Paragraph (1) shall not apply to a respondent seeking to comply with a court order aimed at remedying past discrimination.".~~

SEC. 5. DEFINITIONS.

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

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

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

"(n) ~~The term `group of employment practices' means a combination of particular employment practices in which each practice is responsible in whole or in significant part for an employment decision.~~

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

~~"(1) in the case of employment practices involving selection, that the practice or groups of practices bears a manifest relationship to requirements for effective job performance; and~~

~~"(2) in the case of other employment decisions not involving employment selection as described in paragraph (1), the practice of group of practices bears a manifest relationship to a legitimate business objective of the employer.~~

"(1) in the case of employment practices that are used as job qualifications or used to measure the ability to perform the job, the challenged practice must bear a manifest relationship to the employment in question.

"(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

"(o) ~~"(p) The term `requirements for effective job performance' includes,--~~

~~"(1) the ability to perform competently the actual work activities lawfully required by the employer for an employment position; and~~

~~"(2) any other lawful requirement that is important to the performance of the job, including, but not limited to, factors such punctuality, attendance, a willingness to avoid engaging in misconduct or insubordination, not having a work history demonstrating unreasonable job turnover, and not engaging in conduct or activity that improperly interferes with the performance of work by others.~~

The term `employment in question' means--

"(1) the performance of actual work activities required by the employer for a job or class of jobs; or

"(2) any requirement related to behavior that is important to the job, but may not comprise actual work activities.

"~~(q)~~ (p) The term `respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program,

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

"(n) The term 'justified 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.

"(o) The term 'respondent' means 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).

"(p)(1) The term 'harass' means, in cases involving discrimination because of race, color, religion, sex, or national origin, the subjection of an individual to conduct that creates a working environment that would be found intimidating, hostile or offensive by a reasonable person.

"(2) The term 'harass' also means, in cases involving discrimination because of sex, (i) making the submission to unwelcome sexual advances by an employer a term or condition of employment of the individual; or (ii) using the rejection of such advances as a basis for employment decisions adversely affecting the individual; or (iii) making unwelcome sexual advances that create a working environment

(1) in the case of employment practices used to measure job qualifications or ability to do the job, the term "employment in question" means job performance.

(2) in the case of employment practices not described in paragraph (1), the term "employment in question" means a legitimate business objective of the employer.

The term "job performance" includes--

(1) the performance of actual work activities required by the employer for a job or class of jobs; and

(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

PROPOSAL SENT TO DOJ 6/24
DANFORTH PROPOSAL

The term "required by business necessity" means--

(1) in the case of employment practices primarily measuring qualifications for or ability to do the job, the challenged practice must bear a manifest relationship to the requirements for effective job performance.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

DOLE STAFF RECOMMENDATION (Cannot accept because of substantive standard)

The term "required by business necessity" means--

(1) in the case of practices that are used by the employer because they are relevant to job performance, the challenged practice must bear a manifest relationship to the requirements for effective job performance.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

DOLE STAFF RECOMMENDATION MODIFIED

The term "required by business necessity" means--

(1) in the case of practices that are used <u>as conditions of employment in or transfer to jobs</u>, the challenged practice must bear a manifest relationship to the requirements for effective job performance.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

MODIFICATION II

The term "required by business necessity" means--

(1) in the case of practices that are used as conditions of employment in or transfer to jobs, the challenged practice must bear a demonstrable relationship to successful performance of the jobs for which it was used.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

DEFINITION OF BUSINESS NECESSITY

OPTION A

The term "required by business necessity" means--
(1) in the case of employment practices that are used to measure ability to perform the job, the challenged practice must bear a manifest relationship to the employment in question.
(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

The term "employment in question" includes, but is not limited to-- (1) the performance of actual work activities required by the employer for a job or class jobs; and
(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

DEFINITION OF BUSINESS NECESSITY

OPTION A

The term "required by business necessity" means--
(1) in the case of employment practices that are used to measure ability to do the job, the challenged practice must bear a manifest relationship to the employment in question.
(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

The term "employment in question" includes, but is not limited to-- (1) the performance of actual work activities required by the employer for a job or class jobs; and
(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

OPTION B

The term "required by business necessity" means--
the challenged practice must bear a manifest relationship to the employment in question.
(1) in the case of employment practices used to measure ability to do the job, the term "employment in question" means job performance.
(2) in the case of employment practices not described in paragraph (1), the term "employment in question" means a legitimate business objective of the employer.

The term "job performance" includes, but is not limited to--
(1) the performance of actual work activities required by the employer for a job or class of jobs; and
(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

NITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

September 23, 1991

MEMORANDUM TO JOHN SUNUNU

FROM: LAMAR ALEXANDER LA

SUBJECT: CIVIL RIGHTS LEGISLATION

This is a response I could send to Danforth's August 2 letter to the President. It would keep the civil rights bill from outlawing employers' use of the American Achievement Test.

Jeff Martin, our General Counsel, has done the work on this.

Would you like for us to do anything?

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202

Honorable John C. Danforth
United States Senate
Washington, DC 20510

Dear Jack:

President Bush asked me to review your August 2 letter concerning the pending civil rights legislation. He, as well as I, appreciate your recognition of the educational concerns that we have raised. The President wants a civil rights bill, and I am sure none of us wants a collision between efforts to advance education and efforts to advance civil rights.

In that spirit, I am writing to suggest an approach for avoiding that collision. Under the proposal outlined below, employers would be permitted to consider applicants' or employees' educational achievements, but only if such achievements have a manifest relationship to legitimate business objectives of the employer. Thus, under this test, employers could not set inappropriate educational prerequisites that have the effect of screening out minorities for "dead-end jobs." For example, a janitor who always wanted to be a janitor could not be required to show a diploma.

* * * * *

The Administration does not want to overrule the Supreme Court's Griggs decision. It does not want to authorize employers to impose arbitrary education requirements that bear no relationship to legitimate business objectives and that have a disparate racial impact. However, when many American school children are not learning what they need to know and do to succeed in today's world, we should not send a message that educational achievement does not count in the "real" world. In today's increasingly technical and competitive marketplace -- where jobs and the skill requirements change rapidly and where employers need to hire employees who know how to think and adapt to changing conditions -- employers should not be deterred by the prospect of litigation from having genuinely high educational expectations for their workforce. Reform of our educational system depends on creating incentives for all American school kids to work harder in school. In the long run, this is the best way for disadvantaged Americans to move to the front of the line.

