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Folder Title:
Civil Rights (2 of 2) 1991 [5]

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September 18, 1991

Senator Bob Dole
United State Senate
Office of the Republican Leader
Washington, DC 20510-7020

Dear Senator Dole:

In response to your request, I have reviewed Senator Danforth's proposals for civil rights legislation and the modifications suggested by you and Senator Kassebaum. I will limit my comments to the four areas, identified in your letter, where the two versions differ.

1. Finality of Consent Decrees. In my opinion, the Dole-Kassebaum modifications strike a better balance between the need for consent decree finality and the rights of third parties adversely affected by consent decrees. Your modifications will encourage settlements which take account of the interests of all employees, rather than casting the onus of settlement upon employees not represented in decree negotiations. In workforces increasingly diversified by sex and national origin as well as race, finality should not be given to settlements made at the expense of employees who have notice only that a settlement "might adversely affect the[ir] interests and legal rights." Your modification would prevent litigants from capitalizing on the high probability that potentially affected employees would decline to enter ongoing litigation when their legal rights might not be adversely affected.

Moreover, how would courts determine whether notice contained "sufficient detail" to show an employee that the decree "might adversely affect" him or her? Your proposal, barring challenges where an actual challenge on "the same legal grounds and with a similar factual situation" occurs, would be much easier for courts to apply fairly.

Your proposal might be improved by deletion of the phrase "unless there has been an intervening change in law or fact." Though I appreciate your effort to recognize that legal doctrines in this area do change and that factual changes such as labor market shifts do occur, I think the preceding clause adequately addresses this issue. Where there is an actual challenge to a decree involving "the same legal grounds and with a similar factual situation," it is fair to hold all those "adequately represented" to the outcome of that challenge.

2. Disparate Impact Causation. I believe the Dole-Kassebaum deletion of the phrase "in whole or in significant part" would improve the Danforth proposal. Under the Danforth language, courts would be drawn into making fine determinations of causation not required under Griggs and its progeny or Wards Cove. Your proposal effectively deals with the post-Wards Cove dilemma of employees excluded from employment opportunities by processes "not capable of separation for analysis" without otherwise altering Title VII law.

3. The Definition of "Business Necessity." I will take as a given that a bifurcated standard for "job qualifications" and "other employment practices" would be politically acceptable to both Congress and the Administration. Deletion of "that include job qualifications and are" so that the subsection would read "in the case of employment practices used to measure the ability to perform the job, the challenged practice must bear a manifest relationship to the employment in question" would simplify the provision.

4. Jury Trials. Like you, I am concerned that jury trials, when combined with compensatory and punitive damages, will convert a process designed to facilitate conciliation into a tort litigation system. However, I do not believe any bill before Congress combines greater remedies to victims of discrimination with inexpensive and conciliatory dispute resolution processes. Given the limited framework within which constructive suggestions may be made, I believe your revision would produce more uniform assessments of monetary liability because judges, unlike juries, would have to articulate standards for their calculations of damages. I can not address whether your proposed liability/damages bifurcation would meet Constitutional standards without further research.

If I can be of further assistance to you and Senator Kassebaum, please do not hesitate to call.

Sincerely,

Charles

Charles A. Shanor
Professor of Law

CAS:atj

BOB DOLE
KANSAS

United States Senate

OFFICE OF THE REPUBLICAN LEADER
WASHINGTON, DC 20510-7020

FACSIMILE COVER SHEET

TIME: 5:10 p.m. **DATE:** Sept. 16, 1991

TO: Governor Sununu

FROM: Senator Dole

RE:

23 **PAGES TO FOLLOW THIS COVER SHEET**

COMMENTS: During the recess, I asked five outside experts to review the changes suggested in the Dole-Kassebaum letter. So far, I have received three responses, which I would like to share with you. I have also sent these to Boyden Grey's office.

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September 3, 1991

OUR FILE NO.
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VIA MESSENGER

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

Re: Danforth Civil Rights Proposals

Dear Senator Dole:

Thank you for asking me to review and comment upon Senator Danforth's proposed civil rights bills, and the modifications to those measures suggested by yourself and Senator Kassebaum. I hope that my comments prove useful in considering this important legislation.

Before addressing the specific provisions in question, let me commend you, Senator Kassebaum and Senator Danforth for your attempts to mediate the different approaches in this area in order to achieve a compromise acceptable to all of the various interested parties and in the national interest. I know these efforts have been difficult, and everyone concerned with ensuring civil rights in America is in your collective debt.

Senator Danforth's three bills, while a substantial improvement over H.R. 1 and the civil rights bills passed by both the House and Senate last year, still are very far reaching measures that go well beyond reversal of five troublesome Supreme Court rulings. Indeed, the Danforth bills embody all of the essential elements of prior legislative proposals. For this reason, these bills still suffer from the defects inherent in prior legislation in several key areas. In response to your request, however, I have addressed only those areas in which you and Senator Kassebaum have proposed alteration of the Danforth proposals.[1/]

Remedies

1. The Danforth Proposals

One principal area of concern lies in remedies. I have made my views on expanded remedies under Title VII quite clear in prior comments and testimony, and will not repeat those views at length yet again. I summarized my thoughts on this subject in a letter to you, dated October 10, 1990, discussing last year's proposals:

> I am firmly convinced that the basic Title VII remedial structure -- administrative conciliation, restorative relief rather than damages and bench rather than jury trials -- remains appropriate for the vast majority of Title VII cases. There may be some situations where some variance from this scheme is called for; for example, in harassment cases where there is no economic remedy available under current law. If Congress wishes to supplement existing remedies in these areas, it should do so specifically. It should not turn Title VII into a national tort law, at a time when tort law has shown itself so troublesome in so many areas of our society.[2/]

1/ I have not addressed collateral attacks to consent decrees, an issue raised by the Supreme Court decision in Martin v. Wilks, 109 S. Ct. 2180 (1989), because I wrote an *amicus curiae* brief to the Supreme Court in the Martin case, and actively participated in the advocacy of the losing side before the Court.

2/ You were kind enough to insert my comments into the Congressional Record on October 16, 1990, beginning at S 15350. I would be happy to send you other materials I have prepared on this issue, including testimony on H.R. 1 earlier this year.

Nothing has altered my fundamental conviction on this score. Senator Danforth apparently does not agree with me; his bills continue to allow compensatory and punitive damages, and jury trials, for all Title VII cases involving "intentional discrimination." I believe that this proposal, even with limitations on the amount of compensatory or punitive damages, threatens to disrupt Title VII's successful remedial mechanism.

The principal reason that I am concerned about the enhanced remedies embodied in the Danforth proposals is that they would apply to the vast majority of Title VII cases. Lest there be any misunderstanding, "intentional discrimination" is a term of art under Title VII, and has come to encompass all cases that are not premised upon a "disparate impact" theory of discrimination. "Intentional discrimination" claims do not necessarily involve malicious or intentional bigotry. These cases do not require direct proof of wrongdoing, and in my experience cases of "intentional discrimination" involving direct evidence of animus are quite rare.

Instead, the normal individual "intentional discrimination" claim is based wholly upon circumstantial evidence, and is tried according to a paradigm of proof established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under these standards, a plaintiff seeking to prove "intentional discrimination" initially must show that he or she is a member of a protected group; was qualified for and sought a particular opportunity; was rejected; and that thereafter, the employer continued to seek others for that opportunity. If the plaintiff can meet this initial burden, the employer must articulate a legitimate non-discriminatory reason for the plaintiff's treatment. If the employer does so, the plaintiff then must prove that this reason is a pretext; that is, that it is not the true reason for the employer's action. At no point in this sequence is direct evidence of intentional wrongdoing required.

The Danforth bills would allow compensatory and punitive damages, and jury trials, in such individual "intentional discrimination" cases. Additionally, it is vital for members of the Senate to understand clearly that these enhanced remedies and jury trials would be readily available in class actions under Title VII. As stated above, "intentional discrimination" encompasses a wide variety of claims, including any Title VII case not premised upon the disparate impact theory of discrimination. Many Title VII class actions involve claims of unequal treatment that plainly fall within the world of "intentional discrimination" as that term is used under Title VII.

In such "disparate treatment" class actions, the plaintiff generally must prove a pattern or practice of discrimination. To do so, plaintiffs often depend heavily upon statistical evidence. For example, in a disparate treatment class action attacking an employer's promotion policies, a minority plaintiff might use statistics to show that fewer minorities are promoted than would be expected by their presence in the relevant pool in the workforce. This is much the same premise that would be used in a disparate impact case, which would arise if the plaintiff chose to attack one specific aspect of the promotional process (e.g., an allegedly unlawful test) as opposed to the results of the promotion process as a whole.[3/] Moreover, many courts regard the same level or quantum of statistical proof as probative of discrimination under both theories. <u>See</u>, <u>e.g.</u>, <u>Kilgo v. Bowman Transportation, Inc.</u>, 789 F. 2d 859 (11th Cir. 1986); <u>Diaz v. AT&T</u>, 752 F. 2d 1356 (9th Cir. 1985). While most courts require some anecdotal evidence in disparate treatment class actions, on the theory that statistical evidence alone may not prove that the employer's "standard operating procedure" is discrimination, this trend is not uniform, and in any case introduction of some such evidence does not present a substantial barrier to recovery if adequate statistical evidence is available.

In other words, both the disparate impact and disparate treatment theories are usually available in any given class case, with the result that the expanded remedies, and jury trials, made available under the Danforth proposals would be regularly used in Title VII class actions. Moreover, given the pivotal role statistics often play in pattern or practice class actions, the availability

3/ In a disparate impact case, plaintiffs also typically would demonstrate that the specific employment practice has a disparate or screening impact.

of enhanced remedies in such cases would generate substantial pressure for employers to avoid such actions in the first place. It is ironic that those who have criticized current civil rights proposals for imposing too much pressure upon employers to balance their workforces have not recognized that making class action remedies much more costly is as important in this regard as is too strict a definition of business necessity. If class action remedies are significantly enhanced, as the Danforth bills propose, risk-averse employers desirous of avoiding large potential liability naturally will attempt to avoid liability, presumably through eliminating any statistical disparities that might generate litigation.

To be sure, the Danforth proposals place caps on the recovery of damages, and these are preferable to unlimited damages. But these caps do not cure the fundamental problem. Under Senator Danforth's bills, the vast majority of Title VII cases would involve compensatory and punitive damage claims and would be tried to juries. This would result in a fundamental alteration of Title VII's remedial scheme, and would sacrifice prompt resolution of employment discrimination claims in favor of protracted litigation.

None of the arguments made by the proponents of this legislation are sufficient to justify this wholesale revision of Title VII's basic remedial structure. I have discussed the arguments of the proponents at some length elsewhere, and in the interests of brevity I will not recapitulate my views in this letter.[4/] I hasten to add, as stated above, that enhanced remedies are appropriate under Title VII in some situations. Providing economic remedies for workplace harassment is fully justified. But this limited remedial flaw in the current statute is no reason that the statute's basic remedial scheme should be jettisoned. Title VII is a very successful statute, and it should not be transformed into a national employment discrimination tort claims act.

4/ I would be pleased to provide you with a complete discussion of these matters if this would be helpful.

2. <u>The Dole-Kassebaum Alternative</u>

The alteration that you and Senator Kassebaum have suggested in response to Senator Danforth's bills is a step in the right direction, but in my view incorrectly concedes that Title VII remedies are in need of a generic revision. I agree with you that the legislation would be improved by characterizing the enhanced remedies as "equitable monetary relief" and limiting jury trials to determinations of liability, as opposed to awards of damages. At the very least, this step would simplify the issues to be presented to the jury, and allow more expeditious resolution of Title VII cases. It also would provide less incentive for litigation as opposed to prompt resolution of employment discrimination claims.

Jury Trials

Nonetheless, I do not believe the evidence is sufficient to justify your willingness "to accept the principle of jury trials to determine liability in intentional discrimination cases." Indeed, as stated above, I believe the arguments offered by proponents of this legislation are <u>insufficient</u> to justify extension of jury trials and enhanced remedies to the broad universe of Title VII "intentional discrimination" cases. Moreover, limiting juries to determination of liability will not eliminate the evil that will arise from wholesale expansion of Title VII remedies; that is, undermining the system of administrative conciliation wisely inserted in Title VII in 1964. The enhanced remedies contemplated by the Danforth bills, even as modified by your proposal, would result in dramatic disruption of Title VII's existing remedial scheme.

I would urge you and Senator Kassebaum to reconsider your proposal, and specifically to consider whether the enhanced remedies proposed by Senator Danforth are justified for all Title VII "intentional discrimination" cases. As I have explained above, this is a broad universe of claims, and expanding remedies for all such actions would involve a substantial alteration of Title VII. I believe the expanded remedies that you and Senator Kassebaum contemplate would be quite useful in cases where there is a need for expanded remedies, such as workplace harassment. Indeed, the expanded remedies for workplace harassment contained in the Women's Equal Opportunity Act of 1991 (S. 472) that you introduced earlier this year seem to me a well-considered response to a significant problem. But in the absence of some showing that there is a need for additional remedies and jury trials in all "intentional discrimination" cases, there is no justification for deforming Title VII's remedial structure.

Cumulation of Practices

1. The Danforth Proposal

The "particularity" or "cumulation" problem that has arisen in connection with this legislation is a problem of substance. This problem is exemplified in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), in which plaintiffs alleged that the employer's hiring practices, taken as a whole, were unlawful because the result of those practices was an unbalanced workforce. The Court in Wards Cove held that a plaintiff could not engage in a wholesale attack upon an employer's practices, based upon proof that the employer's selection process taken as a whole yielded fewer successful minority candidates than would have been expected given the pool of qualified candidates available. Rather, the Court stated that a plaintiff was obliged to determine which specific employment practice was being challenged.

This step is vital if the Title VII inquiry is not to devolve into a pure search into whether the employer has hired or promoted by the numbers. This is particularly true in cases involving higher level jobs, where a number of subjective factors may contribute to the employer's decisions. If a plaintiff can attack those practices on a "bottom line" basis, the employer's opportunity to defend itself is severely truncated and there will be tremendous pressure to avoid litigation at all costs.

On the other hand, there may be situations where a plaintiff simply cannot parse an employment process up into its constituent parts for purposes of analysis. When this happens, and where the plaintiff can prove that the employment process, taken as a whole, has a significant disparate impact upon a protected group, it exalts form over substance to dismiss the case.

Senator Danforth's proposal attempts to encompass both situations, and offers a significant advance over prior bills insofar as it provides that the plaintiff can only attack an identified practice absent proof that the elements of the decision-making process are not susceptible of separate analysis. This basic principle, adapted from the Wards Cove case, is the only logical way to avoid pure "by the numbers" litigation. In cases where a plaintiff can prove that an employer's decisional process cannot be segregated for analysis, the process may be attacked as a whole, assuming it creates a disparate impact as a whole. Moreover, the Danforth bill still would allow an employer, in a case in which a global challenge is allowed, to avoid justifying any given practice under the "business necessity" doctrine by proving that the practice did not cause the disparate impact (i.e., was race or sex neutral).

2. The Dole-Kassebaum Alternative

Unfortunately, the Danforth proposal departs from the sensible principles enunciated in Wards Cove by repeatedly speaking of whether a particular employment practice causes the disparate impact "in whole or in significant part." Like you and Senator Kassebaum, I believe inclusion of this phrase in this legislation is very unwise. Indeed, I believe the use of such language stems from basic confusion about this issue, and that its inclusion in the bill will result in significant confusion and perhaps unintended consequences in the courts.

Cumulation

The focus of the disparate impact theory has been and should continue to be upon the use of criteria that unfairly hamper the employment opportunities of members of protected groups; on practices that the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971) described as "built-in headwinds" hampering full employment of members of protected groups. Where practices have an adverse impact, it is appropriate to place the burden on the employer of justifying their continued use despite their adverse impact. Where practices do not have such an impact, and thus do not disadvantage members of protected groups, their use should be committed to the employer's judgment.

The Danforth proposals appear to confuse two separate issues on this score; the adverse impact of the entire decisional process, and the adverse impact of any individual segment of that process. In a case where the elements of an employer's decisional process may be segregated for the purposes of analysis, determining whether any one of those elements has a disparate or screening impact on members of a protected group is relatively straight-forward. Well-accepted statistical principles regularly are utilized by the courts to determine whether any given practice (e.g., an employment test or educational qualification) has a disparate or screening impact upon members of protected groups. These principles are fully adequate to decide whether a particular standard adversely affects members of a protected group.5/

In these circumstances, there is no reason to add a link between the individual selection criterion and the ultimate disparate impact of the entire selection process, which is what the Danforth proposals appear to do. The appropriate measure is the impact of the practice itself. If a selection criterion causes a disparate impact, it can be challenged under the disparate impact theory, regardless of whether it contributes "in whole or significant part" to any ultimate disparate impact. If the practice itself does not cause a disparate impact, it should not fall under the disparate impact theory, regardless of its relationship to any ultimate bottom line impact.6/

5/ The normal method for such analysis lies in standard tests of statistical significance, originally used in jury selection cases (e.g., Castenada v. Partida, 430 U.S. 482 (1977)) and later adapted to Title VII and other discrimination claims. (See, e.g., Hazlewood School District v. United States, 433 U.S. 299 (1977)).

6/ Of course, this would be different if the employer were allowed to defend its selection practices on a "bottom line" basis. This would occur, for example, where an employer could show that its employment process was justified, even though it contained one of more screening tests, because taken as a whole it produced results consistent with the percentage of protected group members in the selection pool. The bottom line defense was rejected by the Supreme Court in Connecticut v. Teal, 457 U.S. 440 (1982), and no legislator has suggested that it be reinstated in connection with these bills. Absent such a defense, there is no rationale for tying the impact of a particular practice to the impact of the entire selection process.

Allowing challenges to practices that account for a disparate impact "in significant part" is nothing more than a thinly disguised method of stating that Congress is willing to allow challenges to practices that in fact do not cause a disparate impact. There is no warrant for allowing challenges to practices that do not hamper the employment opportunities of members of protected groups; by definition these practices do not serve as "built-in headwinds". It is difficult to see why their use should be of concern under a law designed to prohibit employment discrimination.

Moreover, allowing challenges to practices that do not cause a disparate impact opens the back door to the problem that the Court recognized in Wards Cove; attacks on the entire selection process, rather than unfair individual components of those processes. Allowing attacks on the entire selection process should be limited to cases where the entire process is so intertwined that it cannot be segregated for analysis. In such cases, and only in such cases, should the bottom line impact of the process be of significance. In such cases, an employer should be allowed to demonstrate that one or more components of its process does not cause or contribute to the bottom line impact in whole or significant part, and thus avoid the difficult task of justifying a practice under business necessity standards. And in such cases, the plaintiff should be able to controvert this proof, and demonstrate that one or more element of the selection process in fact does cause or contribute in significant part to the bottom line disparate impact. The linkage between individual components of a decisional process and the bottom line impact of that process should be of significance only in such unusual cases. There is no justification for going further, and allowing attacks on practices that do not themselves have a disparate impact on the grounds that these practices somehow contribute to the bottom line impact.

6/ (...continued)
defense, there is no rationale for tying the impact of a particular practice to the impact of the entire selection process.

Business Necessity

1. The Danforth Proposal

An appropriate definition of "business necessity" is central to this legislation. An unduly strict definition of business necessity would lead employers to abandon merit-related selection criteria, because the standards for their justification would be too stringent. There seems to be general agreement that the business necessity standard initially enunciated in Griggs v. Duke Power Company, 401 U.S. 424 (1971), and developed by the federal courts during the 20 years since the Griggs decision, represents an appropriate accommodation of the competing interests involved.

Senator Danforth's proposal, like so many others that have made their way into Congress, attempts to distinguish between employment practices that "are used as job qualifications or used to measure the ability to perform the job" and other practices, thus creating two different business necessity standards. I never have understood the need for two business necessity standards; the Court's decision in Griggs created only one standard. Two standards surely will lead to uncertainty and increased litigation, especially concerning what definition applies in any given case. The Griggs test was clear and simple. The Court held that where an employment practice is shown to have a disparate impact upon the employment opportunities of a protected group, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S., at 432. That concept has been elucidated by the federal courts during the past twenty years, and until the controversy over Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989), no one (in my memory) in the civil rights community argued that Griggs was not stringent enough.

Assuming there is some need for creating two different business necessity standards, there are two critical requirements; first, creating definitions that are appropriate, and second, determining when each definition applies. The Danforth proposal is better than prior efforts in the first respect because it uses the appropriate language from Griggs -- manifest relationship to the employment in question -- as the criterion in cases of employment practices that "are used as job qualifications or used to measure the ability to perform the employment in question." Moreover, the Danforth proposal also uses a broader phrase -- manifest relationship to a legitimate business objective of the employer -- as the standard for all other employment practices. The proposal also appropriately recognizes that the "employment in question" must encompass not only the ability to perform the job, but "any requirement related to behavior that is important to the job." This language is absolutely necessary to ensure that important aspects of behavior (e.g., absenteeism) may be the basis for selection criteria.

2. The Dole-Kassebaum Alternative

But the Danforth proposal fails to clarify the vital issue of when each standard applies, and in so doing creates serious potential problems. In particular, it is difficult to see how any employer would rely on any employment standards that are not "job qualifications." Virtually any requirement relied upon by an employer can be deemed a "job qualification", and thus fall within the first prong of the definition. If this is so, one wonders why the proposed legislation contains a second definitional clause. Moreover, to the extent that all job qualifications are to be judged under the "manifest relationship to the employment in question" standard, and that standard is tied to performance of "actual work activities ... for a job or class of jobs", there is some question as to the employer's ability to hire the best qualified employees, as opposed to those possessing only minimum competence to perform the job.

