Originally Processed With FOIA(s):
S; 1999-0285-F

FOIA Number:
S

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the George Bush Presidential Library Staff.

Record Group/Collection: George H.W. Bush Presidential Records
Collection/Office of Origin: Speechwriting, White House Office of
Series: Speech File Backup Files
Subseries: Chron File, 1989-1993

OA/ID Number: 13719
Folder ID Number: 13719-006

Folder Title:
U.S. Civil Rights Members' Swearing-in 5/17/90 [OA 6898] [2]

Stack:	Row:	Section:	Shelf:	Position:
G	26	20	5	7

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Speech draft	Presidential Remarks: National Commission on Civil Rights, Thursday, May 17, 1990 (9 pp.)	05/14/90	~~P-5~~	

Collection:

Record Group: Bush Presidential Records
Office: Speechwriting, White House Office of
Series: Speech File, Backup Files
Subseries: Chron File, 1989-1993
WHORM Cat.:
File Location: Speech File Backup Files
U.S. Civil Rights Members' Swearing-In, 5/17/90 [2] [OA/ID 06898]

Open on Expiration of PRA
(Document Follows)
By JWM (NLGB) on 01/19/2009

Date Closed:	**OA/ID Number:** 13719-006
FOIA/SYS Case #:	**Appeal Case #:**
Re-review Case #:	**Appeal Disposition:**
P-2/P-5 Review Case #:	**Disposition Date:**
AR Case #:	**MR Case #:**
AR Disposition:	**MR Disposition:**
AR Disposition Date:	**MR Disposition Date:**

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P-3 Release would violate a Federal statute [(a)(3) of the PRA]
P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

PRM. Removed as a personal record misfile.

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

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

good — but somehow in bee we need to say, clearly:
("quotas are wrong. They make America a nightmare of the American Dream.

(Lange/Cawley)
May 14, 1990
11:30 A.M.
[AFFIRM.DOC]

PRESIDENTIAL REMARKS: NATIONAL COMMISSION ON CIVIL RIGHTS
[450 OEOB]
THURSDAY, MAY 17, 1990
[TIME]

Thank you all. Arthur Fletcher, Mary Frances Berry, Esther Gonzalez-Arroyo Buckley, Blandina Cardenas Ramirez, Russell Redenbauch; Dick Thornburg, Secretary Cavazos; Regional directors and State Advisory Committee Members...

It's an honor to have you here today. We meet on an auspicious day -- the anniversary of the landmark Brown v. Board of Education decision. And we meet at a very hopeful moment worldwide. A time when the thundering cry for freedom is being heard and answered from Johannesburg to Panama to Warsaw.

We cannot know how future generations will interpret this wondrous time. But if it fell to me to advise tomorrow's historians, I'd hope this might be known as a new age of freedom -- when the world was witness to the full deliverance of democracy's promise.

Hopeful times, to be sure. But also hazardous -- as exciting and unsettling as the world has ever known. Because the outcomes of this new age are not ordained -- they are ours to decide.

Around the world, people wary of state control, economies weary of bureaucratic central planning, all are looking to America as reason for hope -- as the brightest star to follow as they chart their course to freedom.

So it's all the more crucial now, that we look carefully to the kind of country we are -- to the state of democracy here in the land of its birth. ~~We~~ are called upon to ensure ~~that however~~ Whatever the nations of the world decide ~~to make~~ about their futures, **this democracy means opportunity, for all who call it home.** \\

No one in America -- no one -- has worked harder to deliver the promise of democracy, to make an enduring dream a living reality, than the men and women in this room today.

From its earliest origins, the Commission on Civil Rights has been an independent, bipartisan voice for justice. The Commissioners, Directors, and volunteers who serve on Advisory Committees, all share an intellectual caliber, a moral conviction, and a cultural diversity that are truly America's best. **These men and women have earned our admiration. Today, they deserve our thanks.**

[In ~~particular~~, I hope you'll ~~join~~ me in congratulating three new Commissioners: ~~the~~ new chairman, Arthur A. Fletcher; in absentia, Carl Anderson; and Russell G. ~~Redenbaugh~~.]

Over the last few days I've met with leaders representing America's ~~brilliant~~ rich tapestry of cultural, religious, and ethnic diversity. I got, as I knew I would, a great deal of sound advice -- and as I imagined I would, just a little constructive criticism.

But these leaders, this Commission, and this Administration, all share a common conviction, ~~profoundly felt~~, for equal opportunity. It's a responsibility I have always taken very

seriously -- and it's especially serious now, when our most vital export to the world is democracy.

We must make sure that we as a nation lead by example. We must see that affirmative action is not reduced to a slogan -- and that the principle of equal opportunity has real, living meaning, for all Americans.

My hope, as we begin the last decade of this century, is that the 1990's might be a more thoughtful decade -- an era more committed to community. I want Americans to think about the goals and values they **share** -- not the superficial distinctions and differences that divide them.

The commonwealth and well-being of this nation have always relied on the strength of shared principles. Because behind the false barriers, beneath appearances, beyond the heat of politics, we all want the same things: A just society. Peace. Prosperity. A better life for our children than we've had for ourselves.

So just as the world turns a hopeful face toward freedom, here at home we need a renewed sense that government exists to empower people. If America's best hope is the talent she's had all along, at every step in this evolving experiment we call democracy we should be asking ourselves, **what are we doing** -- and, **does it work**?

To the Civil Rights leadership assembled here today: I have offered you my hand, and my word, that together we will make America "open and equal to all." Today I want to explore in greater depth our commitment to equal opportunity.