Under your bill, as I understand it, "business necessity" -- which represents an employer's defense to a finding that a hiring or other employment practice has a disparate racial impact -- would be defined more narrowly than in the Administration's bill, so that an employment practice used as a job qualification or to measure ability to perform a job must bear a manifest relationship to the job in question. I believe that it may be possible for the Administration to join in your definition of "business necessity," if appropriate provisions can be formulated that address our specific educational concerns.

manifest relationship to SOG
" " to legit bus objectn

In that regard, we have no difficulty with the second provisio stated in your letter defining the term "class of jobs" to include jobs for which an applicant or employee may reasonably be expected to be considered for promotion or transfer within a reasonable period of time. (A conforming amendment to your bill related to this proviso is suggested in the attachment.) However, the first proviso specifically relating to education is too narrow in one respect and too broad in another. It only authorizes an employer to refuse to hire applicants under the age of 18 because they do not have a high school diploma or have not passed a high school equivalency exam. The educational concerns that I have raised are not limited to persons under the age of 18 or to the acquisition of high school diplomas. In today's technical and competitive world economy, increasingly rapid changes in jobs and employment resources require employees with learning and communication skills that enable them to adjust to changing conditions and requirements in their current jobs, as well as in jobs to which they may be promoted. Employers should be able to consider applicants' or employees' capacities to meet these needs. I therefore believe that your proviso needs to be broadened to include (1) degrees other than a high school diploma; (2) applicants' and employees' educational records reflecting their educational achievement, ability to learn, and diligence; (3) promotions as well as hiring decisions; and (4) applicants or employees without an age limitation. On the other hand, the broadening of the education proviso should be accompanied by the limitation that these education factors may be used by the employer if they have a disparate impact only if they have a manifest relationship to a legitimate business objective of the employer. Non-education-related employment practices used as job qualifications would be governed by the narrower test in your bill.

I have taken the liberty to attach a draft of such a proviso. Obviously, I would be pleased to hear your suggestions on it. I am confident that a proviso along these lines would not give employers broad authority to impose arbitrary or unnecessary educational requirements. However, it would recognize the general importance of education in today's and our future economy and send the important signal to students of all ages that it is important to work hard at education.

Sincerely,

Proposed Modification of First Proposed Proviso in Senator Danforth's August 2, 1991 Letter

Nothing in this Act shall be construed to prevent an employer, in making a hiring or other employment decision, from considering an applicant's or employee's educational achievements, including the applicant's or employee's diploma or degrees or academic performance, including test scores, if such consideration has a manifest relationship to a legitimate business objective of the employer.

Conforming Amendment to Danforth bill, consistent with the Second Proposed Proviso in his August 2, 1991 letter

In Section 5, in paragraph (2) of the definition of the term, "employment in question," add the words "or class of jobs" after the word, "job."

SJW

UNITED STATES SENATE
WASHINGTON, D. C.

JOHN C. DANFORTH
MISSOURI

August 2, 1991

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

Dear Mr. President:

Thanks so much for your more than generous comments in your Rose Garden press conference this morning. I especially appreciate your invitation to further communication on the civil rights issue. Here are my thoughts on how you might resolve this matter.

You have said that the specific problem with the legislation I have proposed is that it discourages employers "from relying on educational effort and achievement." In addition, Dick Thornburgh has raised the concern that employers should be able to hire people not only for the immediate job at hand, but for positions to which an employee might be promoted.

I propose that the legislation address each of these concerns, but not in the overly broad way suggested by the Administration.

This could be accomplished by using the same "business necessity" definition in my bill, but including two provisos.

The first would state that:

Nothing in this act shall be construed to prevent an employer from refusing to hire applicants under the age of 18 because they do not have a high school diploma or have not passed a high school equivalency exam.

The second would state:

The term "class of jobs" means jobs to which an employee or applicant may reasonably be expected to be promoted or transferred within a reasonable period of time.

If you could propose these provisos as addenda to my definition of business necessity, I am convinced that I could gain acceptance for the proposal and that we could get this matter behind us.

In addition, I have several other specific suggestions for compromising the other outstanding issues that are between us. I have shown these to Dick Thornburgh, but there has been no response.

Mr. President, I cannot overstate how important I think it is to the country, and more particularly to our party, to resolve the civil rights dispute before it reaches the Senate floor. The present position of the Administration is truly a turning back of the clock on civil rights. It is in direct contradiction to the Supreme Court's 1971 Griggs decision. I am convinced that your objectives can be met in the manner outlined above without doing violence to civil rights law.

Surely, it cannot serve the cause of education for civil rights and education to be put in conflict with one another. There is no doubt in my mind that your education objectives can be squared with existing civil rights law.

Please know my high regard for you. It has never flagged in the slightest throughout this long controversy.

Sincerely,

Jack

DANFORTH BILL

JUNE 27, 1991 1:30 PM

102D CONGRESS

S. 1408

1st SESSION

To amend the Civil Rights Act of 1964 to clarify provisions regarding disparate impact actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES
JUNE __, 1991

A BILL

To amend the Civil Rights Act of 1964 to clarify provisions regarding disparate impact actions, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Equal Employment Opportunity Act of 1991".

SEC. 2. FINDING AND PURPOSES.

(a) FINDING.-Congress finds that the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) has weakened the scope and effectiveness of Federal civil rights protections.

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

~~(1) to overrule the treatment of business necessity as defense in Wards Cove Packing Co. v. Atonio and to codify the meaning of business necessity used in Griggs v. Duke Power Co., 401 U.S. 424 (1971); and~~

(1) to overrule the proof burdens and meaning of business necessity in Wards Cove Packing Co. v. Atonio and to codify the proof burdens and the meaning of business necessity used in Griggs v. Duke Power Co., 401 U.S. 424 (1971); and

(2) to confirm ~~provide~~ statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.).

SEC. 3. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

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

"(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if--

~~"(i) a complaining party demonstrates that a particular employment practice or group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or~~

~~national origin; and~~

~~"(ii)(I) the respondent fails to demonstrate that the practice or groups of practices is required by business necessity; or~~

~~"(II) the complaining party makes the demonstration described in subparagraph (C) with respect to a different employment practice or group of employment practices.~~

"(i) a complaining party demonstrates that a particular employment practice or particular employment practices (or decision-making process as described in (B)(i)) cause a disparate impact on the basis of race, color, religion, sex, or national origin; and

"(ii)(I) the respondent fails to demonstrate that the practice or practices are required by business necessity; or

"(II) the complaining party makes the demonstration described in subparagraph (C) with respect to a different employment practice and the respondent refuses to adopt such alternative employment practice.

~~"(B)(i) With respect to an unlawful employment practice based on disparate impact as described subsection (A), the complaining party shall identify with particularity each employment practice that is responsible in whole or in significant part for the disparate impact, except that if the complaining party can demonstrate to the court, after discovery, that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the group of employment practices as a whole may be analyzed as one employment practice.~~

~~"(ii) If the elements of a decisionmaking process are capable of separation for analysis, the complaining party must identify each element with particularity, and respondent must demonstrate that the element or elements identified that are responsible in whole or in significant part for the disparate impact are required by business necessity. If the respondent demonstrates that a specific employment practice within a group of practices is not responsible in whole or in significant part for the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.~~

"(B)(i) With respect to demonstrating that a particular employment practice or particular employment practices cause a disparate impact as described in subsection (A)(i), the complaining party shall demonstrate that the particular employment practice causes in whole or in significant part the disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.

"(ii) If the respondent demonstrates that a specific employment practice is not responsible in whole or in significant part for the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

~~"(C) An employment practice responsible in whole or in significant part for a disparate impact that is demonstrated to be~~

~~required by business necessity shall be lawful unless the complaining party demonstrates that a different available employment practice or group of employment practices, which would have less disparate impact and make a difference in the disparate impact that is more than merely negligible, would serve the respondent as well.~~

"(C) An employment practice which causes in whole or in significant part a disparate impact that is demonstrated to be required by business necessity shall be unlawful if the complaining party demonstrates that a different available employment practice, which would have less disparate impact and make a difference in the disparate impact that is more than negligible, would serve the respondent's legitimate interests as well and the respondent refuses to adopt such alternative employment practice.