Business Necessity

I believe the alteration that you and Senator Kassebaum have suggested -- that prong one of the definition be limited to cases dealing with job qualifications that are used to measure the ability to perform the job -- meaningfully delineates between the two prongs of the definition, and solves many of the problems inherent in the Danforth proposal. Prong one of the definition obviously is meant to refer to performance-related criteria, measuring the employee or applicant's ability to perform a particular job. Prong two of the definition just as clearly refers to broader criteria, insofar as it discusses a "legitimate business objective of the employer." If there is to be a meaningful distinction between the two prongs of the definition, it surely should correspond with the purpose of the definitions themselves. Employers should be allowed to justify criteria that are not directly concerned with job performance (e.g., measures designed to ensure public safety) under standards that correspond to their underlying concerns. Moreover, an employer's right to hire the best possible workers would be safeguarded more adequately by your language than by Senator Danforth's provision standing alone. Your alternative seems to accomplish this goal while preserving the essential aspects of the _Griggs_ principle.

With the alteration that you and Senator Kassebaum have suggested, I believe the Danforth proposal would provide a business necessity standard that satisfies the essential requirements of this legislation. I would like to make it clear that I do not share the view expressed by some that the Danforth proposal is flawed because it does not afford preference to those with greater educational achievement, whether or not such achievement is related to job performance. I agree with critics of the Danforth proposal, such as EEOC Chair Kemp and Secretary of Education Alexander, that our society places too little emphasis upon educational achievement, and that we should do everything possible to encourage young men and women to stay in school and obtain an education. I do not agree, however, that the equal employment laws should be altered to reward educational achievements if those achievements are not related to the work being performed. A fork-lift driver with an advanced degree in Chinese may be a more interesting person than someone with a grade school education, but there is no rationale for an employer preferring someone with this level of educational achievement if the result is to disadvantage minorities who have had less opportunity for advanced education. In this regard, I believe the _Griggs_ principle strikes an appropriate balance that should be maintained in this legislation.

Once again, I hope that these comments will be useful to you. I would be happy to expand upon them, or to clarify any portion of them, at your convenience.

Very truly yours,

ZacFasman

Zachary D. Fasman

ZDF/djw

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N. THOMPSON POWERS
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September 9, 1991

Honorable Bob Dole
Republican Leader
United States Senate
Washington, DC 20510-7020

Dear Senator Dole:

This is my response to your invitation to comment on the modifications you and Senator Kassebaum have proposed to the civil rights bills (S. 1407, S. 1408 and S. 1409) introduced by Senator Danforth. I will address your proposed modifications to each of Senator Danforth's bills in the numerical sequence of those bills.

1. CIVIL RIGHTS RESTORATION ACT OF 1991 (S. 1407)

Before commenting on your proposals and the Danforth provisions on Martin v. Wilks, I want to advise you that I filed an amicus brief on behalf of the Legal Defense Fund in Martin v. Wilks when that case was before the Supreme Court. I did so because I believe it is important to effective and efficient settlement of discrimination complaints that employers and other respondents be able to resolve such complaints without subjecting themselves to repeated challenges by others affected by the resolution. As a result, while I do not favor retroactive reversal of Martin v. Wilks (or of other Supreme Court decisions), I do support prospective change in the law concerning collateral attacks on judgments or orders resolving employment discrimination complaints.

Martin v. Wilks

You and Senator Kassebaum have proposed three changes to the Danforth provisions on Martin v. Wilks. The principal one of these three would eliminate the provision barring collateral attacks by individuals who did not have actual notice of the proposed judgment or order but whose interests were "adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation."

I appreciate your belief that it is "fundamentally unfair" to bar challenges to judgments or orders by affected persons who did not have actual notice of such judgments and orders. Nevertheless, it seems to me that basic due process considerations are satisfied if one's interests in civil litigation are adequately represented by others similarly situated. Under Rule 23 of the Federal Rules of Civil Procedure, we already have a procedure for binding class members who may not have actual notice of litigation but whose interests are adequately represented by others.

While the Danforth provision does not require the kind of class certification or notice to class members provided in Rule 23, in practice it might function similarly. Perhaps your concerns could be met if these requirements were made more specific.

The second significant change you propose in the Danforth provisions on Martin v. Wilks is to limit the employment practices that will be insulated from collateral attack to those "specifically required" by a judgment or order. The Danforth provision would insulate a practice if it "implements and is within the scope of" a judgment or order.

Your desire to bar collateral attacks only when necessary for compliance with judgments or orders is understandable. However, actions may be "necessary" that are not specifically or at least expressly required by the judgment or order. While these problems could be met by specifying requirements in judgments or orders or in subsequent hearings, this may burden the parties and the courts with time consuming details.

I recommend that you reconsider if actions that are taken in good faith compliance with judgments or orders should not be protected from collateral attack if the other requirements for such protection are met.

Your third proposed change in the Danforth Martin v. Wilks' provisions is to substitute "challenge" for "present objections to" in the two places where the latter words are used. This does not appear to be a significant substantive change and should not be controversial.

2. EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1991 (S. 1408)

You have proposed five changes to Senator Danforth's provisions concerning Ward's Cove and disparate impact analysis. As you may know, I testified before the House Education and Labor Committee in 1990 in opposition to the Ward's Cove provisions of the Kennedy-Hawkins Bill. A copy of that testimony is attached for your information. I do not believe that either the bill passed by the House this year or Senator Danforth's bill adequately resolve my concerns.

Alternative Business Practice

Most of your proposals are ones I would support, especially your proposed substitute paragraph (K)(1)(C) which would make clear that cost is an appropriate consideration in judging the suitability of a proposed alternative employment practice. To my knowledge there is nothing to the contrary in any Supreme Court decision on this issue and at least two courts of appeals have declared that costs are an appropriate consideration in applying the suitable alternative language of Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). See Clady v. County of Los Angeles, 770 F.2d 1421, 1426 & n.1 (9th Cir. 1985), cert denied 475 U.S. 1109 (1986); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1263 (6th Cir. 1981).

References to Supreme Court Cases

I also favor deletion of the reference to Griggs and Ward's Cove as you propose, because I do not believe that all of Ward's Cove should be rejected (e.g., its description of suitable alternatives) and because I do not believe that "codifying" Griggs adequately deals with all of the issues that twenty years of disparate impact litigation have revealed.

Cumulation

I also support your proposal to eliminate the phrase "in whole or in significant part", because it seems to me that if the challenged practice or practices do not cause a statistically significant disparate impact by themselves, there is no basis for a liability determination.

As I testified last year, however, I question the appropriateness of requiring plaintiffs to identify one specific practice that is causing the disparity if the employer has so mingled selection considerations that the specific cause of the disparity is undiscoverable.

Business Necessity

Finally, I see merit in your proposal to limit the practices that must be justified by showing that they bear a manifest relation to the employment in question, to practices that are both job qualifications and that measure ability to perform the job. Your proposal would permit other nonperformance based job qualifications to be justified if they bear a manifest relationship to other legitimate business objectives of the employer. It is a fact that all legitimate job qualifications are not performance based and Senator Danforth's proposed definition of the term "employment in question" recognizes this. (S. 708, Section 5 proposing subsection 701(o)). Your proposal seems to me appropriate further recognition of this same fact.

3. CIVIL RIGHTS AND REMEDIES ACT (S. 1409)

You propose characterizing compensatory and punitive damages to be issued under Title VII as equitable monetary awards and to require a judge to determine the amount of the award after a jury determines liability.

I agree with your comment that the proposal that compensatory and punitive damages be added to Title VII is in no way a "restoration" of what civil rights law was before the Supreme Court's 1988-1989 term. (The same can also be said about a number of the other changes contained in the Danforth bills including the Price Waterhouse provisions and some of the Ward's Cove revisions.)

I also see no reason to introduce jury trials into Title VII litigation unless it is concluded that additional monetary awards should be provided and it is determined that those awards constitute damages to which a constitutional right to trial by jury attaches. If there is no constitutional right to a jury to decide on such monetary awards, I would question the reason for providing a jury trial only on liability.

I hope the above comments are helpful and would be glad to discuss these matters in more detail with you or your staff.

Sincerely,

N. Thompson Powers

N. Thompson Powers

Enclosure

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September 3, 1991

Hon. Bob Dole
United States Senate
Office of the Republican Leader
Washington, DC 20510-7020

Dear Senator Dole:

At your request, I have reviewed the Dole-Kassebaum proposals to amend the three civil rights bills you sent me, each dated June 27, 1991 at 1:00 p.m. I gather that these three bills taken together are the Danforth proposal. Needless to say, the views expressed in this letter and personal, and do not represent The University of Texas.

1. **Martin v. Wilks.** The problem of judgments or consent decrees that override the rights of third parties is not unique to civil rights litigation. In my judgment, it can be adequately handled by existing procedures for mandatory joinder and class actions, and no legislation is necessary. Legislation to simplify the procedures for binding third parties should scrupulously protect the rights of those third parties. It should not be a disguised effort to legislate their rights away.

The Danforth proposal is a considerable improvement over earlier drafts on this issue. As a practical matter, § (*l*)(1)(B)(1) will require that formal notice be sent to affected third parties. Informal notice through press reports and word-of-mouth will rarely make clear that affected third parties could present objections by a date certain. The requirement in § (*l*)(1)(B)(ii) of adequate representation by a person "with a similar factual situation" will usually require a challenge by another employee or applicant, and will generally exclude claims that the employer was an adequate representative. The requirement that the earlier challenge be on "the same legal grounds" eliminates the possibility of a legal theory being waived by an earlier challenge. The legislative history should emphasize these requirements.

a. **"Implements" or "specifically required by."** You propose to strike "implements and is within the scope of," and substitute "is specifically required by." This would be a good change. Other employees should not lose their right to challenge discrimination against them because the employer has made a discretionary decision to do something that helps implement a prior decree. An employer who is discriminating against employees on the basis of race, and claiming the protection of an earlier judgment, should be doing something required by the judgment.

b. **Adequate representation.** You also propose to delete § (*l*)(1)(B)(ii), providing that an employee is barred if his interests were adequately represented by another person who challenged the judgment on the same legal grounds and with a similar factual situation. This matters more in theory than in practice, but it would be important even in practice if the whole package of bills is enacted.

Your proposal is certainly correct in theory and in general legal principle. The standard rule of res judicata is that one litigant's claim is not barred by an earlier litigant's similar claim unless the first litigant were authorized to represent the second. But it is easy to exaggerate the practical significance of this. If the second suit is tried to a judge, and especially if it is tried to the same judge, as the Danforth proposal requires if possible, the second litigant will face a difficult burden of persuasion. The judge will know that the plaintiff is raising objections that have already been litigated and rejected. Getting the judge to take a second challenge seriously, or even to allow adequate time for a full trial on the merits, will be very difficult.

The legal right to your own day in court matters most when there is truly independent fact finding, and that means, when there is a right to jury trial. If the second employee to challenge the decree can try his claim to a jury, the jury will not know about the first challenge. With a jury trial, it may make a real difference whether later claims are bound by the disposition of earlier claims.

A suit to enjoin the operation of an affirmative action plan, either across the board or to the extent of hiring or promoting the plaintiff, would be an equitable claim and tried to a judge. With respect to that claim, I think your proposed amendment is of limited practical significance.

But a suit for damages for intentional discrimination would be a legal claim, triable to a jury, under one of the other bills in the Danforth package. An employer who prefers a minority employee pursuant to a judicial decree is acting intentionally; the only question is one of justification. A white worker disadvantaged by such a preference, who was willing to waive his right to the job and simply sue for his lost pay or other damages, ought to be entitled to a jury trial. With respect to that claim, your proposal makes a practical difference, and your proposal is more consistent the traditional law of the right to be heard.

c. "Reasonable opportunity to object." Your proposals do not address what seems to me to be the greatest weakness in the Danforth proposal. The bill does not define ""reasonable opportunity to present objections." What legal standard applies to these objections? Someone should have to prove, in a hearing to which the claimant is a party, that the employer violated the law and that an adequate remedy for the proven violation necessarily requires discrimination against the claimant. Anything less than that takes away the claimant's civil rights without due process. Not True

The Danforth proposal does not explicitly say this. It may be read as requiring a mere "reasonableness hearing," in which there is no stated legal standard, and it is enough that the employer might have violated the law and that affirmative action is a fairly debatable remedy. Everything would be de facto presumed in favor of the decree and against the claimant. Such a hearing would be a charade, but that is what was allowed in some of the cases prior to *Martin v. Wilks*. See the cases collected in Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. Chi. Legal Forum 103, 137 n.144.

If Congress is going to legislate in the area, it should clarify the substantive standard. I would rewrite § (*l*)(1)(B)(i) as follows:

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had --

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available, ~~to present objections to such judgment or order~~ by a future date certain, to litigate the claim that such person has rights inconsistent with the judgment or order; and

(II) ~~a reasonable~~ an opportunity to ~~present objections to such~~ litigate the claim that such person has rights inconsistent with the judgment or order; or

Then, I would add an additional subparagraph, something like the following:

(C)(i) If, in an action claiming employment discrimination in violation of the Constitution or Federal civil rights laws, a person objects to an employment practice required by a proposed remedy on the ground that the practice would violate such person's own rights under the Constitution or Federal civil rights laws, and the objecting person demonstrates that he would be disadvantaged because of his race by the proposed practice, then the person urging the proposed practice must demonstrate every element of a claim that the objecting person's rights under the Constitution and Federal will not be violated.

(ii) If, in an action challenging an employment practice described in subparagraph (A), the complaining party demonstrates that he has been disadvantaged because of his race by the challenged practice, then the person defending the challenged practice must demonstrate every element of a claim that the complaining party's rights under the Constitution and Federal have not been violated.

Note that this proposal does not specify what a plaintiff of one race must show to override the nondiscrimination rights of workers of other races. It does not try to resolve the debate over affirmative action. It simply says that whatever the elements of a claim to racial preferences are, affected workers of the other race are entitled to be heard on every element of that claim. I don't know whether this amendment is politically viable, but your efforts to guarantee a hearing may be of little moment unless you specify the purpose of the hearing.

2. Proof of disparate impact.

a. "Practice" or "practices." Your propose to strike "or particular employment practices" and "or practices" where ever they appear in § (k)(1)(B)(i). This suggestion is sound. Even after your proposal, the subsection would authorize cumulation of practices where "the elements of a respondent's decision-making process are not capable of separation for analysis." That would seem to be the only legitimate reason for cumulation. If the practices can be separated for analysis, they should be.

I tried to think of a case in which "or practices" might matter. I came up with this one: suppose an employer has one practice -- say a test -- that is readily isolated for analysis, and other practices that cannot be separated for analysis. The last proviso of § (k)(1)(B)(i) may not handle this situation; the language seems to contemplate either a practice-by-practice analysis or a unitary analysis of the whole "decision-making process." Perhaps Senator Danforth intended "or practices" to cover a multi-practice part of the decision-making process.

You can handle this problem by adopting your proposal to strike the references to "practices," and by rewriting the final exception as follows:

> except that if the complaining party can demonstrate to the court that the two or more elements of a respondent's decision-making process are not capable of separation for analysis, the ~~decision-making-process~~ inseparable elements may be analyzed as one employment practice.

Unless I have missed something, I think that this would serve both your goals and Senator Danforth's.

b. "In significant part." Your other proposal is to strike "in whole or in significant part" where ever it appears. I am not aware of any case that has considered whether a practice can cause disparate impact in significant part. My initial reaction was that I simply did not know what this phrase meant or what cases it was intended to cover.

But I may have thought of a case, and I am not sure what is the best way to handle it. Consider a typical hiring process for a highly competitive white collar position. The hiring officer or committee attempts to predict success in the position and the career to which it leads, based on an assessment of the whole person and the whole file. They may use many predictors, no one of which is controlling. At and near the entry level, one predictor will be grades in college or professional school. The other predictors may be more subjective -- interviews, recommendations, writing samples, etc. Suppose the whole decision-making process has disparate impact, and that grades would have disparate impact if they were used alone.

One way to handle this is to say reliance on grades causes "in significant part the disparate impact." Therefore, the employer must show the business necessity of relying in part on grades. The other way to handle it is to say the elements of the employer's decision-making process cannot be separated, so the employer must show the business necessity of the whole process. Your amendment would leave only the second alternative; it would eliminate the first.

It may be easier for both sides to litigate the business necessity of a discrete practice like reliance on grades than to litigate the business necessity of the whole decision-making process. You may be taking away the more manageable option. On the other hand, leaving the more manageable option available would not preclude a plaintiff from trying to litigate the business necessity of the whole decision-making process. And we do not know what other meanings "in significant part" may turn out to have. It is a wildcard phrase, and I may even be wrong even about its core meaning. So I would not argue strongly for leaving it in. But neither am I sure it should come out.

c. Equally effective alternative.

You propose a substitute for Senator Danforth's § (k)(1)(C) on equally effective alternatives. One of the changes incorporates your suggestions to delete all references to "practices" and to "in significant part." Most of the others are stylistic and do not appear to affect meaning. Two changes appear to be substantive and independent of those discussed above.

a. Serving legitimate interests as well. You would elaborate on what it means to "serve the respondent's legitimate interests as well" as the existing practice. You would specify: "comparable in cost and equally effective in predicting job performance or serving the respondent's legitimate interests." This makes clear that cost matters, and that predicting job performance is only one of respondent's legitimate interests.

These are both helpful clarifications. A substantially more expensive alternative does not serve the employer's interests "as well," but that should not be left to inference. Neither proposal defines the scope of the respondent's "legitimate interests," and there will be arguments about that under either draft. But your proposal eliminates the argument that predicting job performance is the respondent's only legitimate interest.

b. **More than negligible improvement.** You would also eliminate Danforth language that the alternative must "make a difference in the disparate impact that is more than negligible." This is probably not very important; negligible differences are presumptively negligible. But the Danforth language eliminates the possibility of a plaintiff showing an alternative that would make a trivial difference, and then claiming that all persons rejected under the old practice are entitled to a remedy. I would be inclined to leave the Danforth language in.

3. **Business necessity.** You propose to substitute "and" for "or" in paragraph 1 of the Danforth definition of business necessity. Your proposal is so obviously an improvement that I suspect the Danforth language may just be a drafting error. Paragraphs 1 and 2 of the definition divide all employment practices into those that must be justified by showing "a manifest relationship to the employment" and those that must be justified by showing "a manifest relationship to a legitimate business objective." Obviously, those job qualifications that are designed to predict performance in the employment belong in the first paragraph, and those that are designed to predict something else belong in the second. But the Danforth "or" puts all "job qualifications" in the first paragraph. Thus, even those qualifications that are not used to measure ability to perform the job must be justified by their "relationship to the employment." Your substitution of "and" would correct this error.

4. **Jury trial.** The Danforth proposal would allow damages and jury trials in intentional discrimination claims. You propose to allow jury trial on liability but not on damages, recharacterizing damages as "an equitable monetary award." You have not specified how you would have the court determine the amount of this award.

I believe that your proposed amendment is unconstitutional. The Seventh Amendment is a dead letter if Congress can avoid it at will by referring to damages as an "equitable monetary award." Changing the label does not change the constitutional substance. The historical law-equity distinction is arcane, and it is unfortunate to have the scope of a constitutional right depend on it. But if Congress may choose legal or equitable remedies at will, the right to jury trial survives only at Congressional sufferance. In my view, the equitable label is plausible only where the money to be awarded is more analogous to some traditional equitable remedy than to common law damages.

The elements of recovery in the Danforth proposal are plainly common law damages. They are referred to as damages, they do not include any relief now authorized under § 706(g), and they do include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." If these would also be the elements of your equitable monetary award, then it would still be damages and the Seventh Amendment should still apply.

You may have in mind something like the "equitable penalty determination" that is now lined out on page 4 of the Danforth bill. This language directed a penalty sufficient to deter, and authorized the court to consider various factors relating to culpability. I believe that this is just a legislative punitive damages provision; the parties could argue about every one of these factors under common law punitive damages rules. But this provision does not so obviously track the elements of common law damages as the other, and there is a substantial chance that the Supreme Court would accept the equitable label and uphold the denial of jury trial.

In *Tull v. United States*, 481 U.S. 412, 427 (1987), the Court considered a scheme of civil penalties payable to the government, where the amount depended on "highly discretionary calculations that take into account multiple factors." It said that such calculations were "traditionally performed by judges," and that jury trial was not required. That reasoning might well apply here, but there is one important difference between Tull and any version of the civil rights bill. In *Tull*, the penalty was payable to the government, which made it look more like a fine or a criminal sentence, where juries have never been required in federal court. I assume that your equitable monetary award would be payable to the plaintiff, which makes it look a lot more like damages. If the money is not payable to plaintiff, it wholly fails to serve the bill's purpose of providing a meaningful remedy for violations that do not result in large accumulations of back pay.

Dicta in *Tull* went even further than I have indicated. The Court said that the Seventh Amendment simply does not apply "to the remedy phase of a civil trial." *Id.* at 426 n.9. If the Court were serious, then you can authorize common law damages and deny jury trial. But the statement is so preposterous that it is hard to believe the Court would adhere to its implications. The remedy to be awarded is the most important factor in determining whether the right to jury trial applies at all. Despite what it said, I do not believe the Court would hold that judges can assess damages in traditional common law actions.

Even if the Court would let you get away with it, I do not believe you should do it. Senators and Representatives also swear to uphold the Constitution, and if the Court quits enforcing the Seventh Amendment, it becomes all the more important for Congress to enforce it.