~~"(2) In deciding whether a respondent has met the standards described in paragraph (1) for business necessity, the court may receive evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to the evidence as is appropriate.~~

"~~(3)~~ A demonstration that an employment practice ~~or group of employment practices~~ is required by business necessity may not be used as a defense ~~only~~ against a claim ~~under this subsection~~ of intentional discrimination under this title.

"~~(4)~~ (3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses an illegal drug as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use 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 race, color, religion, sex, or national origin.

~~"(5) The mere existence of a statistical imbalance in the work force of an employer on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation.~~

~~"(b) CONSTRUCTION. Nothing in the amendment made by subsection (a) shall be construed to overrule any existing case concerning whether recovery is available under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) under a comparable worth theory.~~

SEC. 4. PROHIBITION AGAINST DISCRIMINATORY USE OF TEST SCORES. Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 3) is further amended by adding at the end the following new subsection:

"(l)~~(1)~~ It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color,

religion, sex or national origin.

~~"(2) Paragraph (1) shall not apply to a respondent seeking to comply with a court order aimed at remedying past discrimination.".~~

SEC. 5. DEFINITIONS.

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

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

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

"(n) ~~The term `group of employment practices' means a combination of particular employment practices in which each practice is responsible in whole or in significant part for an employment decision.~~

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

~~"(1) in the case of employment practices involving selection, that the practice or groups of practices bears a manifest relationship to requirements for effective job performance; and~~

~~"(2) in the case of other employment decisions not involving employment selection as described in paragraph (1), the practice or group of practices bears a manifest relationship to a legitimate business objective of the employer.~~

"(1) in the case of employment practices that are used as job qualifications or used to measure the ability to perform the job, the challenged practice must bear a manifest relationship to the employment in question.

"(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

"(o) ~~"(p) The term `requirements for effective job performance' includes,~~

~~"(1) the ability to perform competently the actual work activities lawfully required by the employer for an employment position; and~~

~~"(2) any other lawful requirement that is important to the performance of the job, including, but not limited to, factors such punctuality, attendance, a willingness to avoid engaging in misconduct or insubordination, not having a work history demonstrating unreasonable job turnover, and not engaging in conduct or activity that improperly interferes with the performance of work by others.~~

The term `employment in question' means--

"(1) the performance of actual work activities required by the employer for a job or class of jobs; or

"(2) any requirement related to behavior that is important to the job, but may not comprise actual work activities.

~~"(q)~~ (p) The term `respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program,

UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

September 23, 1991

MEMORANDUM TO JOHN SUNUNU

FROM: LAMAR ALEXANDER LA

SUBJECT: CIVIL RIGHTS LEGISLATION

This is a response I could send to Danforth's August 2 letter to the President. It would keep the civil rights bill from outlawing employers' use of the American Achievement Test.

Jeff Martin, our General Counsel, has done the work on this.

Would you like for us to do anything?

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202

Honorable John C. Danforth
United States Senate
Washington, DC 20510

Dear Jack:

President Bush asked me to review your August 2 letter concerning the pending civil rights legislation. He, as well as I, appreciate your recognition of the educational concerns that we have raised. The President wants a civil rights bill, and I am sure none of us wants a collision between efforts to advance education and efforts to advance civil rights.

In that spirit, I am writing to suggest an approach for avoiding that collision. Under the proposal outlined below, employers would be permitted to consider applicants' or employees' educational achievements, but only if such achievements have a manifest relationship to legitimate business objectives of the employer. Thus, under this test, employers could not set inappropriate educational prerequisites that have the effect of screening out minorities for "dead-end jobs." For example, a janitor who always wanted to be a janitor could not be required to show a diploma.

* * * * *

The Administration does not want to overrule the Supreme Court's Griggs decision. It does not want to authorize employers to impose arbitrary education requirements that bear no relationship to legitimate business objectives and that have a disparate racial impact. However, when many American school children are not learning what they need to know and do to succeed in today's world, we should not send a message that educational achievement does not count in the "real" world. In today's increasingly technical and competitive marketplace -- where jobs and the skill requirements change rapidly and where employers need to hire employees who know how to think and adapt to changing conditions -- employers should not be deterred by the prospect of litigation from having genuinely high educational expectations for their workforce. Reform of our educational system depends on creating incentives for all American school kids to work harder in school. In the long run, this is the best way for disadvantaged Americans to move to the front of the line.

Under your bill, as I understand it, "business necessity" -- which represents an employer's defense to a finding that a hiring or other employment practice has a disparate racial impact -- would be defined more narrowly than in the Administration's bill, so that an employment practice used as a job qualification or to measure ability to perform a job must bear a manifest relationship to the job in question. I believe that it may be possible for the Administration to join in your definition of "business necessity," if appropriate provisions can be formulated that address our specific educational concerns.

In that regard, we have no difficulty with the second provisio stated in your letter defining the term "class of jobs" to include jobs for which an applicant or employee may reasonably be expected to be considered for promotion or transfer within a reasonable period of time. (A conforming amendment to your bill related to this proviso is suggested in the attachment.) However, the first proviso specifically relating to education is too narrow in one respect and too broad in another. It only authorizes an employer to refuse to hire applicants under the age of 18 because they do not have a high school diploma or have not passed a high school equivalency exam. The educational concerns that I have raised are not limited to persons under the age of 18 or to the acquisition of high school diplomas. In today's technical and competitive world economy, increasingly rapid changes in jobs and employment resources require employees with learning and communication skills that enable them to adjust to changing conditions and requirements in their current jobs, as well as in jobs to which they may be promoted. Employers should be able to consider applicants' or employees' capacities to meet these needs. I therefore believe that your proviso needs to be broadened to include (1) degrees other than a high school diploma; (2) applicants' and employees' educational records reflecting their educational achievement, ability to learn, and diligence; (3) promotions as well as hiring decisions; and (4) applicants or employees without an age limitation. On the other hand, the broadening of the education proviso should be accompanied by the limitation that these education factors may be used by the employer if they have a disparate impact only if they have a manifest relationship to a legitimate business objective of the employer. Non-education-related employment practices used as job qualifications would be governed by the narrower test in your bill.

I have taken the liberty to attach a draft of such a proviso. Obviously, I would be pleased to hear your suggestions on it. I am confident that a proviso along these lines would not give employers broad authority to impose arbitrary or unnecessary educational requirements. However, it would recognize the general importance of education in today's and our future economy and send the important signal to students of all ages that it is important to work hard at education.

Sincerely,

Proposed Modification of First Proposed Proviso in Senator Danforth's August 2, 1991 Letter

Nothing in this Act shall be construed to prevent an employer, in making a hiring or other employment decision, from considering an applicant's or employee's educational achievements, including the applicant's or employee's diploma or degrees or academic performance, including test scores, if such consideration has a manifest relationship to a legitimate business objective of the employer.

Conforming Amendment to Danforth bill, consistent with the Second Proposed Proviso in his August 2, 1991 letter

In Section 5, in paragraph (2) of the definition of the term, "employment in question," add the words "or class of jobs" after the word, "job."

UNITED STATES SENATE
WASHINGTON, D. C.

JOHN C. DANFORTH
MISSOURI

August 2, 1991

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

Dear Mr. President:

Thanks so much for your more than generous comments in your Rose Garden press conference this morning. I especially appreciate your invitation to further communication on the civil rights issue. Here are my thoughts on how you might resolve this matter.

You have said that the specific problem with the legislation I have proposed is that it discourages employers "from relying on educational effort and achievement." In addition, Dick Thornburgh has raised the concern that employers should be able to hire people not only for the immediate job at hand, but for positions to which an employee might be promoted.

I propose that the legislation address each of these concerns, but not in the overly broad way suggested by the Administration.

This could be accomplished by using the same "business necessity" definition in my bill, but including two provisos.

The first would state that:

Nothing in this act shall be construed to prevent an employer from refusing to hire applicants under the age of 18 because they do not have a high school diploma or have not passed a high school equivalency exam.

The second would state:

> The term "class of jobs" means jobs to which an employee or applicant may reasonably be expected to be promoted or transferred within a reasonable period of time.

If you could propose these provisos as addenda to my definition of business necessity, I am convinced that I could gain acceptance for the proposal and that we could get this matter behind us.

In addition, I have several other specific suggestions for compromising the other outstanding issues that are between us. I have shown these to Dick Thornburgh, but there has been no response.

Mr. President, I cannot overstate how important I think it is to the country, and more particularly to our party, to resolve the civil rights dispute before it reaches the Senate floor. The present position of the Administration is truly a turning back of the clock on civil rights. It is in direct contradiction to the Supreme Court's 1971 Griggs decision. I am convinced that your objectives can be met in the manner outlined above without doing violence to civil rights law.

Surely, it cannot serve the cause of education for civil rights and education to be put in conflict with one another. There is no doubt in my mind that your education objectives can be squared with existing civil rights law.

Please know my high regard for you. It has never flagged in the slightest throughout this long controversy.

Sincerely,

Jack

DANFORTH BILL

JUNE 27, 1991 1:00 PM

102D CONGRESS 1st SESSION

S. 1408

To amend the Civil Rights Act of 1964 to clarify provisions regarding disparate impact actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES
JUNE __, 1991

A BILL

To amend the Civil Rights Act of 1964 to clarify provisions regarding disparate impact actions, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Equal Employment Opportunity Act of 1991".

SEC. 2. FINDING AND PURPOSES.

(a) FINDING.-Congress finds that the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) has weakened the scope and effectiveness of Federal civil rights protections.

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

~~(1) to overrule the treatment of business necessity as defense in Wards Cove Packing Co. v. Atonio and to codify the meaning of business necessity used in Griggs v. Duke Power Co., 401 U.S. 424 (1971); and~~

(1) to overrule the proof burdens and meaning of business necessity in Wards Cove Packing Co. v. Atonio and to codify the proof burdens and the meaning of business necessity used in Griggs v. Duke Power Co., 401 U.S. 424 (1971); and

(2) to confirm ~~provide~~ statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.).

SEC. 3. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

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

"(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if--

~~"(i) a complaining party demonstrates that a particular employment practice or group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or~~

~~national origin; and~~

~~"(ii)(I) the respondent fails to demonstrate that the practice or groups of practices is required by business necessity; or~~

~~"(II) the complaining party makes the demonstration described in subparagraph (C) with respect to a different employment practice or group of employment practices.~~

"(i) a complaining party demonstrates that a particular employment practice or particular employment practices (or decision-making process as described in (B)(i)) cause a disparate impact on the basis of race, color, religion, sex, or national origin; and

"(ii)(I) the respondent fails to demonstrate that the practice or practices are required by business necessity; or

"(II) the complaining party makes the demonstration described in subparagraph (C) with respect to a different employment practice and the respondent refuses to adopt such alternative employment practice.

~~"(B)(i) With respect to an unlawful employment practice based on disparate impact as described subsection (A), the complaining party shall identify with particularity each employment practice that is responsible in whole or in significant part for the disparate impact, except that if the complaining party can demonstrate to the court, after discovery, that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the group of employment practices as a whole may be analyzed as one employment practice.~~

~~"(ii) If the elements of a decisionmaking process are capable of separation for analysis, the complaining party must identify each element with particularity, and respondent must demonstrate that the element or elements identified that are responsible in whole or in significant part for the disparate impact are required by business necessity. If the respondent demonstrates that a specific employment practice within a group of practices is not responsible in whole or in significant part for the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.~~

"(B)(i) With respect to demonstrating that a particular employment practice or particular employment practices cause a disparate impact as described in subsection (A)(i), the complaining party shall demonstrate that the particular employment practice causes in whole or in significant part the disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.

"(ii) If the respondent demonstrates that a specific employment practice is not responsible in whole or in significant part for the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

~~"(C) An employment practice responsible in whole or in significant part for a disparate impact that is demonstrated to be~~

~~required by business necessity shall be lawful unless the complaining party demonstrates that a different available employment practice or group of employment practices, which would have less disparate impact and make a difference in the disparate impact that is more than merely negligible, would serve the respondent as well.~~

"(C) An employment practice which causes in whole or in significant part a disparate impact that is demonstrated to be required by business necessity shall be unlawful if the complaining party demonstrates that a different available employment practice, which would have less disparate impact and make a difference in the disparate impact that is more than negligible, would serve the respondent's legitimate interests as well and the respondent refuses to adopt such alternative employment practice.

"(2) ~~In deciding whether a respondent has met the standards described in paragraph (1) for business necessity, the court may receive evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to the evidence as is appropriate.~~

"~~(3)~~ A demonstration that an employment practice ~~or group of employment practices~~ is required by business necessity may not be used as a defense ~~only~~ against a claim ~~under this subsection~~ of intentional discrimination under this title.

"~~(4)~~ (3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses an illegal drug as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use 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 race, color, religion, sex, or national origin.

~~"(5) The mere existence of a statistical imbalance in the work force of an employer on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation.~~

~~"(b) CONSTRUCTION. Nothing in the amendment made by subsection (a) shall be construed to overrule any existing case concerning whether recovery is available under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) under a comparable worth theory.~~

SEC. 4. PROHIBITION AGAINST DISCRIMINATORY USE OF TEST SCORES. Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 3) is further amended by adding at the end the following new subsection:

"(l)~~(1)~~ It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color,

religion, sex or national origin.

~~"(2) Paragraph (1) shall not apply to a respondent seeking to comply with a court order aimed at remedying past discrimination.".~~

SEC. 5. DEFINITIONS.

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

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

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

"(n) ~~The term 'group of employment practices' means a combination of particular employment practices in which each practice is responsible in whole or in significant part for an employment decision.~~

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

~~"(1) in the case of employment practices involving selection, that the practice or groups of practices bears a manifest relationship to requirements for effective job performance; and~~

~~"(2) in the case of other employment decisions not involving employment selection as described in paragraph (1), the practice of group of practices bears a manifest relationship to a legitimate business objective of the employer.~~

"(1) in the case of employment practices that are used as job qualifications or used to measure the ability to perform the job, the challenged practice must bear a manifest relationship to the employment in question.