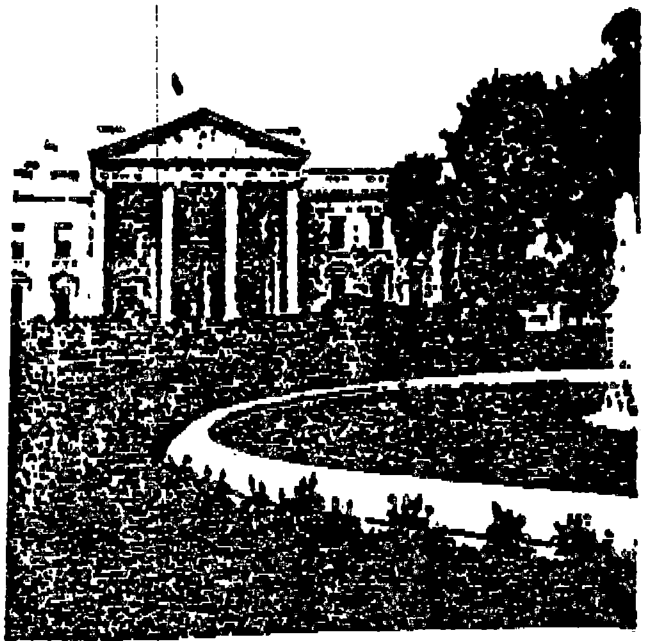
Assuming you can get away with it, amending the Danforth proposal to eliminate jury trial under Title VII would leave the anomaly that race cases under § 1981 would be treated differently from sex cases under Title VII. At the very least, one would have a jury trial available and one would not. If you change the measure of recovery under Title VII, so that plaintiff gets some sort of equitable penalty instead of common law damages, the anomaly is greater. If you try to eliminate the anomaly by eliminating jury trial and common law damages under § 1981, I assume you will have political difficulties because you would be trying to retract rather than restore civil rights protection.

I have written more than you asked for. But the proposals and their implications are complex, and my conclusory approval or disapproval would not help you much. No one elected me to anything, and my conclusions matter only insofar as their reasons are persuasive. I hope that at least some of the reasons are helpful.

Very truly yours,

Douglas Laycock
Alice McKean Young Regents Chair in Law

THE WHITE HOUSE



1600 PENNSYLVANIA AVENUE

WASHINGTON

DATE 9-11-91

FACSIMILE TRANSMITTAL SHEET

TO Boyden Gray

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FROM Nelson Lund

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COMMENTS

THE WHITE HOUSE
WASHINGTON

Date: 9/11/91

TO: CBG

FROM: **NELSON LUND**
Associate Counsel to the President

☐ Action

☐ Comments

☒ FYI

This doesn't make it sound like Mitchell is pushing for early consideration of civil rights.

In the meantime, on behalf of his colleagues, who are also—each and every Member of the Senate—his good friends, I am pleased to welcome DAVID PRYOR back to the Senate. We have missed his counsel and his contribution in the past 5 months. I know we will benefit from both in the future, and we are grateful that he has been spared to return to his seat in the Senate and the friendship of his colleagues.

THE SOVIET UNION

Mr. MITCHELL. Mr. President, since we last convened in August, remarkable events have occurred in the Soviet Union. The Soviet people's rejection of the coup in Moscow was a historic event.

It was catalyzed by a handful of inspiring leaders—Yeltsin, Sobchak, Popov—supported by a significant element of the Soviet military, and achieved by tens of thousands of ordinary and courageous people.

The restoration of Soviet constitutional authority and return to the path of reform—the most stunning example of popular will ever demonstrated in the Soviet Union—deserves a prominent place not simply in their history, but in the history of the 20th century.

Their triumph testifies to the universal longing for freedom and democracy.

Their actions can only reinforce the determination of those individuals—in Cuba, in China—who have yet to realize their right to choose their own governments and determine their own futures.

So, too, does the triumph of popular will in the Soviet Union reaffirm our own appreciation of our precious liberties.

The sobering chill of the attempted coup laid bare the magnitude of what is at stake for the West as the Soviet Union attempts to transform itself into a democracy.

During the first day of the putsch, the possibility of a new international order, a new era of cooperation and peace, suddenly seemed doomed.

A renewed cold war, a new arms race, the intensification of proxy conflict, a stalemated United Nations, and the return of ideological foreign policy seemed unavoidable.

It could have been a moment of despair for the West.

The reversal of the coup now allows us to move swiftly, with renewed vigor, to help strengthen and make irreversible the forces of change in what was once the Union of Soviet Socialist Republics.

There remain inherent limits on our ability to assist this process.

First and foremost, the course of the Soviet Union must be charted by the people of the various Republics themselves. We cannot define their goals. Our energies are no substitute for their own. Our best hopes cannot realize their objectives.

They and they alone will define and determine their future.

The United States wants to assist the Soviet people achieve democracy and a free-market economy. It obviously is in our interest to do so.

But I do not believe that the United States should provide significant financial assistance to the Soviet people unless they demonstrate their commitment to democratization and a free market. The most pressing challenge is for the Baltic States, the various republics and the reconfigured central government to implement painful but crucial far-reaching economic reforms. Otherwise, no amount of outside assistance can revitalize the economy and stabilize the future of democracy.

I also believe that the United States should not provide direct financial assistance unless Soviet governmental authorities drastically reduce their investment in the weapons of war—particularly the strategic nuclear arsenal that becomes increasingly academic as the United States and Soviet Union enhance their ties.

The United States, facing its own internal economic problems, cannot subsidize Soviet military expenditures. Both America and the Soviet Union should be reducing their defense spending. It is time to adjust our defense budgets to the new realities of Soviet-American relations.

I remain hopeful that the Soviet Union will take the necessary steps to make outside assistance practical. There is much we can do, applying the model of Western assistance to Eastern Europe: Establish a currency stabilization fund, expand investment guarantees and commodity credits, provide private enterprise funds, increase technical training programs, assist with defense conversion and environmental cleanup efforts, and move swiftly to provide most-favored-nation trading status.

Some assistance will be best provided directly to the Republics and the Baltic States; some may appropriately go through the central government. This will depend upon the ultimate division of responsibilities between the center and the Republics.

Much of the Western assistance should be provided through multilateral institutions. The World Bank and the IMF can play a critical role in helping to implement economic reforms, and now is the time to fully utilize the newly created European Bank for Reconstruction and Development.

While it is useful to discuss ways in which the West can help institutionalize the transformation of the Soviet Union, the Soviet and Baltic people face an immediate threat: the lack of food, medicine, and other essential supplies.

This year, the Soviet economy is predicted to decline by 17 percent and the harvest is anticipated to be 25 percent smaller than last year.

There is a real possibility of starvation in the Soviet Union this winter.

The West cannot allow this to be the Soviet peoples' reward for rejecting the coup and thwarting a return to communism.

Yet the Western nations, including the United States, have done little to assuage the fears of the Soviet people.

Together with our G-7 partners, or alone if need be, the United States should make our intentions to help the Soviet people receive the food and humanitarian help they need to survive the coming winter.

We have grain and medical supplies. We have the ability to deliver the necessary items. Our humanitarian tradition and our own self-interest dictate that we will rise to the occasion and help avert starvation in the Soviet Union.

We should plainly state our willingness to do so, and work with our allies to make all the necessary arrangements now.

But we must never lose sight of the fact that our first responsibility is to the people of the United States. That is what must take priority in the coming weeks as we seek to wind up the 1st session of the 102d Congress.

We have made a good start. The Senate completed action on the crime bill, the highway legislation, seven of the regular appropriations bills for the coming fiscal year, the Defense Department authorization, campaign finance reform legislation among other important matters.

But a great deal remains to be done.

Most urgently, we must address again the plight of jobless workers whose unemployment benefits have expired.

Although the President signed the bill providing for extended benefits, he says the situation is not serious enough for him to declare an emergency so the benefits can be paid.

But when more than 2 million working people cannot find jobs and have exhausted their unemployment insurance, we say that is as much an emergency as the foreign aid emergencies President Bush has seen fit to finance.

So we must make another effort to bring the plight of working Americans to the President's attention.

Dramatic events overseas do not change the fundamental fact that the health and well-being of our own Nation depends directly on the health and well-being of the middle-income families of America.

It is on that well-being I intend to focus. We must begin to address seriously the erosion of average Americans' incomes that has been caused by higher taxes, despite a decade of tax-cutting rhetoric.

We remain the only industrialized country in the modern world which does not extend basic health care to all its people. The spiraling cost of care and the gaping holes in the health insurance safety net threaten families with economic disaster in the case of accident or serious illness.

We hope to move forward and take up legislation to correct that problem. No American should have to fear that illness will cost the family its economic security.

The economic security of our Nation rests on the ability of Americans to produce goods and services in the future that can compete with the products of other nations in a world marketplace. The only thing that can guarantee our future economic security is a high-quality system of education.

We will conclude action on the elementary and secondary education bill introduced at the beginning of the session. The bill will provide both the resources needed to improve education and the accountability to make sure the resources are wisely spent. We need more than speeches about the goals of the year 2000. We need a way to reach those goals.

In addition, of course, we must conclude work on the routine annual appropriations before the beginning of the fiscal year. We will deal with the confirmation of a new Supreme Court Justice and a new head for the Central Intelligence Agency.

We face veto threats over the notorious gag rule, even though the Nation's medical community universally agrees that it must be revised.

In addition, we hope to act on energy legislation, civil rights legislation, cable television legislation, parental leave legislation as well as concluding conference work on such important items as the crime bill and the highway measure.

We have a full plate before us. The Senate will be in working session 5 days each week and there will be votes scheduled throughout the 5 days of work.

With the cooperation and consideration of all Senators, I hope we can debate fairly and thoroughly on those issues and vote on them, and where significant differences divide us debate those differences in a forthright and civil manner and then move promptly once the Senate reaches agreement.

The changes occurring abroad cannot distract us from the vital issues facing Americans at home. I intend to put the priorities of Americans first in the remainder of the 102d Congress.

RECOGNITION OF THE REPUBLICAN LEADER

The PRESIDENT pro tempore. The time of the leader has expired.

The Republican leader is recognized under the standing order.

SENATORS PRYOR AND STEVENS

Mr. DOLE. Mr. President, first I wish to join my majority leader in welcoming back Senator DAVID PRYOR. I also note on the floor my friend from Alaska, Senator STEVENS, who has undergone a rather serious operation during the recess and he is back hale and hearty and ready to work. I will be making further statement with reference to Senator PRYOR later today.

CONGRESS RETURNS TO FACE THE DOMESTIC AGENDA

Mr. DOLE. Mr. President, a lot has happened in the world since we last met here. But despite the earth-shattering changes in the Soviet Union, there is plenty of work left for us to do. The American people expect us to get busy, and so does President Bush.

I do not need a calendar to know that 1992 is around the corner. No doubt, we will hear a lot of talk this fall about the domestic agenda—who has one and who does not. Much to the disappointment of his critics, President Bush has a domestic agenda. It is the domestic agenda the people elected George Bush to implement in the 1988 landslide. The fact is, his opponents do not like it because it is not their agenda. It is standard political spin to bash the President—but that is not why we are here.

BIPARTISAN COOPERATION

Let us face it, the only way any domestic agenda will be enacted is with bipartisan cooperation. We may share many of the same goals, but we often disagree on how to achieve them. And we have to face reality, and start listening to the taxpayers for a change—we do not have any money to start new, freewheeling spending programs. And under our budget agreement, any programs we do start have to be paid for.

PAYING FOR PROGRAMS

We are all sympathetic to the plight of the unemployed—one person out of work is one too many. But even the New York Times—not exactly a Republican newsletter—characterizes the Democrats' latest unemployment solution as a legislative hoax. I had a plan last month, too, that would have paid for itself, and would have been signed into law by President Bush—a fact conveniently ignored by the President's critics.

I also see where the Democrats may hatch some more soak the rich schemes. They may sound good, but we have seen the impact of the so-called fairness of the luxury tax implemented by the Democrats last year—pink slips all the way from aircraft and boat manufacturers, to car dealers and small-town jewelry shop owners. They said they were giving the middle class a helping hand by taxing the rich—instead, that hand pointed them to the unemployment line.

I expect we will see no shortage of efforts to slash defense spending to pay for a laundry list of big spending programs. But if the incredible turn of events in the Soviet Union taught us anything, it's that the only certainty is uncertainty. And if you ask me, uncertainty in the nuclear world and unilateral disarmament just do not mix.

HEALTH CARE: THE PEOPLE'S NO. 1 PRIORITY

We all agree that health care is a national priority. I spent the recess traveling to every corner of my State, and every place I went, health care was the No. 1 issue, followed closely by the Federal deficit. But there are not any easy answers to the health care dilemma. It will take creative thinking, courage—and yes, a way to pay for it.

These are just some of the challenges facing us for the rest of the year.

On this side of the aisle, we are ready to cooperate to implement a responsible, realistic agenda, not some political agenda. And when we are done, we should adjourn, go home and listen to the people again.

Let us get 1991 done before we start 1992.

OPENING OF THOMAS HEARINGS

Mr. DOLE. Mr. President, the Senate returns to Washington today with a bang. Over in the Judiciary it is lights, camera, action as the curtain goes up on the confirmation hearings on the nomination of Clarence Thomas to the Supreme Court.

The great Will Rogers once said that Senate hearings "have always contributed more to amusement than they have to knowledge." Fifty years later, Rogers' words ring more true than ever.

I have been in this body long enough to witness a complete reversal in the rules of confirmation hearings. It was not all that long ago when the Senate was comfortable basing their vote on the experience, the ability, and the character of the nominee.

The hearings were usually fast and efficient, but they were not very good theater.

All that has changed. Through no fault of Judge Thomas, the hearings which open today are the hottest show in town.

Those opposed to Judge Thomas quickly realized that, as the ABA has concluded, Judge Thomas is qualified to sit on the Court. They realized that he is a man of exceptional ability. He possesses a brilliant intellect, and has excelled in every position in which he has served. They realized that his character is second to none—a character forged in a childhood of poverty in the segregated South.

And they realized that Judge Thomas' life and record were examined by the Senate when he was nominated as Chairman of the EEOC, when he was renominated for a second term, and when he was nominated for his current position as Judge on the D.C. Circuit Court of Appeals. On each occasion, Judge Thomas was overwhelmingly confirmed.

Given the fact that Judge Thomas does have the experience, the ability,

NCLR
NATIONAL COUNCIL OF LA RAZA

THE EMPTY PROMISE: CIVIL RIGHTS ENFORCEMENT AND HISPANICS

SUMMARY REPORT

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I. SUMMARY AND INTRODUCTION

A. *Summary*

This summary report presents key findings and recommendations from the forthcoming report, *The Empty Promise: Civil Rights Enforcement and Hispanics*, which is scheduled for publication in August 1991. The summary focuses on the Equal Employment Opportunity Commission (EEOC), the largest and most important of the federal civil rights enforcement agencies. The full report will provide more detailed information on the EEOC and other federal enforcement efforts that address employment discrimination against Hispanics.

This summary briefly describes the federal equal employment opportunity system, presents evidence on the scope and degree of employment discrimination against Hispanic Americans, describes and analyzes current EEOC enforcement efforts on behalf of the Hispanic community, and provides a series of recommendations to policy makers and the private sector.

Many respected academics, policy makers, and philanthropists now suggest that strategies for improving the social and economic conditions of racial and ethnic minorities should de-emphasize civil rights-based approaches.[1] They argue that civil rights enforcement has "worked," and that eliminating continuing disparities between Whites and minorities should focus exclusively or primarily on human capital improvements, e.g., education and training, or economic development approaches.

At least for Hispanics, the data presented in this summary report suggest otherwise. The summary documents that, far from having "worked," a civil rights enforcement strategy for Hispanics has yet to become a reality. Notwithstanding the necessity of improved education, training and economic development programs and policies -- and the National Council of La Raza vigorously supports such programs and policies -- this summary report demonstrates the urgent need for a vigorous civil rights enforcement strategy to better prevent employment discrimination against Hispanic Americans and to provide compensation for the victims of discrimination.

B. *The Equal Employment Opportunity Enforcement System*

The principal federal statutes and executive orders intended to secure equal employment opportunity for all Americans through the prohibition of various forms of employment discrimination include:

- **Title VII of the Civil Rights Act of 1964 (Title VII)**, which generally prohibits discrimination in public and private employment based on race, color, religion, sex or national origin;

- Executive Order 11246, as amended by Executive Order 11375 (EO 11246), which prohibits discrimination in employment by federal contractors and subcontractors;

- Age Discrimination in Employment Act of 1967, as amended (ADEA), which prohibits employment discrimination on the basis of age;

- Equal Pay Act of 1963 (EPA), which prohibits discrimination on the basis of sex in the payment of wages;

- Sections 501 and 505 of the Rehabilitation Act of 1973, as amended (Sections 501 and 505), which prohibit employment discrimination in the federal sector because of disability;

- Americans with Disabilities Act of 1990 (ADA), which generally prohibits discrimination in public and private employment because of disability; and

- 42 U.S.C. Section 1981 (Section 1981), a Reconstruction-era statute which prohibits discrimination in the making and performance of contracts, including employment contracts.

Many states, counties, and municipalities also have statutes and ordinances that prohibit employment discrimination.

Title VII is the primary federal equal employment opportunity statute; it prohibits discrimination in employment and in employment-related activities based upon race, color, religion, sex, or national origin. The Equal Employment Opportunity Commission (EEOC) was created by Title VII to administer and enforce its statutory mandates; other enforcement agencies include:

- Civil Rights Division of the Department of Justice, which is responsible for enforcing claims under Title VII involving state and local governments and governmental agencies;

- Office of Federal Contract Compliance Programs, in the Employment Standards Administration of the Department of Labor, which has primary enforcement responsibility for EO 11246; and

- Qualified state and local Fair Employment Practice Agencies (FEPAs), which may share Title VII enforcement authority with the EEOC.

The EEOC is primarily responsible for enforcing Title VII, as well as the EPA, the ADEA, Sections 501 and 505, and the ADA. Because of the scope of both the EEOC's jurisdiction and its mission, the agency is usually the first point of contact for victims of employment discrimination seeking relief or remedy.

II. SCOPE OF THE PROBLEM

A. *Legacy of Discrimination: The Hispanic Experience*

Whether they came to what is now the United States by conquest or by choice, Hispanic Americans have faced severe discrimination. In 1848, after the signing of the Treaty of Guadalupe Hidalgo, which ended the Mexican War, thousands of Mexican Americans in the American Southwest were murdered, executed without trial, or lynched; according to one scholar, more Mexican Americans were lynched from 1850 to 1930 than Blacks in the South during the same period. During that period and since, Mexican Americans have been subject to enormous discrimination in education, employment, housing, and the administration of justice. In addition, in the 1930s and again in the 1950s, millions of persons of Mexican descent -- including many U.S. citizens and legal residents -- were "repatriated" to Mexico without benefit of due process.[2]

Puerto Ricans also became U.S. citizens by conquest in 1898, and, like Mexican Americans, have suffered the consequences of being a conquered minority group. Coming to the mainland in large numbers primarily since World War I, first as agricultural laborers and later as industrial workers, Puerto Ricans have faced high levels of social and economic discrimination in education, housing and employment.[3] Other Hispanics, including Cubans and Central Americans, although entering the United States in large numbers during and after the civil rights movement of the 1950s and 1960s, have also been subjected to serious discrimination.[4]

Every Hispanic subgroup, in varying degrees, has encountered discrimination on the basis of skin color and on the basis of cultural characteristics (e.g., language and surname). The literature is replete with references, including many from alleged "scientists," to Hispanics as "mongrels," "lazy," "ignorant, illiterate and non-moral," "miserable, wretched,... petty, thieving, [and] gambling," "greasers," "idle," "thriftless," "sneaky," "do-nothing," "sloppy," and "undependable."[5] In various combinations, these references have formed the basis for a stereotype of Hispanics as being inferior, primitive, and docile; such stereotypes themselves often lead, directly or indirectly, consciously or unconsciously, to discrimination.

B. *Persistence of Prejudice in American Society*

While most people would prefer to believe that prejudice and bigotry are all but extinct in present American society, recent studies indicate otherwise; for example:

- A December 1990 study by the National Opinion Research Center (NORC) examined public opinions and perceptions of six major American cultural groups -- Whites, Jews, Blacks, Asian Americans, Hispanic Americans, and Southern Whites. Of six characteristics measured (wealth, work ethic, violence, intelligence, dependency, and patriotism), Hispanics were rated last on three and next to last on three. Over 80% of those surveyed rated Hispanics, together with Blacks, lower than Whites on one or more of the six characteristics.[6]

- A 1989 study conducted by the Urban Poverty and Family Structure Project at the University of Chicago analyzed the manner in which employers' perceptions of ethnicity and race affect hiring decisions. The study, based on interviews with 185 Chicago-area employers, found that 70% of those surveyed made distinctions among employees or potential employees based on ethnicity and race. According to the employers, being Hispanic and/or Black was perceived as being "lower class" and being White meant "middle class." The study confirmed the tendency of employers to generalize about the meaning of ethnicity and race with regard to the quality of the work force and to rely on these generalizations in their hiring practices.[7]

These studies indicate that the most powerful motivations for employment discrimination -- personal prejudice, intolerance of diversity, reliance on negative stereotypes -- continue to permeate American society. Survey research by the General Accounting Office (GAO), the investigative arm of the Congress, has documented additional evidence of national origin discrimination against Hispanics. In a March 1990 report on the Immigration Reform and Control Act of 1986 (IRCA), the GAO reported the results of a survey of 4362 employers concerning the effects of IRCA's employer sanctions provisions on their hiring practices.[8] The GAO found that:

- An estimated 10% of the employers surveyed reported discriminating against employees or job applicants solely on the basis of national origin characteristics;

- An estimated 5% began a practice of refusing to hire persons based on "foreign" appearance or speech accent; and

- An estimated 8% required only "foreign-looking" and "foreign-sounding" persons to comply with the IRCA's employment verification requirements.[9]

Labor market research provides further evidence that, throughout the 1980s, Hispanics continued to experience high levels of employment discrimination. At least four independent studies have found that, even after controlling for factors known to affect employment and earnings, such as age, occupation, and educational attainment, a significant proportion of the "earnings gap" between Hispanics and Whites appears to be attributable to employment discrimination.

A 1982 National Council of La Raza (NCLR) study, *The Effects of Discrimination on the Earnings of Hispanic Workers: Findings and Policy Implications*, using data from the U. S. Bureau of the Census' March 1981 Current Population Survey, found that 14% of the earnings gap between White males and Hispanic males and 29% of the gap between White males and Hispanic females was due to ethnicity alone, suggesting serious levels of employment discrimination.[10]

A 1982 U.S. Commission on Civil Rights report, *Unemployment and Underemployment Among Blacks, Hispanics and Women*, using data from the March 1980 Current Population Survey, found that, while disparities in unemployment and underemployment between Hispanics and Whites could be explained to some extent as reflections of differences in education, training, and age, substantial disparities remained even after controlling for these factors. The Commission concluded that sufficient evidence exists to suggest that discrimination continues to be a significant, if not a precisely quantifiable, factor in employment disparities between Whites and Hispanics.[11]

A 1985 University of Colorado study, using Census data to analyze the causes of the disparity in earnings among Hispanic, Anglo, and Black males, found that in 1980 discrimination and labor market segmentation accounted for 18.1% of the difference between Hispanic male and White male earnings.[12]

A 1990 study sponsored by the Inter-University Program for Latino Research (IUP), using data from the 1940, 1950, 1960, 1970 and 1980 Censuses, and the 1983, 1986 and 1988 Current Population Surveys, analyzed and compared Latino and White incomes from 1939 to 1987. After controlling for demographic, occupational and human capital differences between Hispanics and Whites, the researchers estimated that employment discrimination accounted for:

- Approximately 10-16% of the gap between Latino male and White male incomes from 1973 through 1987; and

- Approximately 30-40% of the Latino female-White male income gap over the same period.

The study concluded that, although significant progress was made in the 1960s, inequality due to discrimination in the labor market has not declined, and for many Hispanics has actually increased, over the past 20 years.[13]

Taken together, the results of these studies provide compelling evidence of severe, persistent employment discrimination against Hispanics. Despite the fact that the studies relied on a number of different data bases and used somewhat different methodologies,[14] the research findings are remarkably consistent:

- The percentage of the Hispanic male-White male income gap attributable to employment discrimination falls within a 10%-18% range;

- The percentage of the Hispanic female-White male income gap attributable to employment discrimination falls within a 30%-40% range.[15]

Using the mid-point of these ranges, the cost to the Hispanic community attributable to employment discrimination could be conservatively estimated as high as $11.7 billion in lost income annually.[16]

Finally, a new research technique known as a "hiring audit" provides powerful, empirical evidence of continuing employment discrimination against Hispanics. A hiring audit tests for differential treatment in hiring by having pairs of closely matched testers, one from the majority group and one from a minority group, inquire about or apply for the same job. The pairs are matched on all attributes that could affect the hiring decision. The experiences and results of the testers are compared and analyzed to determine differential treatment. A 1989 Urban Institute study, based on 360 "hiring audits" conducted in San Diego and Chicago, found that:

- Anglo (White, non-Hispanic) applicants received 33% more interviews and 52% more job offers than the Hispanic applicants; and

- 31% of the Hispanic applicants encountered unfavorable treatment in the hiring process, compared to only 11% of the Anglo applicants.

Since the hiring audit technique controls for factors that might legitimately affect the hiring process, the adverse treatment experienced by Hispanic auditors was caused by national origin discrimination.[17]

Considered as a whole, the combination of studies cited above demonstrates persuasively that Hispanics suffer from enormous levels of discrimination in the labor market. Survey research shows that Hispanics continue to be perceived in a negative, stereotypical fashion by much of the American public. The research also confirms that negative perceptions of Hispanics are translated by employers into discriminatory hiring practices.

Furthermore, statistical research that isolates the effect of ethnicity on earnings consistently finds that, if other factors are held constant, simply being Hispanic means one is less likely to be employed, and if employed, will earn lower wages, than otherwise expected. Moreover, at least one such study suggests that labor market discrimination against Hispanics may be on the rise.

Finally, the "real world," empirical data drawn from hiring audits shows conclusively that Hispanics receive fewer interviews and job offers than <u>equally qualified</u> Anglo job applicants.

Despite the undeniable progress that Hispanics and other minorities have made since the passage of landmark civil rights legislation in the 1960s, equal employment opportunity remains an unfulfilled goal.

III. CURRENT ENFORCEMENT EFFORTS

A. The EEOC Enforcement Process

The EEOC's primary responsibility under Title VII is the prevention of unlawful employment practices. The principal method of accomplishing this goal is the processing of "charges" or complaints of alleged unlawful employment practices. Charges may be filed with the EEOC by or on behalf of the person claiming to have been discriminated against, or by a member of the EEOC. Charges must be in writing and verified, and must contain information about, among other things, the charging party, the party against whom the charge is made (the "respondent"), and the facts constituting the alleged unlawful practice(s). In certain circumstances, charges are referred to authorized state or local fair employment practices agencies (FEPAs) that share subject matter jurisdiction with the EEOC. These state and local agencies are first given an opportunity to resolve the charge before the EEOC initiates its own proceedings.

Once a charge is filed with the EEOC, an investigation is initiated to determine if reasonable cause exists to believe that the charge is true. If the EEOC determines that no reasonable cause exists, a notice of "no cause determination" is sent to all parties to the charge. Unless a request for review is made and granted, no further action will be taken by the EEOC on the charge.

If reasonable cause is found, the EEOC must first try to eliminate the unlawful employment practice through informal conciliation. If no acceptable conciliation agreement is reached, the EEOC may bring a civil action against the respondent. If reasonable cause is found, but the EEOC decides not to bring a civil suit against the respondent, the EEOC must issue a "notice of right to sue" to the charging party.

Under certain circumstances, the charging party may request a notice of right to sue from the EEOC before the EEOC has completed its investigation and conciliation efforts; this notice is required before a charging party may bring a civil suit based on the charge. The issuance of a notice of right to sue terminates all proceedings on a charge, unless the charge was filed by an EEOC Commissioner.

A charge may be dismissed if: it is not filed in a timely manner; it fails to state a claim under Title VII; the charging party fails to provide necessary or requested information, fails or refuses to appear or be available as necessary for the EEOC to perform its investigation, or otherwise refuses to cooperate; or the respondent's written settlement offer providing a complete remedy for the charging party has not been accepted by the charging party within 30 days. A charge may also be withdrawn as part of an acceptable negotiated settlement between the parties prior to the issuance of a reasonable cause determination by the EEOC. Any sort of resolution of a charge -- dismissal, withdrawal, termination of proceedings, final judgment in a lawsuit -- is considered to be a "charge disposition" by the EEOC.

The EEOC also has statutory authority to bring a civil suit for "pattern or practice" violations of Title VII. The EEOC may bring suit to address systemic discrimination whenever it has reasonable cause to believe a pattern or practice of unlawful employment discrimination exists.

B. *Historical Perspectives: The Hispanic Charge Study*

Hispanics have consistently argued that their community does not benefit equitably from federal civil rights enforcement efforts. In the EEOC's own 1983 report, *Analysis of the EEOC's Services to Hispanics in the United States* (1983 Hispanic Charge Study), an EEOC-appointed task force unanimously found that the EEOC was not providing equivalent service to all protected groups, particularly Hispanics.

Based on the testimony of 120 representatives of the Hispanic community, the study found that Hispanics were either unaware of the EEOC's enforcement authority or had a negative perception of, or general lack of trust for, the agency and its service to Hispanics.[18] Moreover, the task force found that the EEOC's record of hiring Hispanics was very poor, particularly in policy positions, and that the EEOC had made little effort to improve its presence or reputation in the Hispanic community.

The task force also carried out a statistical analysis of the EEOC's record with respect to: (1) the proportion of EEOC's caseload of charges involving Hispanics, (2) the disposition of Hispanic charges, and (3) the agency's litigation efforts on behalf of Hispanics.

The data compiled by the task force showed that during the late 1970s and early 1980s, at a time when the proportion of Hispanics increased from less than 3% of the labor force to nearly 6%, and the overall EEOC charge caseload increased by 76.5%, the proportion of caseload involving Hispanics *dropped* from an average of 7.5% (from 1974-80) to less than 5% in 1982.[19]

In addition, once charges alleging national origin (Hispanic) discrimination were filed, they were more likely to be closed administratively without remedy to the charging party than were charges from other groups.[20] For example, the task force found that in both 1980 and 1982, the EEOC was nine times more likely to recover back pay for Black charging parties than for Hispanic charging parties.[21] During this period, between 79% and 84% of the charges brought by Hispanics were closed without any remedy to the charging party.[22]

With respect to the Commission's litigation record, the 1983 study found that from 1980 through 1983, lawsuits alleging discrimination based upon national origin (Hispanic) were only 2.8% of the EEOC's caseload. Of the EEOC's reported "significant litigation" from 1972 to 1982, there were *no cases listed* in which the issue of national origin discrimination was litigated on behalf of Hispanics as the sole or primary issue, Hispanics were the primary class represented, or Hispanics were the only individuals represented in a "pattern or practice" case.

Based on these findings, the study concluded that the EEOC was responsible for the Hispanic community's lack of knowledge about or lack of trust for the agency because of the extremely poor quality of its investigations of Hispanic charges, the inadequate allocation of resources to service the Hispanic community, and lack of communication between the EEOC and community-based Hispanic organizations.

C. *EEOC's Record in Recent Years*

NCLR conducted its own statistical analysis of EEOC data on charges, dispositions and litigation since the issuance of the 1983 Hispanic Charge Study. Overall, this analysis indicates that little or no improvement has been made by the EEOC since 1983. In fact, given the enormous growth of the Hispanic population during the last decade -- and the concomitant increase in the Hispanic proportion of the labor force -- NCLR's analysis shows a relative decrease in the EEOC's service to the Hispanic community over the last decade. According to the 1990 Census, for example, Hispanics constitute nearly 9% of the total U.S. population, as compared to less than 6% in 1980. Hispanics constituted nearly 8% of the civilian labor force as of March 1990, as compared to less than 6% in 1980.[23]

NCLR's analysis shows that, from 1985 through 1990, charges alleging discrimination based on Hispanic national origin have continued to constitute a disproportionately small percentage of the EEOC's total charge receipts. Charges from Hispanics during this period constituted only 4.15% of the EEOC's total charge caseload (See Figure 1).

By comparison, charges from Blacks alleging discrimination on the basis of race constituted more than 31% of the EEOC caseload. Charges based on allegations of sex and age discrimination constituted more than 21% and nearly 18%, respectively, of the Commission's total charge receipts over this period. Even the number of charges from Whites alleging "reverse discrimination" were nearly as high as those from Hispanics alleging national origin discrimination.

Viewed another way, for every charge alleging discrimination based on Hispanic national origin during this period, there were nearly eight charges alleging racial discrimination against Blacks, more than five charges alleging sex discrimination, and more than four charges alleging age discrimination. Figures 2, 3 and 4 graphically illustrate the disproportionately low rate of Hispanic charges within the total EEOC charge caseload.

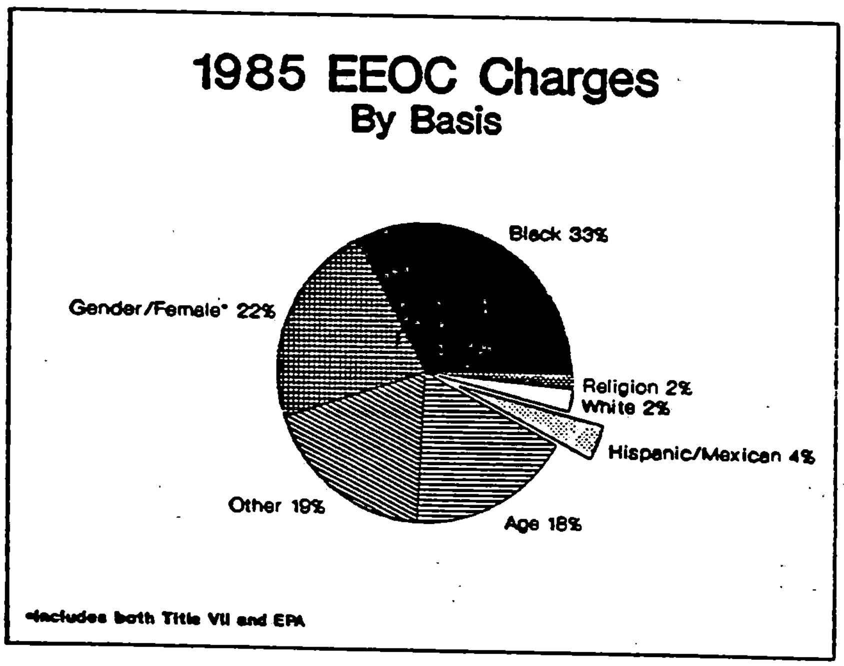
FIGURE 1
EEOC Charge Caseload by Basis* of Discrimination
FY 1985 - FY 1990

Basis	# of Charges	% of Total
Black	261,123	31.65
Gender/Female	177,294	21.49
Age	148,063	17.94
Hispanic	34,305	4.15
White	20,377	2.47
Religion	13,009	1.58
Other	170,957	20.72
TOTAL	825,129	100%

Source: NCLR Analysis of EEOC Data

* Charging parties may allege more than one basis of discrimination, e.g., gender and race. "Gender/Female" category includes claims filed under both Title VII and EPA. "Other" category includes Asian, American Indian, and "retaliation" bases.

FIGURE 2



Moreover, these data tend to overstate the proportion of charges from Hispanics. A significant proportion of the charges listed under the "Other" category were filed on the basis of "retaliation," by employers against persons who had previously filed discrimination complaints. Because Hispanic complaints constitute such a small proportion of the EEOC caseload overall, the number of Hispanics filing retaliation-based charges is likely to be very low. Thus, the actual percentage of the Commission's total charge receipts filed by Hispanics is almost certainly lower than the cited 4.15% figure.

FIGURE 3

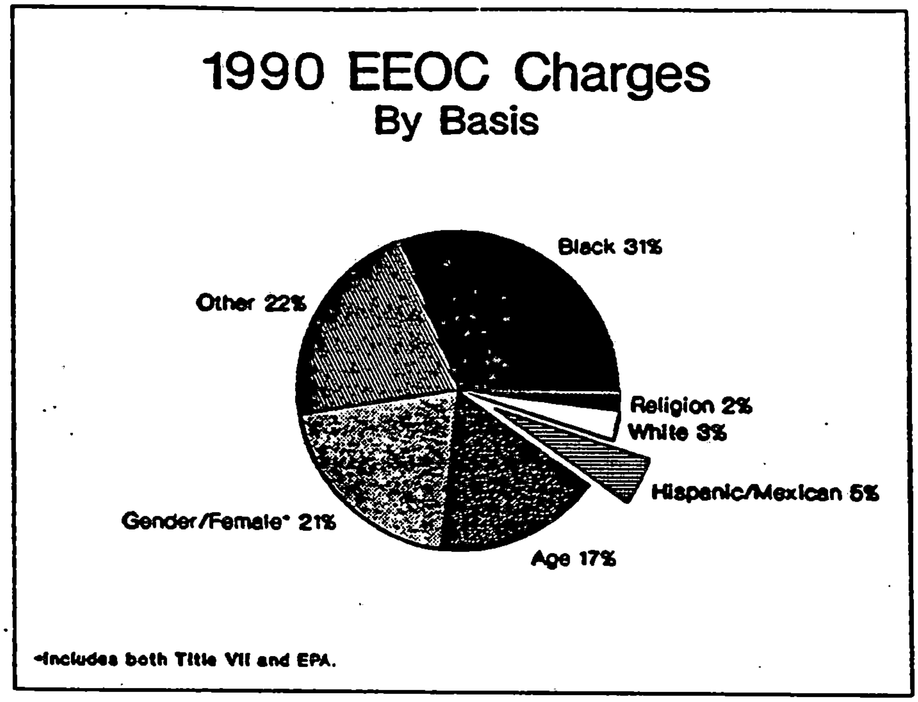
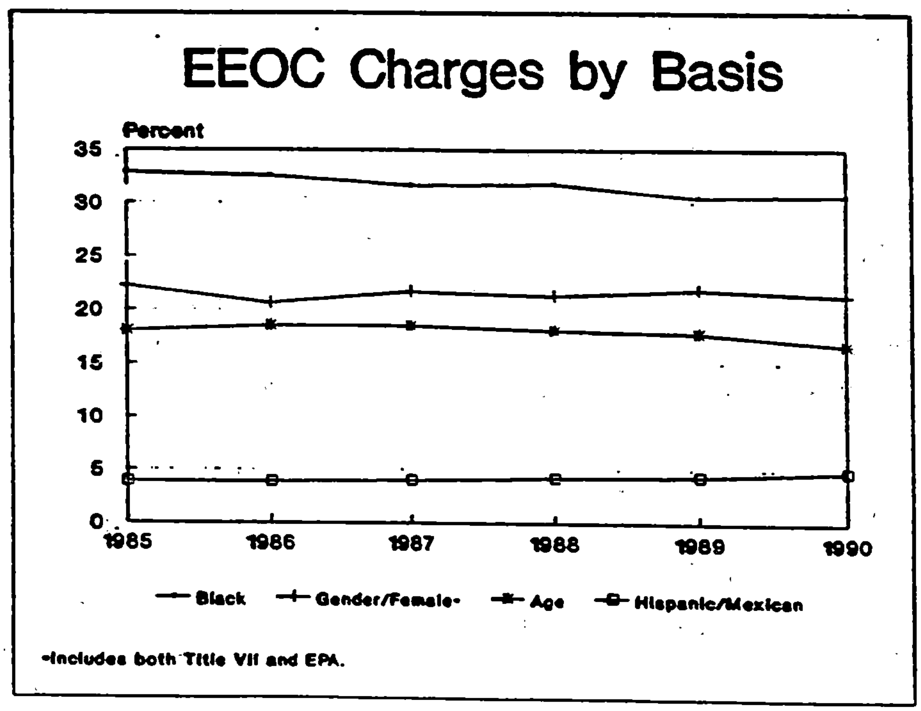


FIGURE 4



Moreover, the proportion of charges from Hispanics that are administratively closed by the EEOC without remedy to the charging party has increased dramatically in recent years. In 1985, approximately 45% of Hispanics' complaints were administratively closed with no remedy; by 1990 that figure had increased to more than 72%. For five of the six years during the 1985-90 period, Hispanic charges were closed without remedy at a rate higher than all other groups combined.

The majority of these charges were closed on the basis of "no cause" findings, i.e., because the EEOC found insufficient evidence that discrimination had occurred. In addition, a significant number of Hispanics' complaints were closed based on the "failure of the charging party to cooperate" with the EEOC's investigation.

There is substantial reason to view these categorizations with extreme suspicion. The EEOC came under considerable criticism in the late 1970s and 1980s for administratively closing cases with little or no substantive investigation.[24]

Any shortcomings of the overall EEOC charge processing system, however, cannot explain the enormously high rate of administrative closures of complaints filed by Hispanics. One possible explanation is that Hispanic complaints are simply not taken seriously by the Commission.[25]

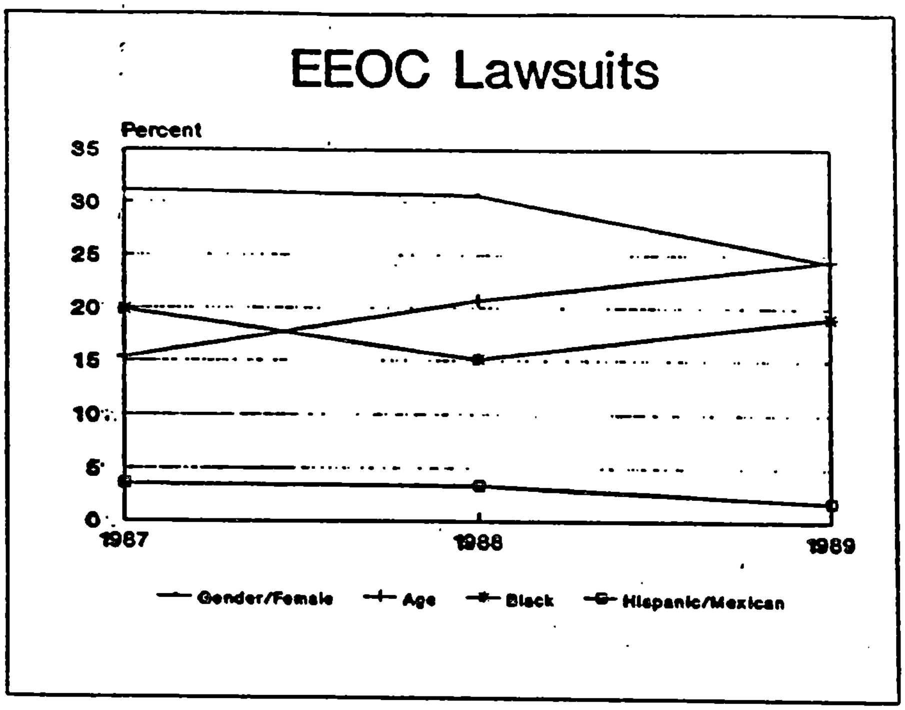
One example of possible differential treatment of Hispanic charges cited in the Hispanic Charge Study involved a case filed by an Hispanic against the State of California Department of Corrections in 1976. After six years with no action, the case was transferred from the EEOC's Los Angeles office to its Phoenix office. The charging party was advised by the EEOC and state officials that a settlement of the case was pending. A year later, the charging party received a notice that the charge had been dismissed based on a "no cause" finding. The charging party subsequently stated that he was informed that the "EEOC needed to close 'old' cases to improve their status with auditors and the Administration." [26]

NCLR examined the EEOC's litigation activity since the 1983 Hispanic Charge Study; this analysis revealed a similar pattern of low levels of service to Hispanics; for example:

- In 1985, only 3.8% of all lawsuits filed by the EEOC were based on a charge of national origin (Hispanic) discrimination.