"(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

"(o) ~~"(p) The term 'requirements for effective job performance' includes,~~

~~"(1) the ability to perform competently the actual work activities lawfully required by the employer for an employment position; and~~

~~"(2) any other lawful requirement that is important to the performance of the job, including, but not limited to, factors such punctuality, attendance, a willingness to avoid engaging in misconduct or insubordination, not having a work history demonstrating unreasonable job turnover, and not engaging in conduct or activity that improperly interferes with the performance of work by others.~~

The term 'employment in question' means--

"(1) the performance of actual work activities required by the employer for a job or class of jobs; or

"(2) any requirement related to behavior that is important to the job, but may not comprise actual work activities.

"~~(q)~~ (p) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program,

news from
Senator Jack Danforth
— Missouri

Contact: Steve Hilton
202-224-6154

For Immediate Release
September 24, 1991

DANFORTH ADOPTS ANTI-BIAS LANGUAGE FROM LAW SIGNED BY PRESIDENT

U.S. Senator Jack Danforth (R-MO) announced today that civil rights legislation to be debated soon in the Senate will carry key worker protection language from the new law that assures equal employment opportunities for disabled Americans.

The law used as a model for the key anti-bias section of the Senate bill is the widely-acclaimed Americans with Disabilities Act (ADA). President Bush signed the ADA into law in July 1990, citing it as a "landmark" and an "historic new civil rights act."

The bill introduced today by Danforth and other Republican Senators would extend the ADA standard of job protection to women and minorities, whose ability to challenge unfair employment practices was undermined by the Supreme Court's ruling in the Wards Cove case (1989). The Republican civil rights bill also would make damages available, under caps, to women and disabled people who are victims of intentional discrimination, and would reverse or modify several other recent Supreme Court cases.

Danforth stated:

"We are introducing civil rights legislation because we believe that decisions by the Supreme Court in Wards Cove and other cases have turned back the clock on fairness in employment.

"There is a national consensus on civil rights. It is shared by Congress, the Administration, and, most importantly, the American people. Americans expect the law to ensure that people are treated fairly in hiring, promotion and similar matters. They do not favor preferences against, or in favor of, people on the basis of race, gender, disability or religion.

"Until this summer, discussion of civil rights legislation was dominated by a destructive and pointless debate over 'quotas.' This debate was bad for the country because it threatened to obscure the national consensus on equal employment opportunities. Fortunately, that debate has ended.

"At this point, it is understood by all parties that the key to a bill supported by the President is the 'business necessity' issue: If an employment practice screens out women and minorities, should the employer show that the practice is related to a person's ability to do the job? I believe the answer should be yes. Such practices should be unlawful unless they are related to the employment in

-- more --

question. Examples of this are a height requirement for police officers which excludes most women or a residency requirement in a suburban area which denies opportunity to minorities from the city.

"Ability to do the job was the standard set by a unanimous Supreme Court in 1971. Hiring on merit was the law of the land until the Wards Cove decision, which lowered the standard. A person's ability to do the job, of course, is a touchstone of the Americans with Disabilities Act.

"It is time to enact legislation. In order to break the impasse over 'business necessity,' we have decided to adopt the language of the ADA to bar employment discrimination. Specifically, the ADA bars 'qualification standards, employment tests or other selection criteria' that screen out disabled individuals, unless the practices are job-related. This is the standard of protection for disabled Americans. Our legislation would extend it to women, minorities and others.

"The bill also would reverse five cases on which there is little disagreement, and provide women and others injured by non-racial discrimination with access to damages, with caps in certain circumstances.

"This past Labor Day, Chairman of the EEOC Evan Kemp said of the the ADA, 'For all the rancor this year over a civil rights bill, we should take some lessons from the ADA, a civil rights bill that Congress passed with lopsided margins . . . [T]he ADA does not require, encourage or permit preferences or quotas for those with disabilities . . . Proponents of civil rights bills of the future should look to the ADA.'

"When it was suggested to me that we follow the ADA to settle the 'business necessity' issue, I was surprised that no one had suggested this approach during the discussions with the Administration. Ninety-one Senators voted for the Americans with Disabilities Act. In the House, the vote was 377-28. The President rightly views the law as a centerpiece of his domestic accomplishments. The ADA's affirmation of hiring on merit is a solid assurance of fairness in the workplace for the disabled. I believe this assurance should and will be extended to all Americans."

The Senate vote of 91-6 to pass the Americans with Disabilities Act was on July 13, 1990. The House of Representatives passed the measure 377-28 on July 12, 1990.

Attachments, including synopsis of bill

practice by the court. This approach is similar to the President's recommendation set forth in the veto message on the Civil Rights Act of 1990.

The bill establishes as law that an employer may consider all elements that relate to the employment in question, such as the ability to perform actual duties as well as other behavior that is important to the job (such as punctuality, the ability to work with others, and other more intangible qualities.)

With respect to employment aptitude tests, which is not a Wards Cove issue, the bill prohibits the adjustment, or "norming," of test scores by racial or other groupings.

Other Principal Sections, Civil Rights Act of 1991:

In the Patterson case (1989), the Court held that the Civil Rights Act of 1866, which bars intentional discrimination in contracts, applies only to the formation and enforcement of contracts, and therefore does not prohibit racial harassment or other forms of discrimination on the job. It is generally agreed that this case should be overturned. The bill is modeled on the language of the Conference Report that accompanied the Civil Rights Act of 1990.

In Price Waterhouse (1989), the Court held that the defendant in a gender-related case may avoid liability by showing that the employment decision would have been made in the absence of intentional discrimination, even when the plaintiff has proven that gender was a motivating factor in the decision. The bill makes it unlawful for gender to be a motivating factor in an employment decision. The bill does not provide damages, nor reinstatement, should the employer show the same decision would have been made, absent reliance on gender as a motivating factor. In such circumstances, the plaintiff would be entitled to declaratory relief or an injunction. Attorney's fees would be available only for work directly attributable to pursuit of a "Price Waterhouse" claim. This approach is similar to the President's recommendation in his veto message on the CRA of 1990.

In Martin v. Wilks (1989), the Court held that white firefighters were not bound by a court-approved consent decree entered into by the City of Birmingham, AL, even though they had actual notice and an opportunity to intervene. The bill reverses the case. It provides that individuals can be bound by a judgment or consent decree if they had actual notice that the decree could adversely affect their interests and had an opportunity to object to the decree, or if their interests were fairly represented in court by a previous litigant on the same legal grounds and in a similar factual situation.

In Lorance (1989), the Court held that the statute of limitations for challenges to the fairness of seniority plans begins when the plan is adopted, not when it is applied to the plaintiff. The bill reverses the case.

In Shaw (1986), the Court held that interest on delayed payment was not available to plaintiffs who secured a judgment against the Federal government. Such interest is available when a judgment is won against a private party. The bill reverses the case, providing that the Federal government must pay interest on delayed payments.

Summary of Civil Rights Act of 1991
September 24, 1991

Republican Senators introduced legislation today to address rulings by the Supreme Court with respect to equality of employment opportunity and fairness in the work place. Today's bill reflects revisions to legislation proposed by Senator Danforth and others on June 4. The revisions have been made primarily to accommodate concerns expressed by the Administration.