- Lawsuits filed by the EEOC in 1987, 1988 and 1989 on the basis of Hispanic national origin discrimination constituted, respectively, 4%, 3%, and 2% of all EEOC lawsuits (see Figure 5).

FIGURE 5



With respect to cases perceived as being of particular significance, the Commission's 1986, 1987, and 1988 summary of "noteworthy resolutions secured by the EEOC" for each of the three fiscal years shows that:

- In 1986, only 4.8% were based on a claim of national origin (Hispanic) discrimination; in 1987, only 1.6% were for Hispanic claims; and in 1988, only 1.9% were for Hispanic claims.

- Only 4.9% of all "substantive" lawsuits filed by the EEOC in fiscal years 1986, 1987, and 1988 list national origin as at least one basis for the charge. Because these data are not disaggregated by type of national origin, it is unclear how many, if any, are specifically Hispanic claims.[27]

Even when the EEOC litigates on behalf of Hispanics, it appears that Hispanics receive smaller average monetary awards than other groups. In 1988, for example, in single plaintiff lawsuits -- which generally tend to recover larger monetary awards than suits with two or more plaintiffs -- Hispanics received an average of $6,867 per suit, compared to average awards of $39,282 for suits alleging discrimination based on age, $10,078 claims based on race (Black), $9,270 claims based on religion, and $12,004 claims based on gender/female (See Figure 6).

In 1989, the average awards in such suits were markedly different for each group; however, Hispanics' awards continued to be significantly lower than other groups' awards (See Figure 7).[28]

FIGURE 6

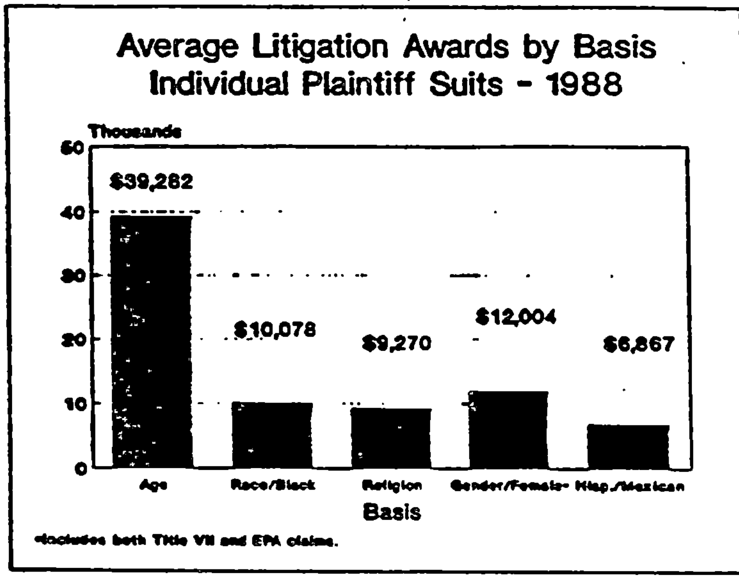
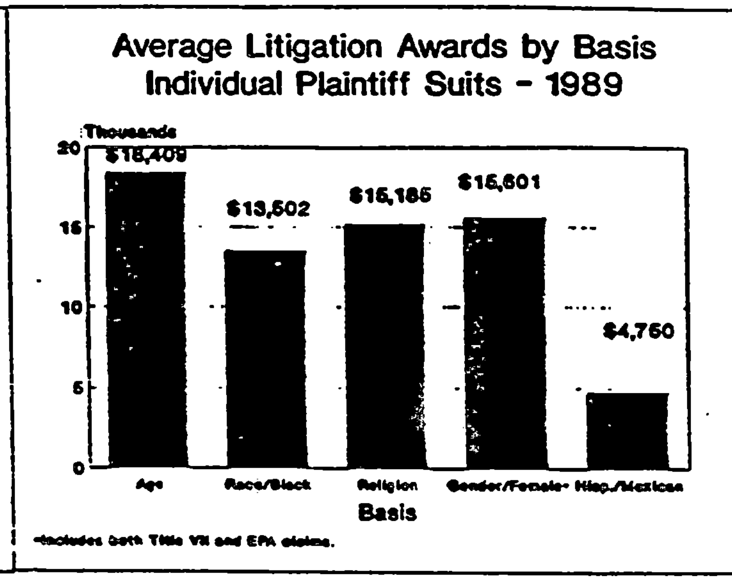


FIGURE 7



Finally, a number of major class action lawsuits (those with 25 or more plaintiffs) were resolved by the Commission in 1988 and 1989. Such lawsuits are believed to have a major deterrent effect in that they are often accompanied by substantial publicity. Of these 31 class action lawsuits, 13 were on behalf of victims of sex discrimination, 12 were on behalf of age discrimination victims, and six on behalf of Black victims of racial discrimination; none was on behalf of Hispanics.

D. *Conclusion: The EEOC Provides Inequitable Treatment to Hispanics*

By any standard, Hispanics are underserved by the EEOC, and it appears that the trend is worsening. Hispanics constitute a significantly smaller portion of the total EEOC charge caseload than either the percentage of Hispanics in the population or the proportion of Hispanics in the workforce. In addition, the Hispanic proportion of the EEOC caseload in the late 1980s was lower than it was at any time during the period from 1974 through 1980.[29]

It cannot be credibly argued that Hispanic complaint levels reflect low levels of discrimination against Hispanics relative to other groups. The 1990 IUP study cited above, for example, shows that discrimination against Hispanics as compared to other groups has increased in recent years.[30] Macro-economic indicators, including a relative decline in the wage gap between males and females, for example, suggest that the levels of charges alleging sex discrimination should have decreased relative to Hispanic complaints in the 1980s; instead the reverse was true.[31] Finally, similar hiring audits of Blacks and Hispanics by the Urban Institute -- albeit in different markets -- showed that Hispanics faced higher levels of discrimination at the hiring stage than Blacks.[32] If levels of discrimination were the primary determinant of complaint caseloads, then one would have expected the relative proportion of Hispanic complaints to have increased in the 1980s.

Some might argue that the high closure rate of Hispanic cases may simply reflect that Hispanics are more likely to file frivolous or unsubstantiated discrimination claims. There are two problems with this reasoning. First, it fails to explain why the administrative closure rate of Hispanic charges would have increased from 45% in 1985 to 72% in 1990. Second, given the compelling evidence of massive employment discrimination against Hispanics cited above, if Hispanics tended to file many unsubstantiated complaints, one would expect that total Hispanic charges would constitute a disproportionately high percentage of the total EEOC caseload; in fact, the opposite is true.

It is difficult to avoid the conclusion that the EEOC is engaging in differential treatment of Hispanics in its charge receipt and disposition system. One the one hand, if the Hispanic charges received by the EEOC are without merit, it means that the EEOC is failing to identify and seek relief for the thousands of legitimate Hispanic discrimination victims. If, on the other hand, the relatively low number of Hispanic charges in the EEOC caseload represent *bona fide* cases of discrimination, then the high administrative closure rate reflects a pattern of negative, differential treatment of Hispanic complaints.

Finally, even if the low level of EEOC litigation on behalf of Hispanics is in part a reflection of the low rate of Hispanic charges, it also is a reflection of the EEOC's failure to seek out and litigate Hispanic claims on its own initiative.

Thus, in 1991, nearly a decade after the issuance and acceptance by the EEOC of the Hispanic Charge Study findings, it is clear that the Commission's service to Hispanics remains extremely poor. Indeed, if the Commission applied the same "disparate impact" analysis it uses against employers alleged to have engaged in acts of unintentional discrimination to its own enforcement record, it would be forced to conclude that the EEOC is itself guilty of discrimination against the Hispanic community.[33]

IV. ANALYSIS AND IMPLICATIONS

A. *Barriers to Improved Civil Rights Enforcement for Hispanics*

The civil rights enforcement system in general, and the EEOC charge system in particular, places heavy burdens on victims of discrimination in seeking and obtaining redress. Such victims must have the knowledge, skills, and resources to: (1) know and understand what constitutes unlawful employment discrimination; (2) know how and where to file a formal complaint or obtain legal representation; (3) collect evidence to support the allegation of discrimination; (4) follow through on the complaint by appearing at one or more interviews with investigators and attorneys, formal hearings, and conciliation meetings; (5) withstand possible intimidation and threats of retaliation by employers; (6) bear substantial economic opportunity costs, e.g., time lost while pursuing the claim or looking for work in cases involving refusals to hire or unlawful firings; and (7) pay substantial direct costs, including transportation, child care, and attorney's fees. It is a system that only the most aggressive, persistent, and resourceful members of the population can use.

Hispanics constitute a disproportionate share of the most economically disadvantaged Americans with extremely low levels of education, high unemployment rates and low incomes.[34] Given these severe hardships, the burdens of the civil rights enforcement system are particularly difficult for many Hispanics to overcome.

Many interrelated factors account for the failure of Hispanics to benefit equitably from federal civil rights enforcement. Some of these factors are unique to the Hispanic community and may require special, targeted efforts by the EEOC and other enforcement agencies. Other factors are directly related to the manner in which the EEOC and other civil rights enforcement agencies choose to serve Hispanics.

The failure of the EEOC to implement effective outreach and education for the Hispanic community has resulted in Hispanics generally having little knowledge about their own rights and about what constitutes illegal employment discrimination. Lack of outreach and education has also resulted in Hispanics having little or no knowledge of how to access the services provided by the various federal civil rights enforcement agencies, particularly the EEOC.

If an outreach and public education program is to be effective for the Hispanic community, the special needs of many Hispanics must first be addressed. Language and literacy are particular concerns for the Hispanic community. About one in four Hispanics in the United States has limited proficiency in English.[35] Even among those fluent in English, educational disparities mean high levels of illiteracy within the Hispanic community -- by one estimate, more than half of all Hispanic adults are functionally illiterate.[36]

Moreover, Hispanics who are aware of their rights and know where and how to file a complaint may be deterred from doing so because of the EEOC's dismal record regarding

Hispanics' interests. Hearings before the 1983 EEOC Task Force revealed a profound level of mistrust of the EEOC within the Hispanic community.[37] NCLR's analysis of EEOC's performance since the 1983 Hispanic Charge Study demonstrates that this lack of trust is well founded.

Even those Hispanics who do file EEOC charges are more likely than other groups to have those complaints dismissed. Those who are lucky enough not to have their cases dismissed -- and, therefore, must pay the substantial direct and indirect costs of pursuing a complaint -- are still not likely to receive equitable and effective service; they are less likely than other groups to receive monetary awards and their average award is likely to be significantly smaller than those received by other groups.

B. *Societal Factors Inhibiting Effective Enforcement*

Not all of the disparity in Hispanics' treatment by the civil rights enforcement system, however, is attributable to government programs and policies. Policy makers and the media are also guilty of ignoring or neglecting Hispanics in the context of civil rights. For example, during the Senate floor debate on the Civil Rights Act of 1990, there was no mention of Hispanics by the major sponsor of the legislation.[38]

Similarly, an NCLR study analyzed 626 articles in the *New York Times* and *Washington Post* from January 1989 through November 1990 to examine the manner in which the media covers Hispanics on civil rights issues. The study revealed that only 50, or 7.9%, of such articles even mentioned Hispanics as a group in their coverage of general civil rights matters, including the pending Civil Rights Act of 1990.[39] The little media coverage received by Hispanics tends to be negative. Portrayals of Hispanics in national television and print advertising have been particularly onerous, and have included the now infamous "Frito Bandito," but also lesser known -- but no less damaging -- caricatures such as Liggett & Myers' Paco, who never "feenishes" anything, and Arid Deodorant's "bandido," ("If it works for him, it will work for you").[40] Finally, recent content analysis of television programming has found that Hispanics are the most negatively portrayed group on television.[41] Negative portrayals of Hispanics are particularly harmful because, given the significant influence of the media on public opinion, they tend to reinforce negative attitudes toward and foster discrimination against Hispanics.

To the extent that policy makers and the media both ignore Hispanics in civil rights debates and coverage, enforcement agencies are less likely to focus time, energy, and resources on addressing discrimination against Hispanics because they are likely to believe no problem exists. Similarly, the general public is unlikely to take or to urge action because it will remain unaware of or unsympathetic to the problems facing Hispanics.

Hispanics are further hampered in their efforts to obtain relief or remedy for employment discrimination by the lack of access to legal services. If an Hispanic victim of employment discrimination is persistent and tenacious enough to make it to and through the EEOC process, but is still left with no remedy for a valid claim, it is extremely difficult to find an attorney able to pursue the claim in a private lawsuit. In general, much of the private civil rights enforcement network, including public interest law firms and legal service agencies, suffers from problems similar to those affecting government agencies: their time, attention, and resources are focused elsewhere.

The public interest law community's civil rights efforts contribute to the problem in several ways. First, public interest legal organizations tend to emphasize "impact litigation," usually to the exclusion of more fundamental, "garden variety" civil rights enforcement issues, which include the vast majority of discrimination claims. A result is that little attention or visibility is given to the virtual absence of an effective public and private infrastructure that is needed to handle the vast majority of discrimination claims.

Second, the high visibility advocacy and public education efforts of these groups frequently focus on expanding civil rights coverage to include new classes or new remedies or deal with very technical, often arcane, legal issues. This lack of attention to the basic elements of civil rights enforcement tends to encourage the widely-held misperception that the "basic" civil rights problems have been solved. This allows public debate and discussion to shift to the most extreme and controversial issues, such as "quotas," and undermines political and public support for the less controversial notion of improving the existing civil rights enforcement system.

Finally, Hispanic organizations at both the local and national levels have not focused sufficient attention to improving the civil rights enforcement system. Community-based organizations, which are generally advocacy and social service groups, are the primary institutions in and serving the Hispanic community; these organizations usually lack the capacity or the expertise to guide discrimination victims through the legal process. Given the large and growing body of evidence of widespread employment discrimination against Hispanics, the Hispanic community itself will have to play a more aggressive and effective role in developing and implementing an effective civil rights enforcement system.

V. POLICY RECOMMENDATIONS

To make the current federal equal employment opportunity enforcement system work effectively for Hispanics, will require special and renewed commitment to civil rights by all elements of American society. The EEOC, the federal agency charged with primary enforcement responsibility, should initiate both internal and external programs targeted to the Hispanic community. Congress and the Administration should indicate their support by authorizing new programs designed to combat employment discrimination and by appropriating sufficient resources to carry out those programs. The United States Commission on Civil Rights (USCCR) should reassume its former position as independent monitor of federal civil rights enforcement efforts, with special emphasis on the EEOC and its service to underserved groups. Hispanic and other civil rights organizations should broaden their agendas and redirect their energies to assure that the basic elements of civil rights protections are preserved and made more effective. Other interested parties, such as the media, the education community, and philanthropic organizations, should devote more attention to Hispanic concerns to promote much-needed understanding of Hispanic issues. The recommendations presented below are suggested starting points for the many entities that play important roles in the equal employment enforcement system.

A. The EEOC

The recommendations made in the 1983 Hispanic Charge Study to the EEOC for improving its service to Hispanics remain appropriate in 1991, primarily because few, if any, were subsequently implemented by the EEOC.

1. **The EEOC should develop and implement a major outreach and public education campaign targeted to underserved groups like Hispanics, as well as Asian Americans, Native Americans, and people with disabilities, with the goal of encouraging and receiving more charges by victims of discrimination.**

As suggested by the 1983 Hispanic Charge Study, the most effective means of outreach to the Hispanic community is through the use of Hispanic community-based organizations. The effort must be vigorous, direct, and widespread.

2. **The EEOC should improve -- by redesign if necessary -- its internal procedures for processing, investigating, and prosecuting charges to address the extraordinarily high administrative closure rate of Hispanic charges.**

3. **The EEOC should commit itself to pursuing litigation on behalf of Hispanics as vigorously as it pursues the claims of other protected groups.**

4. **The EEOC should fulfill its obligation to pursue affirmative efforts by increasing systemic investigations and litigation on behalf of Hispanics, particularly in industries and areas of the country in which discrimination or unfair employment practices are especially likely to occur.**

5. **The EEOC should initiate aggressive recruitment of and promotion for Hispanic employees.**

Unless the EEOC can demonstrate -- through deeds as well as words -- that it will equitably serve Hispanics who do come forward with discrimination complaints, then no amount of outreach will improve the Commission's image in, and trust by, the Hispanic community and complaint levels will remain unacceptably low.

B. Congress and the Administration

Both Congress and the Administration should demonstrate their commitment to the civil rights of Hispanics by allocating attention and resources to the special concerns of Hispanics.

1. **Congress and the Administration should authorize and fund the development and implementation of new fair employment "hiring audit" programs to assist and complement the EEOC's enforcement efforts.**

Creating and/or funding Hispanic community-based organizations to carry out fair employment auditing programs would be the most effective method of identifying and combatting employment discrimination against Hispanics.

2. **Additionally, Congress and the Administration should assist in the development and maintenance of the grassroots infrastructure that links victims of discrimination to enforcement authorities.**

Particularly with underserved groups such as Hispanics, a grassroots network to assist victims in finding and using civil rights enforcement mechanisms is currently almost non-existent. In addition to hiring audits, community-based groups should be assisted to provide outreach and public information programs, victim assistance, and other activities that will bring federal enforcement efforts to the community level.

3. **Congress should appropriate and the Administration must approve an increased level of resources to the EEOC and other civil rights enforcement agencies sufficient to perform the recommended outreach, education, and enforcement activities, as well as their current efforts.**

Appropriations for civil rights enforcement activities should be at least equal to inflation-adjusted FY 1980 levels, with additional funds to cover newly protected classes like persons with disabilities.

C. *The U.S. Commission on Civil Rights*

1. **The USCCR should resume its role as monitor of federal civil rights enforcement efforts, with special attention to the EEOC.**

The 1983 Hispanic Charge Study recommended that the EEOC be subject to oversight by an independent agency with authority to monitor and evaluate its enforcement efforts. This description parallels the original statutory mandate of the USCCR. Although the agency has strayed from that mandate in the last decade, under its present leadership the USCCR has made substantial progress in regaining its former stature. The USCCR should return immediately to its historic role of civil rights "watchdog."

The USCCR should once again issue annual reports evaluating the performance of federal civil rights enforcement agencies, analyzing their funding levels and allocation of resources, and suggesting improvements. Because the EEOC is the one federal agency with the sole function of enforcing civil rights, it needs and deserves particular attention.

D. *The Hispanic Community and Other Interested Parties*

All other entities concerned with civil rights -- among them the media, philanthropic organizations, and the education community -- should become knowledgeable about the concerns of the Hispanic community. For far too long, Hispanics have been either ignored or presumed to have similar, but lesser, problems compared to other minorities.

1. **The Civil Rights Community** should expand its shared agenda to include basic enforcement issues as a priority. The established civil rights community should be most "inclusive" in its approach; it should invite all minorities to participate in the dialogue in which the general civil rights agenda is set so that all fundamental civil rights concerns are equitably addressed.

2. **The Media** should also take a more "inclusive" approach to coverage of civil rights issues to provide a more accurate and complete perspective. With the explosive growth of Hispanics and Asian Americans, the media should soon realize that civil rights issues are no longer simply Black and White. Hispanic views on "mainstream" stories, as well as special and feature stories on issues unique to the Hispanic community, should be standard elements of media coverage. The media should acknowledge and assume its responsibility to heighten the public's awareness of and understanding of Hispanic civil rights issues. Inaccurate and demeaning stereotypes and portrayals of Hispanics should be eliminated in advertising, news, and entertainment programming.

3. **Philanthropic Entities**, such as foundations and corporations, should devote greater resources to civil rights enforcement issues – including Hispanic-specific issues – in their grant-making activities.

4. **The Education Community** at every level should take responsibility for educating the public about the contributions made and problems faced by Hispanics in American society. Issues such as the Hispanic civil rights movement and Hispanics' struggle to take their place in mainstream American society should be standard in curriculum at all levels.

5. **The Hispanic Community**, especially our elected officials and organizational leadership, should become more active in the civil rights arena. Hispanic leadership has a responsibility to:

   - Better inform the Hispanic community about its rights and remedies;

   - Incorporate civil rights activity into all aspects of programmatic activity; and

   - Insist on being part of any negotiation or decision-making process in which civil rights matters are addressed.

To fulfill the promise of equal employment opportunity for Hispanics, the performance of civil rights enforcement agencies, most notably the EEOC, must improve and public attitudes toward and images of Hispanics must change. This requires simultaneous awareness, attention, and action by a number of different groups and entities, none of which can begin too soon.

ENDNOTES

1. See, for example, William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy*, Chicago, University of Chicago Press, 1987.

2. On discrimination generally against Mexican Americans in the 19th and early 20th centuries, see: John H. Burma, *Spanish-Speaking Groups in the United States*, Durham, NC, Duke University Press, 1954; Cary McWilliams, *North From Mexico: The Spanish-Speaking People of the United States*, New York, Greenwood Press, 1968; Leo Grebler, Joan Moore and Ralph Guzman, *The Mexican American People, The Nation's Second Largest Minority*, New York, The Free Press, 1970; Wayne Moquin and Charles Van Doren, eds., *A Documentary History of the Mexican Americans*, New York, Praeger Publishers, 1971; Matt S. Meier and Feliciano Rivera, *The Chicanos, A History of Mexican Americans*, New York, Hill and Wang, 1972; and Albert Camarillo, *Chicanos in a Changing Society*, Cambridge, Harvard University Press, 1979. On murders and lynchings of Mexican Americans, see McWilliams, *op. cit.*, pp. 107-132 and Moquin and Van Doren, *op. cit.*, p. 253.