Section 5 of Civil Rights Act of 1991:

The bill affords to women, religious minorities and the disabled damages for intentional discrimination. These are new remedies; therefore, this bill is not "restorative." The bill is a compromise between the positions of Democrats in Congress, civil rights groups, business groups, and the Administration. The bill provides damages without caps for back pay and other past out-of-pocket costs. The bill also sets overall caps on future pecuniary damages; pain and suffering, and punitive damages. For employers with 100 or fewer employees, this cap is $50,000. For employers with between 101 and 500 employees, the cap on damages is $100,000. For businesses with more than 500 employees, the cap on damages is $300,000. Juries will be available to decide liability and amount of damages.

Sections 7 and 8, Civil Rights Act of 1991:

The bill reverses Wards Cove (1989), in which the Court made it more difficult for plaintiffs to prove a claim of disparate impact. A disparate impact claim is intended to insure that hiring and promotion practices truly measure whether an individual can perform a job. Employers may not use practices with no manifest relationship to the employment in question if the practices have the effect of excluding minorities, women, or religious minorities.

The bill is a compromise between the positions of Democratic Senators and Representatives and civil rights groups, on one hand, and the Administration, on the other. With respect to specific issues:

The bill defines "business necessity" to be an employment practice(s) that "bears a manifest relationship to the employment in question." The bill includes exact language from the Americans with Disabilities Act to define which employment practices are subject to the "manifest relationship" test. Thus, the bill states that practices used as "qualification standards, employment tests or other selection criteria...must bear a manifest relationship to the employment in question."

The bill also includes a standard for practice(s) not used as "standards, employment tests or other selection criteria"; such practice(s) must bear a manifest relationship to a legitimate business objective.

The bill calls upon plaintiffs to specify the practice(s) ("particularity") that cause in whole or in significant part the disparate impact. Particularity is not required when a plaintiff shows that a decision-making process cannot be separated for analysis; such an inseparable process will be treated as a single

Emphasis supplied

The Washington Times MONDAY, SEPTEMBER 2, 1991 / PAGE F3

EVAN KEMP JR.

Opportunity for the disabled

This Labor Day will, thankfully, be the last one that will not be just another day for millions of Americans who are kept out of work by artificial barriers.

The Americans With Disabilities Act (ADA), a revolutionary law signed by President Bush on July 26 a year ago, not only brings persons with disabilities into the workforce but also serves as a model for future civil rights legislation.

For all the rancor this year over a civil rights bill, we should take some lessons from the ADA, a civil rights bill that Congress passed with lopsided margins.

This long overdue legislation proclaims that "the nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living and economic self-sufficiency for such individuals" with disabilities. The ADA thus guarantees that places of public accommodation, transportation, telecommunications and, above all, employment will be accessible to those with disabilities, such as people who are blind, wheelchair users, those with hearing and speech impediments and others who have a major life activity that is substantially impaired.

This legislation, which will take effect for most businesses on July 26, 1992, will obviously require fundamental changes in the way we regard the workplace and its employees. Though opponents wildly exaggerated the costs of reasonable accommodation of qualified individuals with disabilities, this law will make a world of difference to those individuals seeking work and all its benefits.

Why the contrasting reception with the other civil rights bills currently being debated? Let me focus on the employment provisions of the ADA, since these are the parts of the civil rights bill that are currently most in dispute. The difference is far more than a matter of the specific groups being affected; approval for the ADA rests on other grounds, which should be examined by those who want another civil rights bill.

First of all, the whole premise of the ADA is to bring individuals into the *mainstream* of American society; to end job, housing and public accommodations segregation. Rather than emphasizing the differences of persons with disabilities, our newest civil rights law seeks common ground between them and those who are fully able-bodied. The disability rights movement is one of those rare groups whose logic requires it to disappear.

Rather than emphasizing the differences of persons with disabilities, our newest civil rights law seeks common ground between them and those who are fully able-bodied.

Second, the ADA does not require businesses to hire just any person with disabilities; they must be qualified. The ADA requires only that employers offer the opportunity to work, and if the accommodation (for example, a reader for a blind attorney) required for the business is too expensive, then it cannot be forced upon them. The ADA is not an entitlement program.

Thus, the ADA does not require, encourage or permit preferences or quotas for those with disabilities. Accommodation of people who use wheelchairs (widening an aisle) is different from acommodation for someone who is hearing-impaired (providing a telephone relay system). The action an employer takes must be individual and not just addressed to a mass labeled as "the disabled." Remedies are thus *tailored to the individual.*

Finally, none of these developments would have been possible if the ADA had not drawn its strength from this nation's belief in the fundamental principle of equal opportunity. At long last, this ideal will embrace those with disabilities. A moral consensus, which is surely built on the civil rights movement, underlies the ADA.

The lessons to be drawn seem very plain. Proponents of civil rights bills of the future should look to the ADA. They must ask themselves: Is this civil rights bill going to bring Americans closer together? Will it reduce workplace frictions and those throughout society? Or will it foster resentment?

Does the bill encourage people to get the most out of their education? Does it reward those who have the incentive to complete training programs? Can employers feel they can hire the most qualified — without fear of lawsuit?

Are the remedies the civil rights bill offers appropriate to the violation? Can employees believe they are being treated fairly in hiring and promotions and have adequate recourse when they must sue for their rights? Are we really compensating the victim adequately if we require quotas or their euphemisms, goals and timetables? (I look forward to seeing a damages provision.) What good does it do a victim of discrimination to hire others of his or her particular class? A desirable civil rights bill would allow tough remedies that at the same time aid specific victims of discrimination.

Finally, proponents of civil rights must ask themselves how their legislation addresses the moral consensus on civil rights that goes back to the Declaration of Independence. We must take civil rights back from the domain of interest groups and lawyers and restore it in the language and tone of the family dinner table. We need to revive the connection between civil rights and fundamental moral principles.

The ADA passed these tests. Any civil rights bill that does so will become law. Like our holidays, such a law will be another occasion for all Americans to rejoice in their common heritage.

Evan Kemp Jr. is chairman of the U.S. Equal Employment Opportunity Commission, which enforces federal employment discrimination laws.

Weekly Compilation of

Presidential Documents

Monday, July 30, 1990
Volume 26—Number 30
Pages 1137–1170

Remarks on Signing the Americans with Disabilities Act of 1990

July 26, 1990

Evan, thank you so much. And welcome to every one of you, out there in this splendid scene of hope, spread across the South Lawn of the White House. I want to salute the Members of the United States Congress, the House and the Senate who are with us today—active participants in making this day come true. This is, indeed, an incredible day. Especially for the thousands of people across the Nation who have given so much of their time, their vision, and their courage to see this act become a reality.

You know, I started trying to put together a list of all the people who should be mentioned today. But when the list started looking a little longer than the Senate testimony for the bill, I decided I better give up, or that we'd never get out of here before sunset. So, even though so many deserve credit, I will single out but a tiny handful. And I take those who have guided me personally over the years: of course, my friends Evan Kemp and Justin Dart, up here on the platform with me; and of course—I hope you'll forgive me for also saying a special word of thanks to two from the White House, but again, this is personal, so I don't want to offend those omitted—two from the White House, Boyden Gray and Bill Roper, who labored long and hard. And I want to thank Sandy Parrino, of course, for her leadership. And I again—it is very risky with all these Members of Congress here who worked to hard, but I can say on a very personal basis, [Senator] Bob Dole has inspired me.

This is an immensely important day, a day that belongs to all of you. Everywhere I

Emphasis supplied

look, I see people who have dedicated themselves to making sure that this day would come to pass: my friends from Congress, as I say, who worked so diligently with the best interest of all at heart, Democrats and Republicans; members of this administration—and I'm pleased to see so many top officials and members of my Cabinet here today who brought their caring and expertise to this fight; and then, the organizations—so many dedicated organizations for people with disabilities, who gave their time and their strength; and perhaps most of all, everyone out there and others—across the breadth of this nation are 43 million Americans with disabilities. You have made this happen. All of you have made this happen. To all of you, I just want to say your triumph is that your bill will now be law, and that this day belongs to you. On behalf of our nation, thank you very, very much.

Three weeks ago we celebrated our nation's Independence Day. Today we're here to rejoice in and celebrate another "Independence Day," one that is long overdue. With today's signing of the landmark Americans for Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom. As I look around at all these joyous faces, I remember clearly how many years of dedicated commitment have gone into making this historic new civil rights act a reality. It's been the work of a true coalition, a strong and inspiring coalition of people who have shared both a dream and a passionate determination to make that dream come true. It's been a coalition in the finest spirit: a joining of Democrats and Republicans, of the legislative and the executive branches, of Federal and State agencies, of public officials and private citizens, of people with disabilities and without.

This historic act is the world's first comprehensive declaration of equality for people with disabilities—the first. Its passage has made the United States the international leader on this human rights issue. Already, leaders of several other countries, including Sweden, Japan, the Soviet Union, and all 12 members of the EEC [European Economic Community], have announced that they hope to enact now similar legislation.

Our success with this act proves that we are keeping faith with the spirit of our courageous forefathers who wrote in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights." These words have been our guide for more than two centuries as we've labored to form our more perfect union. But tragically, for too many Americans, the blessings of liberty have been limited or even denied. The Civil Rights Act of '64 took a bold step towards righting that wrong. But the stark fact remained that people with disabilities were still victims of segregation and discrimination, and this was intolerable. Today's legislation brings us closer to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness.

This act is powerful in its simplicity. It will ensure that people with disabilities are given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream. Legally, it will provide our disabled community with a powerful expansion of protections and then basic civil rights. It will guarantee fair and just access to the fruits of American life which we all must be able to enjoy. And then, specifically, first the ADA ensures that employers covered by the act cannot discriminate against qualified individuals with disabilities. Second, the ADA ensures access to public accommodations such as restaurants, hotels, shopping centers and offices. And third, the ADA ensures expanded access to transportation services. And fourth, the ADA ensures equivalent telephone services for people with speech or hearing impediments.

These provisions mean so much to so many. To one brave girl in particular, they will mean the world. Lisa Carl, a young Washington State woman with cerebral palsy, who I'm told is with us today, now will always be admitted to her hometown

theater. Lisa, you might not have been welcome at your theater, but I'll tell you—welcome to the White House. We're glad you're here. The ADA is a dramatic renewal not only for those with disabilities but for all of us, because along with the precious privilege of being an American comes a sacred duty to ensure that every other American's rights are also guaranteed.

Together, we must remove the physical barriers we have created and the social barriers that we have accepted. For ours will never be a truly prosperous nation until all within it prosper. For inspiration, we need look no further than our own neighbors. With us in that wonderful crowd out there are people representing 18 of the daily Points of Light that I've named for their extraordinary involvement with the disabled community. We applaud you and your shining example. Thank you for your leadership for all that are here today.

Now, let me just tell you a wonderful story, a story about children already working in the spirit of the ADA—a story that really touched me. Across the Nation, some 10,000 youngsters with disabilities are part of Little League's Challenger Division. Their teams play just like others, but—and this is the most remarkable part—as they play, at their sides are volunteer buddies from conventional Little League teams. All of these players work together. They team up to wheel around the bases and to field grounders together and, most of all, just to play and become friends. We must let these children be our guides and inspiration.

I also want to say a special word to our friends in the business community. You have in your hands the key to the success of this act, for you can unlock a splendid resource of untapped human potential that, when freed, will enrich us all. I know there have been concerns that the ADA may be vague or costly, or may lead endlessly to litigation. But I want to reassure you right now that my administration and the United States Congress have carefully crafted this Act. We've all been determined to ensure that it gives flexibility, particularly in terms of the timetable of implementation, and we've been committed to containing the costs that may be incurred.

This act does something important for American business, though—and remember this: You've called for new sources of workers. Well, many of our fellow citizens with disabilities are unemployed. They want to work, and they can work, and this is a tremendous pool of people. And remember, this is a tremendous pool of people who will bring to jobs diversity, loyalty, proven low turnover rate, and only one request: the chance to prove themselves. And when you add together Federal, State, local, and private funds, it costs almost $200 billion annually to support Americans with disabilities—in effect, to keep them dependent. Well, when given the opportunity to be independent, they will move proudly into the economic mainstream of American life, and that's what this legislation is all about.

Our problems are large, but our unified heart is larger. Our challenges are great, but our will is greater. And in our America, the most generous, optimistic nation on the face of the Earth, we must not and will not rest until every man and woman with a dream has the means to achieve it.

And today, America welcomes into the mainstream of life all of our fellow citizens with disabilities. We embrace you for your abilities and for your disabilities, for our similarities and indeed for our differences, for your past courage and your future dreams. Last year, we celebrated a victory of international freedom. Even the strongest person couldn't scale the Berlin Wall to gain the elusive promise of independence that lay just beyond. And so, together we rejoiced when that barrier fell.

And now I sign legislation which takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America.

With, again, great thanks to the Members of the United States Senate, leaders of whom are here today, and those who worked so tirelessly for this legislation on both sides of the aisles. And to those Members of the House of Representatives with us here today, Democrats and Republicans as well, I salute you. And on your behalf, as well as the behalf of this entire country, I

now lift my pen to sign this Americans with Disabilities Act and say: Let the shameful wall of exclusion finally come tumbling down. God bless you all.

Note: The President spoke at 10:11 a.m. on the South Lawn of the White House. In his opening remarks, he referred to Evan Kemp, Chairman of the Equal Opportunity Employment Commission; Justin Dart, Chairman of the President's Committee for Employment of People With Disabilities; C. Boyden Gray, Counsel to the President; William L. Roper, Deputy Assistant to the President for Domestic Policy and Director of the Office of Policy Development; and Sandy Parrino, chairperson of the National Council of Disabilities. A tape was not available for verification of the content of these remarks. S. 933, approved July 26, was assigned Public Law No. 101–336.

Call Byrd re 8-2 Connie Horner/
Ltr/George Bradley/dell

On the record:

Administration officials have been discussing the civil rights bill with Sen. Danforth for quite some time. These discussions have not yet produced an agreement. If Sen. Danforth's decision to introduce a new bill means that he is no longer seeking an agreement, we are disappointed. The Administration will present its views of the new bill after it has been carefully reviewed.