3. On discrimination against Puerto Ricans, see Burma, *op. cit.*; Joseph P. Fitzpatrick, *Puerto Rican Americans, The Meaning of Migration to the Mainland*, Englewood Cliffs, NJ, Prentice Hall, 1971; Luis Antonio Cardona, "The Coming of the Puerto Ricans," Washington, D.C., *Unidos*, 1974; U.S. Commission on Civil Rights, *Puerto Ricans In the Continental United States: An Uncertain Future*, Washington, D.C., October 1976; Clara E. Rodriguez, *Puerto Ricans, Born in the U.S.A.*, Boulder, CO, Westview Press, 1991.

4. On discrimination against Cubans, see Andres H. Hernandez, et. al., "The Cuban Minority In the U.S.: Final Report on Need Identification and Program Evaluation," Washington, D.C., Cuban National Planning Council, 1974; Jose Llanes, *Cuban Americans: Masters of Survival*, Cambridge, MA, Abt Books, 1982.

5. On pejorative references generally, see Burma, *op. cit.*; Grebler, et. al., *op. cit.*; McWilliams, *op. cit.*; and Octavio I. Romano, ed., *Voices: Readings from El Grito*, Berkeley, CA, Quinto Sol Publications, 1971. On relationship of stereotypes to various forms of discrimination, see above and Camarillo, *op. cit.*

6. Tom W. Smith, *Ethnic Images*, General Social Survey Topical Report No. 19, National Opinion Research Center, Chicago, University of Chicago, December 1990.

7. Joleen Kirschenman and Kathryn M. Neckerman, "'We'd Love to Hire Them, But. . .': The Meaning of Race for Employers," in Christopher Jencks and Paul E.Peterson, eds., *The Urban Underclass*, Washington, D.C., The Brookings Institution, 1991.

8. IRCA imposes civil and criminal penalties on employers who knowingly hire or continue to employ individuals who are not legally authorized to work in the United States.

9. U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination*, Washington, D.C., March 1990. Based on 4362 usable responses from employers surveyed, the GAO projected its findings to 4.6 million U.S. employers.

10. Naomi Verdugo, *The Effects of Discrimination on the Earnings of Hispanic Workers: Findings and Policy Implications*, Washington, D.C., National Council of La Raza, July 1982.

11. U.S. Commission on Civil Rights, *Unemployment and Underemployment Among Blacks, Hispanics, and Women*, Washington, D.C., November 1982.

12. Franklin J. James, *The Lack of Hispanic Economic Progress During the 1970s: Preliminary Observations*, University of Colorado at Denver, paper delivered at North American Meetings of the Regional Science Association, November 9, 1984.

13. Martin Carnoy, Hugh Daley, Raul Hinojosa Ojeda, *Latinos in a Changing U.S. Economy: Comparative Perspectives on the Labor Market Since 1939*, Inter-University Program for Latino Research, New York, Research Foundation of the City University of New York, 1990.

14. For example, some of the studies control for region; others do not. Some control for a single broad measure of educational attainment; others use multiple variables. Some studies control for occupation by using an industry breakdown (e.g., agriculture, mining, retail trade), while another cites occupational categories (e.g., white collar, blue collar). One study controls for marital status, while the others do not. This diversity of variables with consistent results strongly suggests that the findings of discrimination cannot be attributed to statistical quirks or methodological flaws.

15. Carnoy, Daley, and Hinojosa Ojeda, *op. cit.*

16. NCLR calculations, based on Current Population Survey data for 1988 and 1990. For example, multiplying the estimated percentage of the total wage gap attributable to discrimination (approximately 20%, combined male and female) by the total White-Hispanic wage gap in 1988 ($12,146) produces an estimated income loss due to discrimination of approximately $11.7 billion.

17. The 1989 Urban Institute study is reported in U.S. General Accounting Office, *op. cit.*

18. U.S. Equal Employment Opportunity Commission's Task Force, *Equal Employment Opportunity and Hispanics: An Analysis of the Equal Employment Opportunity Commission's Services to Hispanics in the United States*, Washington, D.C., December 2, 1983, pp. 7-8.

19. *Ibid.*, pp. 37-38.

20. *Ibid.*, p. 28.

21. *Ibid.*, p. 39.

22. *Ibid.*, p. 27.

23. U.S. Department of Commerce, Bureau of the Census, *The Hispanic Population in the United States: March 1990*, Series P-20, No. 449, Washington, D.C., March 1991.

24. U.S. Equal Employment Opportunity Task Force, *op. cit.*, pp. 25-26.

25. *Ibid.*, p. 28.

26. *Ibid.*, pp. 25-26, Exhibit 4A.

27. U.S. Equal Employment Opportunity Commission, *Combined Annual Report Fiscal Years 1986, 1987, 1988*, Washington, D.C., 1990. Thus the 4.9% represents a ceiling or maximum for these years.

28. These data should be interpreted with great caution. First, they tend to fluctuate significantly from year to year, reflecting the small number of suits resolved annually. Second, the size of the awards is based on factors such the wages and the amount of work lost by the discrimination victim, which tend to vary greatly from case to case. Similarly, because the averages represent arithmetic means, a few unusually high or low awards can significantly skew the group averages.

29. The caseload percentages from the 1983 Hispanic Charge Study and as calculated by NCLR are not strictly comparable because of different categorization procedures. For example, NCLR included "retaliation" in its calculation, which brings all other percentages down.

30. Carnoy, Daley, and Hinojosa Ojeda, *op. cit.*, Chapter 3.

31. See Leticia Miranda and Julia Teresa Quiroz, *The Decade of the Hispanic: An Economic Retrospective*, Washington, D.C., National Council of La Raza, March 1990, pp. 16-19.

32. The Urban Institute, *Opportunities Denied, Opportunities Diminished: Discrimination in Hiring, Washington, D.C., 1991*, pp. 28-29. The Urban Institute studies found that Hispanic applicants encountered unfavorable treatment in the hiring process in 31% of the hiring audits, compared to 20% for the Black applicants.

33. "Disparate impact" is a basis of liability by which a claim may be made under Title VII. The theory provides that an employment practice or a group of practices, which may appear to be neutral, may be found to be an unlawful employment practice under Title VII <u>if</u> the practice or practices have a disproportionate and adverse effect (or impact) upon

a certain group of people and the employer cannot prove that the practice or practices are necessary to conduct business.

34. Denise De La Rosa and Carlyle E. Maw, Ph.D., *Hispanic Education: A Statistical Portrait 1990*, Washington, D.C., National Council of La Raza, October 1990, Chapter 6; Leticia Miranda and Julia Teresa Quiroz, *op. cit.*

35. Arturo Vargas, *Literacy in the Hispanic Community*, Washington, D.C., National Council of La Raza, July 1988.

36. *Ibid.*, pp. 7-9.

37. U.S. Commission on Civil Rights (1982), *op. cit.*, pp 9-12, p.22.

38. EEOC Commissioner Tony Gallegos, Letter to Raul Yzaguirre, President, National Council of La Raza, July 1990.

39. Internal study conducted by National Council of La Raza, December 1990.

40. Tomas Martinez, "Advertising and Racism: The Case of the Mexican American," Octavio I. Romano, ed., *op. cit.*

41. S. Robert Lichter, Linda S. Lichter, Stanley Rothman, and Daniel Amundson, "Prime-Time Prejudice: TV's Images of Blacks and Hispanics," *Public Opinion*, July/August, 1987, pp. 13-16.

GEORGE BUSH'S QUOTA BILL

The Dismaying Impact of *Griggs*

TERRY EASTLAND

President Bush says he wants to sign a civil rights bill but not a quota bill. Meanwhile, congressional Democrats insist that their civil rights bill is not a quota bill. Obviously, no one in either party wants to be seen as favoring quotas. But the irony of the current legislative battle over civil rights is that both President Bush and his liberal opponents in Congress have more in common than they are publicly willing to admit. Both bills support the dreaded "Q" word: both, to one degree or another, support quotas. Both the president and congressional Democrats would require employers to justify any hiring or promotion standards that result in less-than-proportionate employment of minorities and women. In so doing, both accept a 1971 Supreme Court decision called *Griggs* v. *Duke Power Company*. For two decades *Griggs* has forced employers to resort to preferential treatment of minorities and women in order to avoid litigation and liability under Title VII of the Civil Rights Act of 1964.

In 1989 a Supreme Court concerned about the negative impact of *Griggs* sensibly acted to contain it in *Wards Cove Packing Company* v. *Atonio*. How—not whether—to revise *Wards Cove* has led the Bush administration and congressional liberals to fight about quotas. It is a superficial battle; whoever really wants to dismantle America's quota culture must not only accept *Wards Cove* but also take the bold step of asking for further reform of *Griggs*. Whatever its value 20 years ago, *Griggs* today is bad public policy, and in an economy facing ever stiffer international competition, it can only make matters worse.

Breathtaking Judicial Activism

Griggs is one of the Supreme Court's most important civil rights decisions and the most significant of all of the Court's decisions concerning employment discrimination. The media have largely neglected *Griggs* in their coverage of the now two-year-old effort to pass new civil rights legislation. But that struggle cannot be understood apart from a knowledge of *Griggs*.

In *Griggs* the Supreme Court made its first significant interpretation of Title VII of the Civil Rights Act of 1964, which created a federal right to equal employment opportunity, free of racial discrimination. In a breathtaking instance of judicial activism, a unanimous Court, in an opinion by Chief Justice Warren Burger, wrote into the statute the equal results standard demanded by "disparate impact" theory and its model of proportional representation in the workplace.

Willie Griggs and 12 other black employees at Duke Power's Dan River Steam Station near Draper, North Carolina, charged in a class action that the company had discriminated against blacks in violation of Title VII. Duke Power had compiled a long record of overt discrimination, having restricted blacks prior to 1965 to the plant's labor department, where the highest-paying jobs paid less than the lowest-paying jobs in the four all-white operating departments. In 1955, in an effort to upgrade the quality of its work force, the company had required a high school diploma for initial assignment to any department except labor and for transfer from one of the "white" departments (coal-handling) to the three other white departments, all of them higher-paying. When Title VII took effect in the summer of 1965, the company ended its practice of limiting employment opportunities for blacks to the labor department and also extended to employees in that department the high school requirement for transfer to the better jobs elsewhere, although not for initial employment. Whites hired before 1955 without high school diplomas, however, were exempted from the new educational requirement. The company also required that anyone seeking a job in any department but labor pass two professionally developed general aptitude tests. Employees without high school diplomas could qualify for upward transfer by passing the two tests.

Griggs and his colleagues contended that, whatever their intent, the company's employment requirements had an adverse impact upon blacks and that these requirements did not measure the ability to perform a particular job. Duke Power replied that under Title VII ability tests were permitted so long as they were not used

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to discriminate on the basis of race.

The U.S. Court of Appeals for the Fourth Circuit rejected the claim of the plaintiffs that requirements not explicitly job-related violated Title VII because of their disparate impact upon blacks. The appeals court held that for Title VII to have been violated, the plaintiffs had to show that Duke Power had in fact intended to discriminate against blacks when it adopted the diploma and test requirements. There had to be, in other words, discriminatory purpose.

"Built-in Headwinds"

When the case moved to the Supreme Court the plaintiffs' attorneys focused not on Griggs or any of the other individuals in the class action; indeed they professed not to know which employees, white or black, had taken and failed the tests used by Duke Power, although some of the plaintiffs had taken and passed them. The lawyers urged the Supreme Court to think of the case in terms of the impact of the employment requirements upon blacks *as a group*. They succeeded.

The Court said that the objective of Title VII was to remove "barriers that have operated in the past to favor an identifiable group of white employees over other [*i.e.*, non-white] employees." An employment selection practice or procedure or test can be neutral on its face, "and even neutral in terms of intent," but if it operates to "freeze" the status quo of "past discriminatory employment practices," it violates Title VII. Basic intelligence, said the Court, cannot manifest itself fairly in a testing process unless it has "the means of articulation." And blacks as a group do not have this means because they have "long received inferior education in segregated schools." In a footnote, the Court reported U.S. census figures for 1960 showing that 34 percent of white males, but only 12 percent of black males, in North Carolina had completed high school. It also noted statistics from the Equal Employment Opportunity Commission showing that 58 percent of whites had passed a battery of tests including those used by Duke Power, while just 6 percent of blacks had done so. The Court assumed that the failure of blacks to do better—and presumably on a par with whites—was "directly traceable to race."

Blacks, in short, had been the victims of societal discrimination in regard to education. It no doubt helped the argument in the Court's mind that the particular society in question had been one of Jim Crow. Burger, in his opinion, relied on a 1969 voting rights case, also from North Carolina, *Gaston County* v. *United States*, in which the Court had struck down a literacy test for voter registration. In *Gaston*, while observing that there had been no intentional discrimination, the Court said that the literacy test effectively discriminated against blacks because North Carolina's formerly segregated inferior education had prevented them from acquiring the skills needed to pass the test.

Burger wrote that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." The touchstone, he elaborated, is "business necessity." Thus, if an employment practice that operates to exclude blacks "cannot be shown to be related to job performance, the practice is prohibited." Duke Power had not met this high standard; by its own testimony it had adopted its educational and testing requirements to improve the overall quality of its work force but without any specific job assignments in mind.

Burger seemed to accept the company's declaration of a lack of discriminatory intent, noting Duke Power's special effort to help its undereducated employees by underwriting two-thirds of the tuition for high school training. But "good intent," he said, "does not redeem employment procedures or testing mechanisms that operate as 'built-in-headwinds' for minority groups and are unrelated to measuring job capability."

Burger maintained that when Congress wrote Title VII it was concerned about not simply the motivation of employment requirements but also their consequences, and that, in fact, Congress had placed "on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." At the end of his opinion Burger reiterated: "What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." The Court gave practical guidance by approving EEOC guidelines interpreting a section of Title VII that authorizes the use of "any professionally developed ability test" that is not "designed, intended, or used to discriminate because of race." The EEOC guidelines said that Title VII permitted only the use of job-related tests and that employers using such a test must have available data "demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."

Contradicting Title VII

The *Griggs* decision contradicted both the language and legislative history of Title VII. The text of Title VII defines "an unlawful employment practice" as "discriminat[ion]...because of [an] individual's race, color, religion, sex, or national origin." In the remedial section of Title VII, courts are required to find that the defendant has "intentionally engaged in or is intentionally engaged in an unlawful employment practice."

The legislative history makes clear that Congress rejected racial imbalance, or disparate impact, as a definition of discrimination. The decision in a 1964 Illinois case, *Myart* v. *Motorola*, had worried some members of Congress: Under that state's fair employment practices act, a racially neutral test had been invalidated on grounds that it had a disparate impact upon blacks; the employer was told he could not use it until he showed that it did not cause a racial imbalance within his work force. Senator Clifford Case, one of the leading authorities on Title VII, assured his colleagues that the new federal law would not permit *Motorola*-like cases; a federal court, he said, could not read Title VII to require an employer "to lower or change the occupational qualifications he sets for his employees simply because fewer [blacks] than whites are able to meet them." An authoritative Senate memorandum maintained that bona fide qualifications tests would not have to be abandoned where, "because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups." An employer "may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance."

Burger dodged the text and history of Title VII, saying that employers whose employment requirements have a "markedly disproportionate" impact upon minorities must demonstrate their "business necessity," a term found nowhere in Title VII or in previous Court opinions. In approving the EEOC guidelines, Burger said they reflected the will of Congress, yet they did no such thing. The EEOC itself was aware that its enforcement of Title VII conflicted with congressional intent, as Hugh Davis Graham points out in *The Civil Rights Era: Origins and Development of National Policy*. The EEOC's own *Administrative History* of 1969 acknowledged that Congress had defined discrimination as one of "intent in the state of mind of the actor," and that it did not consider professionally developed ability tests as discriminatory. The EEOC, though, had come to disregard "intent as crucial to the finding of an unlawful employment practice" and instead emphasized forms of employer behavior that "prove to have a demonstrable racial effect without clear and convincing business motive." The EEOC thought that either Congress would have to amend Title VII to embrace disparate impact theory or that the agency would have to change its policy to return to Congress's model of intentional discrimination. Thanks to *Griggs*, neither had to occur.

Race-Norming and Other Evils

Griggs was handed down the same year the Court approved racial busing as a remedy for school segregation in *Swann* v. *Mecklenburg* (another North Carolina case and another opinion for a unanimous Court by Chief Justice Burger). Yet down through the years *Griggs*, while far less publicized, has perhaps had more influence upon both public and private employment than *Swann*, soon constrained by other rulings, has had upon public education. *Griggs* ratified the policy direction of the EEOC, which since 1965 has been given the authority to enforce Title VII in private employment. This became Justice Department policy in 1972 when Congress authorized that agency to enforce Title VII in public employment.

Griggs meanwhile inspired private civil rights lawyers to bring disparate impact cases, leading to a series of decisions that further eroded the original intent of Title VII. In 1975 the Court said in *Albemarle Paper Company* v. *Moody* that even tests having a rational relationship to job performance are subject to litigation under Title VII if they adversely affect minorities. Significantly, it added that when an employer does validate his test, the plaintiff still has an opportunity to prove the test was a pretext for discrimination by showing that other measures having less of a disparate impact upon minorities would serve the employer's business purpose.

By the mid-1970s, Title VII had become a strong plaintiffs' statute. Virtually no employment practice having a "disparate impact" has been immune from legal attack based on *Griggs*: a wide range of recruitment, hiring, assignment, testing, seniority, promotion, discharge, and supervisory selection practices have been successfully challenged. Relying on *Griggs*, a federal judge told the Drug Enforcement Administration that it may not consider previous work experience in promotion decisions. Similarly, a federal judge in Alabama told the Birmingham police department that when hiring new officers it may not take into account applicants' felony conviction records.

The disparate impact theory of *Griggs* also has helped promote the trend over the past decade toward race-norming, in which scores on ability tests free of cultural bias are "adjusted" for differences among whites, blacks, Hispanics, and other groups. Just a few years after *Griggs*, E. F. Wonderlic & Associates, a major marketer of cognitive-ability tests, promoted an "Ethnic Conversion Table" by which employers could ensure racially proportionate test scores. Wonderlic sent employers information on how to race-norm, with this advice: "Select to fill proper ratios and quotas. Select the best-suited individuals by ethnic class."

The Bush administration committed a serious strategic mistake by failing to make a public case for the original understanding of Title VII.

Hiring by Numbers

No one has yet produced a comprehensive study of the practical impact of *Griggs* upon the American workplace. Probably some employment requirements adopted out of racial prejudice have been scrapped; at the same time many benign employment requirements have probably also been thrown out. Doubtless, too, some employers have simply hired by the numbers in order to avoid litigation. (Of course, there is no merit in announcing preferential treatment for certain minorities, since employers also can face lawsuits from those not preferred.) As one personnel officer quoted by Nathan Glazer has revealed:

> You can avoid violating Title VII and also avoid rocking the boat until you have enough hard data at hand to prove or disprove the actual relevance of various selection factors to the prediction of job performance for all groups. You do it by *temporarily equalizing* the impact of each factor being considered on each group in the applicant population while you study it.
>
> For example, our company had been using a

particular test to select employees for one job. Approximately 25 percent of the white males in the applicant population had been passing the test by scoring above a certain score. Now we just make sure that the top 25 percent of the applicants from each of the groups protected by Title VII also pass that test. We don't worry about what score becomes the cutoff for the various groups; we stick with the percentage passing from each group.

This racial hiring by numbers would not occur apart from the judicial interpretation of Title VII provided by *Griggs*. In fact, this practice is in direct conflict with Title VII, which states: "Nothing in this title shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin of such individual or group." Yet that is exactly what *Griggs* has required employers to do.

Following *Griggs*, a federal judge told the Birmingham police department that when hiring new officers it may not take into account applicants' felony conviction records.

Wards Cove

In 1989, a Supreme Court concerned about extravagant lower court uses of disparate impact theory sensibly acted to contain it in *Wards Cove Packing Company* v. *Atonio*. The case involved Alaskan salmon canneries that employed a mainly white work force in skilled jobs and a mainly nonwhite work force in unskilled jobs. The U.S. Court of Appeals for the Ninth Circuit had ruled that this imbalance created a *prima facie* case of disparate impact against the company, thus obligating it to show that its hiring and employment practices were justified by business necessity. The Supreme Court disagreed, relying on a 1977 ruling in which it had held that the proper comparison in a disparate impact case is between "the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs."

If the Ninth Circuit's decision of what constitutes a *prima facie* case of disparate impact had been allowed to stand, it would have paved the way for additional Title VII litigation and liability, thus forcing more and more employers to resort to racial preferences. Justice Byron White, writing for the Court, said that the Ninth Circuit's theory "would mean that any employer who had a segment of his work force that was—for some reason—racially imbalanced, could be hauled into court and forced to engage in the expensive and time-consuming task of defending the 'business necessity' of the methods used to select the other members of his work force. The only practicable option for many employers will be to adopt racial quotas, insuring that no portion of his work force deviates in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII."

No one in Congress has dared propose overturning *Wards Cove* on this point. It is the Court's next holding in *Wards Cove*, however, that congressional liberals aim to reverse. The Court insisted that a *prima facie* case of disparate impact cannot be made *without* attributing the disparity to one or more employment practices. Thus, a plaintiff must isolate and identify the specific employment practices said to cause the statistical disparity. He cannot simply point to the disparity, even when properly drawn. Here the Supreme Court was correcting lower federal courts that had held that plaintiffs in disparate impact cases do not have to specify the particular practice(s) responsible for the disparity. Justice White observed, correctly, that every one of the Supreme Court's disparate impact cases focused on the impact of a particular employment practice. Congressional liberals who say they merely want to return to *Griggs* are disingenuous on this issue; they want the further judicial gloss on *Griggs* added by some lower courts that the Supreme Court in *Wards Cove* erased.

Wards Cove also clarified the plaintiff's burden of proof. The Court held that once a *prima facie* case of disparate impact is established with respect to a particular employment practice, the burden of producing evidence of a legitimate business justification for that practice will shift to the employer. The burden of persuasion, however, remains with the plaintiff, who must disprove an employer's evidence that his practice has a legitimate business justification. The Court said that what is at issue is whether a challenged practice "serves, in a significant way, the legitimate employment goals of the employer."

Dispute over "Business Necessity"

Both the administration and congressional liberals agree on overturning *Wards Cove* in respect to burden of proof; both say it should always fall to the employer. The disagreement concerns the definition of "business necessity." For a challenged practice to serve a "business necessity" under the administration's definition, it must bear "a manifest relationship" to the employment in question—a term directly from *Griggs*. But this line from *Griggs* is not enough for the civil rights lobby. It wants another, not unreasonable reading of the imprecise opinion in *Griggs*, which has been supplied by lower courts, one that basically requires an employer to demonstrate the absolute indispensability of a challenged practice to the employer's business. In *Wards Cove* Justice White was rebuking lower court interpretations on this point when he said "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." With his eye on the realities in the workplace, White said that such a high standard would be "almost impossible for employers to meet" and would "result in a host of evils," such as racial-preference hiring. Congressional liberals have a different view of "business necessity"; they propose that employers must show that their selection practices bear "a significant and manifest relationship to successful job performance," which is close to another locution in *Griggs*, that of "a demonstrable relationship to successful [job] performance."

The legislation preferred by congressional liberals would increase the pressure upon employers to resort to racial preferences. President Bush is right to say that theirs is a quota bill, yet his alternative is not invulnerable to the same charge, because it assumes the validity of disparate impact theory. The reality under *Griggs* is that any theory of discrimination driven by numbers leads to hiring by the numbers. Still, the administration's bill is preferable; the legal structure it proposes would not pressure employers to resort to preferences to the same degree as the bill favored by the civil rights lobby.

Even at this late date in the legislative debate, the question that deserves to be addressed is not how *Wards Cove* should be overturned but whether it should be overturned, and beyond that, whether it is not time to think anew about the case that started and provided the theory for preferential treatment, *Griggs* v. *Duke Power Company*. *Wards Cove* was a badly needed clarification of judge-made law; if we are going to have disparate impact theory, we must have the kind of constraints placed on it by *Wards Cove*. We cannot have law developing in the lower federal courts that only encourages increasing resort to racial preferences, which after all do violate the explicit text of Title VII.

When *Wards Cove* was first handed down, Bush's Justice Department indicated its agreement with the decision. While allowances can be made for the practical demands of politics, President Bush himself would have been well advised to have considered taking a strong stand in defense of *Wards Cove*, and against *any* changes to it.

Return to Congressional Intent

The great unwritten story about *Wards Cove* is that, together with a case decided in 1988, *Watson* v. *Fort Worth Bank & Trust Company*, it suggests the Court's willingness to rethink its Title VII jurisprudence. This is the prospect congressional liberals fear. Down through the years the Court has treated two kinds of cases—disparate impact and disparate treatment, *i.e.*, intentional discrimination, cases—and some members of the Court may want to do away with this two-track approach and unify the law of Title VII in terms of its original understanding. Ironically, *Griggs* might well have been decided in the plaintiffs' favor on the basis of disparate treatment, thus sparing the nation its fateful dalliance with disparate impact and proportional representation. (Indeed, as Herman Belz in his new book, *Equality Transformed: A Quarter Century of Affirmative Action*, points out, the southern setting of *Griggs* in which racial discrimination had once been the law of the land and Duke Power's own history of purposeful discrimination invited the inference that what the Court really objected to was intentional discrimination.) The Court's emphasis in *Wards Cove* that the burden of proof in disparate impact cases should *at all times* [the Court's italics] remain with the plaintiff suggests its possible direction; the burden of proof in disparate treatment cases has always rested with the plaintiff.

If the Bush administration survives the current effort to codify disparate impact theory, it should rethink its civil rights strategy. It may have committed a serious strategic mistake by failing to make a public case for the superiority of the original understanding of Title VII. While it is too late to criticize *Griggs* purely in terms of judicial activism, solid policy arguments can be made against disparate impact and its harmful consequences.

Information about the number of minorities hired for a certain job is relevant, under a proper understanding of Title VII, to an inquiry into whether purposeful discrimination has occurred; but it cannot be considered *prima facie* evidence of discrimination. Even when the most appropriate statistical comparison is made, it does not follow that the remaining statistical differences between or among racial groups can be attributed to racial discrimination, whether on the employer's part or society's in general; age, location, and education, among other variables, are also explanatory.

Attacking High Standards

The use of disparate impact theory has worked against the setting of reasonable standards not simply for getting a job but for achievement in life. If an employer may only test for what is "essential," and thus is effectively forbidden to test in ways that might demonstrate relative qualifications, then why test at all? And why should those who take tests have any incentive to do well on them? Or to study in school? *Griggs* was written against the backdrop of the Jim Crow South, but the nation cannot afford to be saddled with a theory of discrimination that has a disparate impact upon minorities today. All forecasts indicate that by the year 2000 the majority of new entrants in the American work force will be minorities. If America is to compete effectively in today's international economy, testing must no longer be regarded as synonymous with racial discrimination. The anti-high-standards mentality encouraged by *Griggs* must be ended. This is an especially important goal for President Bush, given his education agenda, which has committed itself to stiffer testing that prepares students, in the words of the president, for "productive employment in our modern economy."

In time, unless new civil rights legislation is passed that would prevent it, the Supreme Court itself might reform *Griggs*, making all but arbitrarily imposed tests permissible under a Title VII shorn of disparate impact theory. The superior course would be for Congress and the president to join hands in legislating this change. It is time to go after *Griggs*.

COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY

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CUNY, BCC

CR

May 17, 1991

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

THE CHIEF of STAFF
has seen

Dear John:

All my mental alarms and red lights went on when reading the fifth paragraph of the attached White House fact sheet.

Codifying Griggs v. Duke Power Co. is tantamount to codifying quotas.

Apart from the un-American shift in the burden of proof therein, there is no way (and I am reporting a twenty-year experience) by which employers "proofs" can avoid being pulverized by judicial grinding stones.

When faced with the enormously high cost for "practice justification," which in turn can hardly withstand litigatory mutilation, a wise employer opts for the easy way out, i.e., agrees to quotas.

Your children and mine will be the victims.

I hope we do not win battles only to lose the war.

Sincerely,

Miro M. Todorovich

FACT SHEET ON ADMINISTRATION CIVIL RIGHTS BILL

- The Administration is committed to strengthening the strong employment discrimination laws that now exist. These improvements will operate to obliterate consideration of factors such as race, religion, sex, or national origin from employment decisions.

- A major objective of the Administration is to ensure that Federal law provides strong new remedies for harassment based on race, sex, religion, or national origin. The Administration proposes to create a new monetary remedy, up to $150,000, for these forms of discrimination.

- In addition, the Administration proposes to extend 42 U.S.C. 1981 to outlaw racial discrimination in the performance of contracts, overruling Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

- The Administration also proposes legislation overturning the Supreme Court's decision in Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), which unfairly limits the time for challenging discriminatory seniority systems.

- The administration also proposes to codify the "disparate impact" cause of action for employment practices that unintentionally exclude disproportionate numbers of certain groups from some jobs. This codifies Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Administration bill shifts the burden of proof to the employer to justify practices having a disparate impact under the rule of "business necessity." This overrules the contrary decision in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989).

- In order to help curtail unnecessary litigation, the use of alternative dispute resolution mechanisms will be encouraged.

- The time has come for Congress to bring itself under the same antidiscrimination requirements it prescribes for others. This will promote both fair treatment for congressional employees and a greater appreciation by Congress of the consequences of new legislative initiatives.

- Other improvements, including changes in certain provisions affecting the statute of limitations and expert witness fees, will also enhance the administration of Title VII of the 1964 Civil Rights Act.

From: **EDWARD I. KOCH**

I thought you would be interested in the enclosed.

All the best.

ROBINSON SILVERMAN PEARCE ARONSOHN & BERMAN

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WRITER'S DIRECT NUMBER:

June 18, 1991

The Hon. Les Aspin
U. S. House of Representatives
2336 Rayburn House Office Building
Washington, DC 20515-4901

Dear Les:

I have your letter of June 11. I have more than an "interest" in civil rights. I am a firm believer in securing the civil rights of all of our citizens, but not through the use of reverse discrimination. I believe H.R.1 is a bill which encourages racial, ethnic, religious and gender quotas and, therefore, should be defeated.

There are legislative changes that are necessary as a result of recent Supreme Court decisions, but H.R.1 does not solve most of those problems. What it does do is pressure employers to fill jobs on the basis of racial, ethnic and religious proportionality in order to avoid massive backpay and attorneys' fees awards. The proponents never admit that they support quotas and always refer to affirmative action in a way that would place them on record as opposing quotas, even when they acknowledge support of "goals, timetables and sanctions." Those words are simply euphemisms for quotas.

What H.R.1 does, and regrettably the President's bill in the spirit of compromise does the same, is to presume an employer guilty of racial, ethnic, religious or gender discrimination when his workforce statistically does not mirror the applicant workpool or the regional population in the particular job category when plaintiffs allege discrimination based not on intentional discrimination but on the "disparate outcome" of testing or of the hiring practice. The burden of proof is then shifted to the employer who must defend his hiring practices. H.R.1 also effectively eliminates the plaintiff's requirement to identify the practice(s) causing the disparity and has a brand new onerous definition of business necessity which exceeds the definition in Griggs v. Duke Power (1971) and subsequent Supreme Court cases. Faced with costly lawsuits, monetary damages and negative publicity, employers will simply throw in the towel and make certain their workforce reflects the "correct" racial, ethnic, religious and gender profile, rather than hiring the best person for the job.

I don't believe that President Bush, in introducing his bill through Robert Michel (R-Il.), should have compromised on this issue by including as he did the same presumption of guilt as H.R.1, but at least his bill retains the two other safeguards against quotas requiring the plaintiff(s) to identify the practice(s) causing the discrimination and the Supreme Court's 20-year-old concept of business necessity.

Some suggest there should be compromise on both sides. I suggest that fundamental positions of morality which we all have, sometimes on different sides of the same issue, whether it be with respect to abortion, the death penalty, gay rights, civil liberties and civil rights, should not be compromised. Are there many supporters of Roe v. Wade, who would agree to a compromise, which opponents sometimes offer, to eliminate the right of abortion on demand up to the second trimester except to save the life of the mother, and in cases of rape, incest or gross fetal defects? I doubt that you would vote for such a bill. And certainly supporters of N.O.W. and many others would not. Would you suggest that those who are opposed to the death penalty, as for example New York Governor Mario Cuomo, give up their deeply held position against it by agreeing to it but only in the case of someone convicted of killing a police officer in the line of duty? I doubt it.

There are those in the Congress and on the editorial pages who have used the fact that both the Anti-Defamation League and the American Jewish Congress supported H.R.1 as a shield to criticism. However, subsequent to the bill's passage, both groups have stated that H.R.1 does indeed have quota implications, placing their ultimate support of H.R.1 in question. One reason they take this position is that in an effort by its sponsors to put themselves on record as opposed to quotas, H.R.1 now contains language defining "quota" in such a way as to inferentially protect quotas. How? By defining a quota as requiring employers to take those who are not qualified for the job, and making that action illegal. That means that the minimally qualified applicant of the "correct" race, ethnicity, religion or gender needed to avoid lawsuits based on the presumption of guilt and H.R.1's rewriting of the other elements of disparate impact lawsuits would be hired rather than the best applicant and that would be legal and a quota.

I believe H.R.1 is supported by some because they feel nothing else has worked to end racial discrimination. In fact, much has been accomplished in breaking down discrimination against minorities and women, but much more can and should be done to reduce and eliminate remaining discrimination. We can point with pride to the fact that of the top ten cities in our country half have been or currently are governed by a black mayor. But I do not believe in engaging in reverse discrimination to cure past or present discrimination except when a specific individual can show that he or she was the subject of discrimination in which case that individual should be given preferential treatment to correct the prior discrimination.

"Race norming" which has been used by the federal government for nearly 15 years allows testing applicants for jobs solely within their own race or ethnicity and eliminates scoring the entire applicant group with the same criteria. This practice elevates minority applicants over white and Asian applicants taking the same test and scoring higher. There is a bitterness amongst many whites, who are 80% of the country's population, which results from a feeling that their sons and daughters will suffer reverse discrimination to atone for the earlier and current discrimination practiced against blacks and Hispanics. Many believe as I do that David Duke received 60% of the white vote in Louisiana for U.S. Senate not because those voting for him support the Ku Klux Klan, but rather because of their anger against the Democratic party and its support of preferential treatment and racial and ethnic quotas.

There are many who applaud Senator Kennedy for his leadership in the fight for H.R.1. These same people attack President Bush for his continued opposition to the legislation which he believes encourages quotas and is antithetical to our historical opposition to the use of such quotas. You know that better than anyone else, coming from ~~Wisconsin~~ Minnesota, the state Hubert Humphrey once represented and where his opposition to quotas is well-known.

The children of those who are wealthy, in political office or have access to "networking" will always get jobs and will not suffer the consequences of the reverse discrimination created by the passage of H.R.1. The children of our working poor and middle classes of every ethnic extraction including, but not limited to, Irish, Italian and Jewish will see their sons and daughters restricted in their opportunities. Ultimately, they will have to accept that they will not rise in an occupation or profession of their choosing based on their ability but will be judged by the demographics of race, ethnicity, religion and gender in employment in the private sector, in government and at our universities. That is not the America that most of us, including blacks, Hispanics and women who are the intended beneficiaries of preferential treatment under H.R.1, have dreamed of or been made cognizant of during our school careers.

Enclosed is some additional material on the subject including a statement I made before the American Jewish Committee and various op-ed articles.

I have gone on at great length knowing that I will not convince you, but I do believe that I have reasonably, responsibly and accurately described what H.R.1 will do and have staked out my position in opposition as a matter of conscience which I will not compromise.

All the best.

Sincerely,

Ed

Edward I. Koch

EIK/mgl

LES ASPIN
1st District, Wisconsin

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June 11, 1991

The Honorable Ed Koch
Robinson Silverman Pearce
1290 Ave. Of The Americas, 30th Fl.
New York, New York 10104

Dear Ed:

Knowing of your interest in civil rights, I wanted to let you know of my support for H.R. 1, the Civil Rights and Women's Equity in Employment Act of 1991. Three versions, called substitutes, of this bill were considered by the House of Representatives on June 4 and 5, 1991.

The first substitute to H.R. 1 was offered by the Congressional Black Caucus of which I am an associate member. It was introduced by Representative Edolphus Towns (D-NY) and Representative Pat Schroeder (D-CO). This measure most closely mirrored the Civil Rights Bill as reported by the House Judiciary Committee and House Education and Labor Committee. It fully overturned all five 1989 Supreme Court decisions which drastically limited anti-bias court cases. Since the 1989 Supreme Court decisions, employees have experienced great difficulty in gathering the evidence necessary to prove discrimination. The substitute would have returned to the pre-1989 law which required the employer to prove that it did not discriminate. Furthermore, this measure would have placed no cap on compensatory or punitive damages which victims of discrimination could receive. I voted for the Towns-Schroeder Substitute because it was the most fair and intellectually honest version of the civil rights bill that the House considered. Unfortunately, it failed to pass the House by a vote of 152 to 277.

The next version of this bill that came before the House was the weakest of the three. It was introduced by Representative Robert Michel (R-IL) and supported by President Bush. While claiming to be a civil rights bill, it only overturned one and partially overturned two of the five 1989 Supreme Court decisions. Under this substitute, intentional discrimination on the basis of gender, race, color, religion and national origin could still be permissible if there were other contributing factors leading to an employer's decision. I believe that discrimination on the basis of race, sex, religious affiliation or ethnic background should never be permitted. Furthermore, this measure would safeguard employers from compensatory and punitive damages in certain cases of intentional discrimination. I voted against the Michel Substitute because I felt it would significantly water-down the Civil Rights Bill. This substitute was defeated 162 to 266.

June 11, 1991
Page Two

Finally, the House considered the bipartisan compromise as introduced by Representative Jack Brooks (D-TX) and Representative Hamilton Fish (R-NY). Unlike the Michel Substitute, this legislation fully overturns all five 1989 Supreme Court rulings that severely undermined a plaintiff's ability to win a discrimination case. Specifically, it would return the burden of proving discrimination to the employer from the alleged victim. Furthermore, it would allow most victims of discrimination to receive punitive damages of up to $150,000 or the amount of compensatory damages, which ever is greater. Victims of racial discrimination would not be subjected to this cap, since they are already allowed uncapped punitive damages under an 1886 federal statute. Although the Towns-Schroeder Substitute was a better bill, I am pleased that the House passed this measure with my support by a vote of 264 to 166. Likewise I voted for final passage of H.R. 1, when it passed the House by a vote of 273 to 158.

The chances of enactment of the Civil Rights Bill remains uncertain. The Senate is expected to pass a bill similar to the House's Civil Rights Bill in the near future. However, President Bush has threatened to veto this historic legislation. Despite this obstacle, I will continue to support this bill and do all that I can to ensure that it ultimately becomes law.

Sincerely,

Les Aspin

Les Aspin
Member of Congress

LA/meb

STATEMENT BY EDWARD I. KOCH

TO THE AMERICAN JEWISH COMMITTEE

TUESDAY, MAY 28, 1991

So much has been written on the subject of H.R.1. I thought I would simply provide you with what I think covers the subject most adequately and supports my view that H.R.1 encourages quotas and should be opposed.

First, let me describe the annexed documents: The first document is a letter of May 15, 1991, authored by me and sent to members of Congress urging their vote against H.R.1. Attached to that letter is an analysis of H.R.1 and an explanation of "race norming" and how H.R.1 relates to "race norming." The second, third and fourth documents are Wall Street Journal op-ed articles -- the first, authored by me, dated February 5, 1991, which discusses why H.R.1 would adversely impact on white, Jewish males; the second, dated February 20, 1991, by Gordon Crovitz discusses the relevant cases, in particular Griggs and Wards Cove; the third, dated May 22, 1991, refers to the actions I have taken in lobbying Congress and others against the civil rights bill and why. The fifth document is a memorandum by Agudath Israel of America, dated May 3, 1991, which was sent to members of the U.S. House of Representatives which provides its views on "several of the most controversial provisions of H.R.1." And the final document is a memo from C. Boyden Gray, Counsel to the President, in which he discusses "race norming" and provides a detailed analysis of H.R.1 with the administration's reasons for opposing it.

The question to ask yourself is the following: Would you support legislation that would encourage reverse discrimination in order to eliminate current racial discrimination? If you would, then your support for H.R.1 is understandable, because H.R.1 attempts to do exactly that. However, if you believe that it is unfair, discriminatory and reverse racism to punish approximately 80% of the American population which is white by providing preferential treatment to the 20% who are minorities, and preferential treatment to women who are a majority then you would agree with me and oppose H.R.1.

Simply put, H.R.1, in affect, by presuming a employer guilty of having practiced racial, ethnic, religious and gender discrimination by showing that his workforce in particular jobs does not statistically reflect either the racial, ethnic, religious or gender make-up in the regional workforce for those particular jobs or the applicant work pool for the jobs, places the burden upon the employer to rebut this presumption of guilt. The huge backpay and attorney fee awards that could result will encourage employers to quietly make sure their workforce mirrors the profile needed in order to avoid problems, even if that means hiring by quota.

There is a debate raging as to whether or not Griggs v. Duke Power which created the cause of action alleging that hiring practices that appear fair can still be unlawful if they disproportionately harm one group was, in fact, overturned by Wards Cove. Scholars differ on that issue. Some believe that

Wards Cove simply clarified the law and is consistent with Griggs, to wit, explaining: "(1) Plaintiffs must identify a specific hiring practice that has an adverse impact on a minority group; (2) once such a practice is identified, the employer has the burden of showing that the practice 'serves in a significant way the legitimate employment goals of the employer'; and (3) if the employer can show a legitimate justification for the hiring practice, plaintiffs can still win if they show that the employer could use other factors that don't disproportionately disqualify minorities."

Among other things, H.R.1 imposes a new burden on the employer to prove that the "business necessity" requiring that an employer's hiring criteria where the workforce doesn't reflect the required profile "must bear a significant relationship to the successful performance of the job." This is more stringent than the standard the Supreme Court used in Griggs and its subsequent disparate impact decisions. Griggs used language allowing the employer to engage in rational choices with respect to hiring criteria by requiring that there be a "manifest relationship to the employment in question." The definition of business necessity in Wards Cove is that the employment practice "serves, in a significant way, the legitimate employment goals of the employer." This is consistent with Griggs as the Supreme Court made clear in 1979 in its New York Transit Authority v. Beazer decision. In contrast, H.R.1 defines "business necessity" as having a "significant relationship to (the) successful performance of the job." This proposed standard is clearly more onerous than the Griggs test. Moreover, because H.R.1 refers to "successful performance," it would prohibit an employer from raising standards beyond minimal ones to provide better services if to do so would result in a disparate impact.

Now let me turn to the more parochial issue of the impact on Jews and others of different religious persuasions. Jews tend to shy away from any concern that might be referred to as parochial.