On background:

The new bill appears to contain ~~many of the~~ essentially same fundamental flaws as H.R. 1 (the bill passed by the House of Representatives) and last year's Kennedy-Hawkins bill (which was vetoed by the President.

The new bill does not appear to solve the most serious problems with the previous bills: (1) they would drive employers to adopt quotas by radically changing the law of disparate impact; (2) they would protect existing quotas from legal challenge by slamming the courthouse door in the face of those who have been victimized by quotas in consent decrees; and (3) they would transform civil rights litigation into a tort-style system with juries awarding compensatory and punitive damages.

The new bill does not contain a definition of "business necessity" from the Americans with Disabilities Act. Indeed, it could not do any such thing since "business necessity" is used in the ADA as an <u>undefined term</u>.

Copy to Boyden/McClure

UNITED STATES SENATE
WASHINGTON, D. C.

JOHN C. DANFORTH
MISSOURI

June 20, 1991

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

Dear John:

Yesterday, you said that everyone agrees that the objective of civil rights legislation should be to return to the Supreme Court's decision in Griggs v. Duke Power Co., and that the definition of "business necessity" should be lifted verbatim from that decision. I think that your suggestion is very important, and that it offers the possibility of a real breakthrough in resolving this problem.

The issue dealt with in Griggs is explained by Chief Justice Burger in the first sentence of the Court's opinion:

> We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (401 U.S. at 425-426, emphasis supplied)

The Court then proceeds to analyze the employment standards before it. With respect to two tests administered to employees, the Court finds that:

> Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. (401 U.S. at 428)

The Court then analyzes Title VII as follows:

> The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.
>
> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.
>
> The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used. (401 U.S. at 431-432, emphasis supplied)

Further interpreting Title VII, the Court quotes the following EEOC guidelines as "expressing the will of Congress:"

> The Commission accordingly interprets "professionally developed ability test" to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. (401 U.S. 433 n. 9, emphasis supplied)

Finally, at the end of the opinion, the Court summarizes its holding.

> What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the

> better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract. (401 U.S. at 436, emphasis supplied)

John, as you can see, a fair reading of Griggs is not a matter of lifting one isolated sentence out of context. From the beginning of the opinion to the end, Griggs is about job performance. Therefore, it is clear to me that the Court best defines business necessity at 401 U.S. 431. Using Griggs language verbatim, the legislation could provide that:

The term "required by business necessity" means--shown to be related to job performance.

Let me know what you think.

Sincerely,

cc: Senator Robert Dole

UNITED STATES SENATE
WASHINGTON, D. C.

JOHN C. DANFORTH
MISSOURI

June 20, 1991

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

Dear John:

Yesterday, you said that everyone agrees that the objective of civil rights legislation should be to return to the Supreme Court's decision in Griggs v. Duke Power Co., and that the definition of "business necessity" should be lifted verbatim from that decision. I think that your suggestion is very important, and that it offers the possibility of a real breakthrough in resolving this problem.

The issue dealt with in Griggs is explained by Chief Justice Burger in the first sentence of the Court's opinion:

> We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (401 U.S. at 425-426, emphasis supplied)

The Court then proceeds to analyze the employment standards before it. With respect to two tests administered to employees, the Court finds that:

> Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. (401 U.S. at 428)

The Court then analyzes Title VII as follows:

> The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.
>
> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.
>
> The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used. (401 U.S. at 431-432, emphasis supplied)

Further interpreting Title VII, the Court quotes the following EEOC guidelines as "expressing the will of Congress:"

> The Commission accordingly interprets "professionally developed ability test" to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. (401 U.S. 433 n. 9, emphasis supplied)

Finally, at the end of the opinion, the Court summarizes its holding.

> What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the

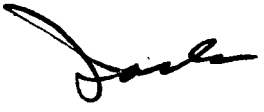
> better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract. (401 U.S. at 436, emphasis supplied)

John, as you can see, a fair reading of Griggs is not a matter of lifting one isolated sentence out of context. From the beginning of the opinion to the end, Griggs is about job performance. Therefore, it is clear to me that the Court best defines business necessity at 401 U.S. 431. Using Griggs language verbatim, the legislation could provide that:

The term "required by business necessity" means--shown to be related to job performance.

Let me know what you think.

Sincerely,



cc: Senator Robert Dole

UNITED STATES SENATE
WASHINGTON, D. C.

JOHN C. DANFORTH
MISSOURI

June 19, 1991

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

Dear John:

This afternoon you asked me to provide you with verbatim quotes from the Griggs decision, which define "business necessity."

The seven instances in which the Griggs decision defines business necessity are listed below:

The practices must:

A) "be significantly related to successful job performance", 401 U.S. 424, 426.

B) "be shown to be related to job performance", 401 U.S. 424, 431.

C) "bear a demonstrable relationship to successful performance of the jobs for which it was used." 401 U.S. 424, 431.

D) "[not be] unrelated to measuring job capability." 401 U.S. 424, 432.

E) "have a manifest relationship to the employment in question." 401 U.S. 424, 432.

F) "measure the applicant's ability to perform a particular job or class of jobs." 401 U.S. 424, 433 n.9.

G) "[be] demonstrably a reasonable measure of job performance." 401 U.S. 424, 436.

Our problem has been that definitions A, B, C, D, F, and G are acceptable to the civil rights

community, and only definition E is acceptable to the White House legal counsel. This is why we have tried to satisfy both points of view with a bifurcated definition.

If the White House could accept definitions A, B, C, D, F or G, I am sure that we could pass a bill in short order. I do not believe that it would be possible to convince supporters of the legislation to accept only definition E as being the heart of the Griggs decision.

We believe that the holding in Griggs with respect to business necessity is best expressed in the following passage:

"The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. 424, 431.

Please let me know what you think.

Sincerely,

UNITED STATES SENATE
WASHINGTON, D. C.

JOHN C. DANFORTH
MISSOURI

June 19, 1991

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

Dear John:

This afternoon you asked me to provide you with verbatim quotes from the Griggs decision, which define "business necessity."

The seven instances in which the Griggs decision defines business necessity are listed below:

The practices must:

A) "be significantly related to successful job performance", 401 U.S. 424, 426.

B) "be shown to be related to job performance", 401 U.S. 424, 431.

C) "bear a demonstrable relationship to successful performance of the jobs for which it was used." 401 U.S. 424, 431.

D) "[not be] unrelated to measuring job capability." 401 U.S. 424, 432.

E) "have a manifest relationship to the employment in question." 401 U.S. 424, 432.

F) "measure the applicant's ability to perform a particular job or class of jobs." 401 U.S. 424, 433 n.9.

G) "[be] demonstrably a reasonable measure of job performance." 401 U.S. 424, 436.

Our problem has been that definitions A, B, C, D, F, and G are acceptable to the civil rights

community, and only definition E is acceptable to the White House legal counsel. This is why we have tried to satisfy both points of view with a bifurcated definition.

If the White House could accept definitions A, B, C, D, F or G, I am sure that we could pass a bill in short order. I do not believe that it would be possible to convince supporters of the legislation to accept only definition E as being the heart of the Griggs decision.

We believe that the holding in Griggs with respect to business necessity is best expressed in the following passage:

"The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. 424, 431.

Please let me know what you think.

Sincerely,