The fact is that because Jews are only 2% of the population of the United States and also tend to be in appointed government positions and university faculty positions in greater numbers than their percentages of the population and because governments and universities are subject to H.R.1, anyone minimally qualified could bring an action against the university or the government alleging there were more Jews than the profile presumptively allowed and too few of the religious affiliation of the litigant represented in the workforce. Few employers would be likely to want to run the risk of the costly lawsuits that would be brought. There are very few positions in government that have a legal professional requirement e.g. doctor, engineer, architect, and I have rarely met a voter who did not believe that he or she couldn't do better than any commissioner appointed by any mayor. At universities it would be hard to justify that it was significantly related to successful job performance that there be the advanced degrees and published articles by applicants now required for faculty positions to carry out ones duties. And the "presumed statistical profile" will become the subtle norm rather than hirings based on merit and scholarship.

There is now a willingness on the part of some large corporations to give up their opposition to the legislation in exchange for a limit to their liability by a cap on monetary damages. Under existing law only those who establish discrimination based on race may sue for compensatory and punitive damages other than two years back pay. Unlike the version of last year, this year's version of H.R.1 eliminates the cap of $150,000 imposed on all but those who suffered discrimination based on race. And there is an ongoing effort to put back the cap. I believe this approach is wrong. I believe that where intentional discrimination is established, the victim, whether white or female or black or Hispanic or Asian, and of whatever religious persuasion, should be entitled to compensatory and punitive damages and treated equally before the law. I do believe, however, that when you create a new cause of action particularly where passions can become inflamed, you can provide that these cases shall by heard and decided solely by a judge, and I would support such an outcome. This expansion of liability is, in fact, a change on my part; equality before the law demands it.

There are two 1989 Supreme Court decisions Congress ought to overturn. First, in Patterson, the court ruled that Section 1981, banning racial discrimination in making and enforcing contracts, does not cover the terms and conditions of contracts. Thus, racial harassment on the job is not illegal under Section 1981. Congress should close that loophole. Second, Congress should overturn the Lorance decision which makes it more difficult to challenge certain intentionally discriminatory seniority systems.

These changes can be made without enacting H.R.1 with all of its other provisions encouraging quotas.

Also, let me state for the record my position on affirmative action. There are two forms of affirmative action. I support the following: Reaching out and encouraging minorities and women to apply for positions which historically have not been open to them or where the environment is seemingly hostile to them and encouraging them to apply. Particularly in the case of minorities because of historical failures in our education system I support providing mentoring services for those who need them. But when the position is filled it should be done solely on the merits with no bonus for being a member of a minority group or for being female and no handicap as a result of being white and/or male. The alternative form of affirmative action which I oppose is euphemistically described as goals, timetables and sanctions. I see no difference between that method and the use of quotas.

I have done what I said I wouldn't do -- discuss the bill in some detail rather than leave it to the accompanying documents, but it is not possible to do otherwise and have an intelligent discussion.

I urge you to reconsider your position and withdraw your support for H.R.1

THE WALL STREET JOURNAL
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Civil Rights Bill: The Way to Religious Quotas

By EDWARD I. KOCH

Why is the newly introduced Civil Rights Bill still a quota bill?

Because, like the 1990 version known as Kennedy-Hawkins, the legislation finds that an unlawful employment practice is established when "a complaining party demonstrates that an employment practice (or group of practices) results in a disparate impact on the basis of race, color, religion, sex or national origin, and the respondent fails to demonstrate that such practice is required by business necessity."

The employer would have the burden of proving that the hiring practice or group of practices bear a "significant relationship to successful performance of the job." Contrary to the claims of the legislation's supporters, this standard is more stringent than the standard consistently applied in this area by the Supreme Court. The court says that employers may justify hiring practices if they bear a "manifest relationship to the employment in question."

Under the Supreme Court test, employers can justify many hiring practices as bearing a "manifest relationship" to the employment. Under the bill's proposed test, it is unlikely that employers would be able to prove that a challenged job requirement bears a "significant relationship" to "successful" job performance. To avoid potential liability under such a murky standard, employers would, of necessity, resort to quota hiring.

Cases under the disparate-impact standard have focused on racial and gender discrimination. But under the bill, disparate impact will be so easy to prove that it will be applied to alleged religious discrimination, and employers will react defensively to the threat of such lawsuits.

Proponents of the bill note that some Jewish organizations, traditionally opposed to quotas, endorse the legislation. I suggest that Jewish organizations haven't alerted their memberships to the fact that under such a law employers probably will have to justify why there are more Jews on a percentage basis in a particular job than in the applicant job pool.

To defend themselves from suits, employers would have to justify the disparate impact. Surely that would mean keeping statistics on the number of Jews, Catholics, Protestants, Muslims, etc. It might even mean keeping track of all the subdivisions—such as Jehovah's Witnesses and Seventh Day Adventists; Sunni and Shiite Muslims; Orthodox, Conservative and Reform Jews—as well.

The proposed law would particularly create a misplaced incentive for governments and universities to hire on the basis of race, color, religion, gender or national origin. They would feel intense pressure to select the lesser-qualified individual of a group not adequately represented from a statistical standpoint—both to avoid the "disparate impact" and exposure to costly lawsuits they would be likely to lose, as well as to avoid student unrest, picket lines and adverse publicity. They will hire the statistically correct. (In New York City, those who would suffer disproportionately would be white Jewish males.)

Few employers would be likely to want to run the risk of costly lawsuits, attorneys' fees and massive back-pay awards. The mere filing of a lawsuit could hurt sales and public acceptance of the company's product.

Nationwide, the percentage of blacks is 12%; Hispanics about 8%; Asians about 2%. Among whites, those who are Jewish would still suffer the most because they are only 2% of the population.

Many who support this bill deny they support quotas, but acknowledge supporting affirmative-action programs requiring goals, timetables and sanctions; they claim that these programs do not entail preferences and reverse discrimination. But goals and timetables quickly *become* de facto quotas when employers face sanctions if they don't achieve them, and when the burden of proof falls upon the employer to justify hiring practices.

It is not "immoral" to be for quotas, nor is it "immoral" to oppose them. New York Mayor David Dinkins publicly supports quotas, as do many other New York City leaders; they think the benefits outweigh the costs. But there is much more to be said in support of the position that this bill would create reverse discrimination and would be bad for America as a whole.

During November's election campaign, many editorials around the country denounced Sen. Jesse Helms's ad depicting a white worker losing his job as a result of quota preferences. What if his opponent, Harvey Gantt, had run an ad that showed two black hands and commentary saying, "Is it unfair for us to be given preferential treatment to catch up from the burden of slavery?" Would that ad have been denounced? I doubt it.

Will the supporters of this bill attack those of us who oppose it as racists because we honestly believe that it will foster quotas? Unfairly, they will probably do so again this year, as they did last year. False charges of racism are the refuge of those who cannot argue on the merits.

Civil-rights groups have been seeking a fig-leaf compromise with some opponents of the bill to facilitate an override of any presidential veto. Their latest ploy has been to approach some big businesses with a new offer. These civil-rights groups are hoping that if the damages available under the bill for intentional discrimination are reduced, the businesses will agree to language that, while ostensibly "solving" the quota problem, does not do so. But so long as this bill encourages quotas, and it does, it should not be acceptable no matter what compromise is offered.

Mr. Koch, former mayor of New York, writes a weekly column for the New York Post and is in private legal practice.

Defenders of the Civil-Rights Bill Doth Protest Too Much

Actor Playing the Queen: Both here and hence pursue me lasting strife; If, once widow, ever I be wife!

Hamlet: Madam, how like you this play?

The Queen, his mother: The lady doth protest too much, methinks.

Shakespeare, whose wisdom did not end with first, let's kill all the lawyers, knew that people who issue the loudest claims also often know best that they're false. So

Rule of Law

By L. Gordon Crovitz

it is with the din of assurances by its proponents that the Civil Rights Act of 1991 could never ever result in race, sex and religious quotas.

There is a lull before the battle resumes on the legislation President Bush vetoed last year as a quota bill and "lawyers' bonanza." It's a good time to stand back and parse some of the legal technicalities to see why the reintroduced legislation would still force employers to choose between quotas and ruinous lawsuits.

The civil-rights groups say they want to reverse five recent Supreme Court rulings. The Bush administration is happy to overrule two cases, which excluded some lawsuits over promotions and seniority. Mr. Bush says it would be unfair to reverse *Martin v. Wilks*, which said that people who were not parties to consent decrees can sue if they suffer from resulting racial quotas. There's also no reason to reverse *Price Waterhouse v. Hopkins*, which said an employer can somehow try to convince a court that it would have made the same promotion decision even if it hadn't used an unlawful factor such as sex.

The quota-inspiring change comes in provisions that civil-rights lawyers say would "only" reverse the case of *Wards Cove Packing Co. v. Atonio*.

To understand what's at stake here, note that the country has come so far since the 1964 Civil Rights Act that intentional discrimination is not the issue. The original law banned what civil-rights lawyers call "disparate treatment"; by now, most litigation is instead about "disparate impact." This refers to the expansion of the civil-rights laws by the Supreme Court in the 1971 case of *Griggs v. Duke Power*, which said that hiring practices that appear fair can still be unlawful if they disproportionately harm one group, such as where a utility company required educational degrees held by many fewer blacks than whites.

Wards Cove did not overturn *Griggs*. The justices still welcome disparate-impact cases based on statistical evidence without any evidence of intentional discrimination. What *Wards Cove* did was clarify that trial judges can recognize there are statistics and then there are statistics—and that only relevant numerical evidence can prove "disparate impact."

Wards Cove itself showed the slipperiness of numbers games. The family-owned firm hired seasonal workers to process and pack salmon in its Alaska plants. Several minority workers, including Frank Atonio, a Samoan, claimed discrimination. Their evidence was that half of the plant's unskilled workers were minorities, but that one-quarter of the skilled workers were minorities. They argued that half the skilled workers should also be minorities.

There were several problems with this claim. For one thing, the relevant labor market in Alaska was 10% minorities. Under a strict statistical approach, Wards Cove Packing probably hired "too many" skilled and unskilled minorities already. Also, many of the seasonal unskilled workers were hired through a minority-run local of a union, which might explain the irony of minority overrepresentation as the basis for a discrimination lawsuit.

The Supreme Court used the case to clarify the rules for numbers-based lawsuits: (1) Plaintiffs must identify a specific hiring practice that has an adverse impact on a minority group; (2) once such a practice is identified, the employer has the burden of showing that the practice "serves in a significant way the legitimate employment goals of the employer"; and (3) if the employer can show a legitimate justification for the hiring practice, plaintiffs can still win if they show that the employer could use other factors that don't disproportionately disqualify minorities.

The plaintiffs in *Wards Cove* lost, but worthy cases have won under its three-part test. John Dunne, head of the Justice Department's civil-rights division, told Congress this month about several of the winning cases. A teacher in Alabama was reinstated when a court found that minorities disproportionately failed a teacher-certification test, an almost all-white New Jersey town had to drop its residents-only rule for public employees and Jacksonville, Fla., had to change its exam for firefighters.

Employers would have to hire enough—but not too many—Catholics, Baptists, Jews, Muslims.

The proposed civil-rights bill would go far beyond reversing *Wards Cove*. Plaintiffs would not have to identify any single factor in hiring or promotion that the employer could then try to defend. The employer instead would have the entirely new task of proving the "business necessity" that all the objective and subjective requirements for employment "must bear a significant relationship to successful performance of the job." The phrase "successful performance" is especially vague.

Uncertain standards always promote litigiousness, but the problem is especially severe here because the bill would reverse the usual due-process rules to presume that the defendant is guilty until and unless he can prove himself innocent. If in doubt, a defendant is guilty of "discrimination."

No employer can prove that every requirement for a job is necessary for successful performance. No Wall Street law firm can prove that only lawyers from Ivy League-type schools can possibly do the job, for example. The law would also cover religion, so employers would have to hire enough—but not too many—Catholics, Baptists, Jews, Muslims.

The proposed bill also goes beyond the 1964 civil-rights law, *Griggs* or *Wards Cove* by replacing the ideal of mediation with the divisiveness of jury trials and punitive damages. This year's bill as introduced by Rep. Jack Brooks even put back the provision dropped last year that would allow unlimited punitive damages. The bill's section calling for punitive damages comes under the heading of damages for "intentional discrimination," but in fact no intention is required. All that's needed is "indifference to the federally protected rights of others," whatever that means.

Employers would be left in the position that Justice Sandra Day O'Connor warned against in a recent case limiting disparate-impact cases. "If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted."

During the debate on the 1964 Civil Rights Act, Hubert Humphrey said that the law guaranteed equal opportunity, and that no court could "require hiring, firing or promotion of employees to meet a racial 'quota.'" After all the lawsuits demanding goals, timetables and set-asides, any civil-rights bill should pass a simple test: Congress should be bound by its provisions. As the bill now stands, Congress is the only institution in the country that Congress would exempt.

Hizzoner Goes to Washington to Fight the Quota Bill

Rule of Law

By L. Gordon Crovitz

You might ask, how can it be that I, your former colleague who voted for every civil-rights bill when in Congress and as a young lawyer in 1964 went to Mississippi to defend black and white civil-rights workers who were registering voters, could take such a position? The answer is simple. H.R. 1 is not a civil-rights bill. It is a bill which will encourage quotas based on race, ethnicity, religion and gender.

Ed Koch is a Democrat mugged by quotas. The former How'm I Doin'? mayor of New York City and former liberal U.S. representative has lobbied Congress against the civil-rights bill, jawboned leaders of Jewish groups and planned strategy with White House lawyers.

Mr. Koch's reaction against the bill is one reason why it will make no difference that Democrats in Congress have temporarily withdrawn their bill. After two years of claiming this is not a quota bill, the week or so the Democrats plan for going back to the blackboard will not produce a non-quota bill.

Mr. Koch recalls that he first began to look closely at the bill after he read an article in November in the Forward, a national Jewish weekly, that described how the bill would force employers for the first time either to hire by religious quotas or risk legal liability. Joseph Morris of the Chicago-based Lincoln Legal Foundation wrote that the bill would outlaw "disparate impact" not just by race and sex but also by religion and national origin. Counting by religion sounded a warning.

As Mr. Koch wrote in a Feb. 5 article on the Journal editorial page, disparate-impact analysis is best understood as a fancy legal term inviting quotas. Under a 1971 Supreme Court case, plaintiffs can prove discrimination even when there is no evidence of intentional discrimination. Only lawyers could dream up an offense called non-intentional discrimination, but here's how it works: If an employer's work force does not precisely mirror the area's labor pool of minorities, presto, the defendant is presumed guilty.

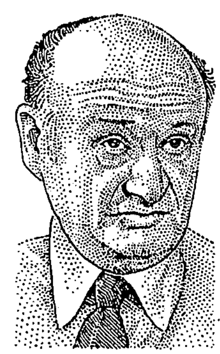
Again, only lawyers could claim that only discrimination prevents every company in every industry from hiring the statistically correct number of Hispanics, Methodists, Ukrainian-Americans. In a non-lawyer's world, of course, it would be a fluke if the employees of any single company anywhere managed to reflect perfectly every conceivable subgroup.

To be fair to the Democrats, the White House version of the bill would also continue the use of statistics alone to establish "discrimination." The big difference is that with punitive damages and other lures for contingency-fee lawyers, the Democrats' bill would create enormous incentives for companies to lock in quotas as the best and perhaps only defense to accusations of disparate impact. The bill would also water down defenses to lawsuits by making the definition of terms such as "business necessity" even more vague than the courts have left them.

Mr. Koch, soft-spoken as always, explained that his former Democratic colleagues in Congress "got out of touch because they are so frightened by militant black and white leadership in the civil-rights groups." Mr. Koch said, "It's the politically correct position that blacks need help, Hispanics need help, even Jews with Spanish surnames need help, but Asian-Americans don't. I happen to think that is insane.

"You get dragged along. Everyone wants to do the right thing, but you find that it's the wrong thing," he said. "The easy right thing to do is to give groups preferences, but this means that innocent white people are going to suffer. I do not accept that."

After he began to speak out, several Jewish groups also reconsidered their typically unblinking support for any legislation that calls itself a civil-rights bill. The groups that now most strongly oppose the bill represent Orthodox Jews, whose members follow strict dietary, dress and Sabbath observance rules that set them apart. They understand that the bill invites employers to start keeping track of the religion of workers and tempts them to hire and fire to come as close as possible to reflecting the makeup of the local community. Yet even asking someone's religion is now rightly considered out of bounds.



Ed Koch

Mr. Koch's outspokenness against the bill won him an invitation to the White House. Mr. Koch told Boyden Gray, the president's counsel, that race-norming was the smoking gun of quotas. This is the practice of grading test scores on a race and ethnic curve; a 300 on one aptitude test is reported to potential employers as a 79 for a black applicant, a 62 for an Hispanic and a 39 for a white or Asian.

Democrats now say they might try to limit test scoring by race-norming. They forget that the reason race-norming was invented in the first place in the early 1970s was as a defense to the then-new disparate-impact lawsuits. Any civil-rights bill that increases the exposure of employers to lawsuits based simply on statistics will only encourage race norming and other sleights of hand to meet quotas without admitting the deed.

"Over the years those who now advocate" this civil-rights bill, Mr. Koch said, "concealed the impact of some of the legislation, court decisions and administrative agency rulings which in the past have encouraged quotas by referring to those measures benignly as affirmative action. I support affirmative action when it is defined as reaching out and encouraging minorities to apply for a position or contract," he said, "providing them with mentoring services where needed but always filling the position or awarding the contract solely on merit and never excluding any group on the basis of race, ethnicity, religion or gender."

Most Americans probably agree with Mr. Koch's praise for voluntary affirmative action. Nor is there any serious opposition to laws that prohibit intentional discrimination—that is, what non-lawyers call discrimination. The paradox for politicians who want a new civil-rights bill is that no law can go beyond this prohibition against discrimination to also capture all the nuances of encouraging minorities without discriminating against whites. This is why we ended up with a sterile and legalistic debate about statistics.

The best civil-rights bill now probably is no civil-rights bill. If there are problems prosecuting people who discriminate, let's have a bill that deals with the issue. We do not need to legally mandate the all-but-impossible requirement of perfectly matching the race, sex, religious and ethnic makeup of the available labor pool.

There is an alternative to expanding the imperial reach of lawyers, lawsuits and judges. This is to encourage voluntary affirmative action by people of good will. Put it this way. The civil-rights groups that support this bill believe that the way to accomplish harmony is to encourage more lawyers to bring more lawsuits. As the debate over this bill shows, lawsuits and harmony remain an unlikely combination.

LES ASPIN
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June 11, 1991

The Honorable Ed Koch
Robinson Silverman Pearce
1290 Ave. Of The Americas, 30th Fl.
New York, New York 10104

Dear Ed:

Knowing of your interest in civil rights, I wanted to let you know of my support for H.R. 1, the Civil Rights and Women's Equity in Employment Act of 1991. Three versions, called substitutes, of this bill were considered by the House of Representatives on June 4 and 5, 1991.

The first substitute to H.R. 1 was offered by the Congressional Black Caucus of which I am an associate member. It was introduced by Representative Edolphus Towns (D-NY) and Representative Pat Schroeder (D-CO). This measure most closely mirrored the Civil Rights Bill as reported by the House Judiciary Committee and House Education and Labor Committee. It fully overturned all five 1989 Supreme Court decisions which drastically limited anti-bias court cases. Since the 1989 Supreme Court decisions, employees have experienced great difficulty in gathering the evidence necessary to prove discrimination. The substitute would have returned to the pre-1989 law which required the employer to prove that it did not discriminate. Furthermore, this measure would have placed no cap on compensatory or punitive damages which victims of discrimination could receive. I voted for the Towns-Schroeder Substitute because it was the most fair and intellectually honest version of the civil rights bill that the House considered. Unfortunately, it failed to pass the House by a vote of 152 to 277.

The next version of this bill that came before the House was the weakest of the three. It was introduced by Representative Robert Michel (R-IL) and supported by President Bush. While claiming to be a civil rights bill, it only overturned one and partially overturned two of the five 1989 Supreme Court decisions. Under this substitute, intentional discrimination on the basis of gender, race, color, religion and national origin could still be permissible if there were other contributing factors leading to an employer's decision. I believe that discrimination on the basis of race, sex, religious affiliation or ethnic background should never be permitted. Furthermore, this measure would safeguard employers from compensatory and punitive damages in certain cases of intentional discrimination. I voted against the Michel Substitute because I felt it would significantly water-down the Civil Rights Bill. This substitute was defeated 162 to 266.

Finally, the House considered the bipartisan compromise as introduced by Representative Jack Brooks (D-TX) and Representative Hamilton Fish (R-NY). Unlike the Michel Substitute, this legislation fully overturns all five 1989 Supreme Court rulings that severely undermined a plaintiff's ability to win a discrimination case. Specifically, it would return the burden of proving discrimination to the employer from the alleged victim. Furthermore, it would allow most victims of discrimination to receive punitive damages of up to $150,000 or the amount of compensatory damages, which ever is greater. Victims of racial discrimination would not be subjected to this cap, since they are already allowed uncapped punitive damages under an 1886 federal statute. Although the Towns-Schroeder Substitute was a better bill, I am pleased that the House passed this measure with my support by a vote of 264 to 166. Likewise I voted for final passage of H.R. 1, when it passed the House by a vote of 273 to 158.

The chances of enactment of the Civil Rights Bill remains uncertain. The Senate is expected to pass a bill similar to the House's Civil Rights Bill in the near future. However, President Bush has threatened to veto this historic legislation. Despite this obstacle, I will continue to support this bill and do all that I can to ensure that it ultimately becomes law.

Sincerely,

Les Aspin
Member of Congress

LA/meb