To begin with, this administration is committed to action that is truly affirmative -- positive action, in every sense -- to strike down all barriers to advancement, of every kind, for all people. We will tolerate no barriers, no bias, ~~no so-called "benign neglect".~~ No inside tracks, no two-tiered systems, no glass ceilings, and no rungless ladders. \\

Now, let me tell you what we're against. \\

We're against any action or lack of action that would perpetuate or exacerbate injustice. And I know the leadership in the ~~legislature~~ Congress shares this conviction.

This nation's progress against prejudice -- from the 1964 Civil Rights Act, to the Voting Rights Act, to the Fair Housing Act, to the Age Discrimination in Employment Act -- it has all hinged on the principle that no one in this country should be excluded from opportunity.

That's why I remain firmly committed to the enactment this year of **landmark legislation to extend protections to those Americans with disabilities.** \\ And we're committed to new measures, like the Hate Crimes Statistics Act, fair housing initiatives, and revitalized enforcement of restrictions against employment bias.

Many of this administration's proposals, in fact, share common ~~ground~~ goals with the legislation being offered by Senator Kennedy and Representative Hawkins.* We've supported efforts to ensure an individual's ability to challenge discriminatory seniority systems. We've also moved to stiffen the penalties for

racial discrimination in setting or applying the terms and conditions of employment.

Today, as we work to ensure that America represents democracy's highest expression, I want to offer four principles that ought to ~~inform~~ guide any amendments to our civil rights laws.

These principles are firmly rooted in the spirit of our current laws -- and after the extensive discussions we've had this week, I think they're principles on which we all of us -- including the leadership on the Hill -- can agree. So **I will enthusiastically support legislation that meets these principles.**

First, <u>civil rights legislation must operate to obliterate consideration of race, color, religion, sex, nation of origin, age, or disability from employment decisions</u>. As you know, Title VII encourages hiring on the basis of ability and qualifications, not race or religion.

Some provisions of the Kennedy-Hawkins bill, with the best of intentions, still have an unintended consequence: they encourage employers to make decisions on the basis of these irrelevant characteristics. In spite of recent amendments, the bill continues to encourage employers to base hiring decisions on the very considerations our civil rights laws direct them to ignore.

this is red flag for conservatives — why not say "more effective, not less"?

So **we seek civil rights legislation that is <u>more</u> effective ~~comprehensive~~, not less.** Because the focus of employers in this country must be on providing equal opportunity for all workers

-- not on developing strategies for avoiding litigation -- strategies that are likely to result in quota schemes violating the most basic principles of our civil rights tradition, and the promise of democracy.

The surest, most insidious symptom of the perpetuation of injustice was well understood by Martin Luther King in 1962. He wrote that "tokenism can now be seen not only as a useless goal, but as a genuine menace. It is a palliative which relieves emotional distress, but leaves the disease and its ravages unaffected."

We want to eradicate the disease. And America's minority communities deserve more than symptomatic relief. They deserve systematic solutions -- through strategies that transcend statistics and quotas.

Rather than perpetuate the demoralizing stigma of preferential distinctions, we should empower and ennoble our minority communities. Rather than sowing the seeds of self-doubt and questions of competence in anyone's heart, we should seek systematic change that allows every American to excel.

We should seek dignity without question marks or asterisks. Rather than asking statistics to be the arbiters of justice -- rather than dividing by group -- we should empower as a whole. And I'm confident the leadership will work with me to craft a bill, in the spirit of our record of unbiased civil rights legislation, that moves us toward this goal.

Second, civil rights legislation must reflect fundamental principles of fairness: individuals who believe their rights have been violated are entitled to their day in court, and an accused is innocent until proven guilty. In every case of civil rights dispute, constitutional protections must be preserved.

There may be no reparation sufficient to the kind of injustice suffered through and still being overcome by America's minority communities. But the sense that this country recognizes past wrongs can, and must, be matched with an equal determination to set them right. We must hold ourselves to the highest standards, and not let past injustice distort present potential and future achievements. The Constitution was written to protect the individual. And so must every one of us protect it.

Third, Congress must subject itself to the same requirements it prescribes for others. In 1972, the Civil Rights Act of 1964 was justly applied to executive agencies and state and local governments. Congress, however, is not yet covered. This inconsistency must be remedied, to give Congressional employees and applicants the full protection of the law. These people, too, are entitled to their rights ~~in court~~, and the Congress should ~~be~~ join the Executive Branch in setting an example for employers in the private sector.

And fourth, Federal law should provide an adequate deterrence to sexual or religious harassment on the basis of disability in the workplace, and ensure a speedy end to such discriminatory practices. In improving the remedies, however, our civil rights laws should not be turned into a bonanza for

lawyers, encouraging litigation at the expense of conciliation, mediation, or settlement. Ultimately, cooperation will serve the interests of all parties far better than litigious conflicts.

Arthur Fletcher said recently, "I'm looking for a more comprehensive response. You can't go a quarter-mile in this time in our nation's history when the full mile is needed." I agree. A moment ago, I spoke of my conviction that America's minority communities deserve more than symptomatic relief. I believe they deserve systematic solutions -- an agenda of change that transcends statistics and quotas.

We seek strategies that work -- putting power where it belongs: in the hands of people. And that means new ideas, like school vouchers to give poor parents the power of an alternative, and choice in where to send their kids -- so that all can have access to the best.

It means more tenant control and ownership of public housing. Tax credits for child care without restrictions of any kind, to give parents more flexibility and choice. And policies that underwrite prosperity, by encouraging capital flow to build more businesses in poor neighborhoods.

Affirmative action and equal opportunity must be more than issues of social responsibility, and more than matters of legal compulsion. Because as labor markets tighten, people of every walk of life, of every kind, all will be in growing demand in this new decade.

All will be needed. In any field, those who know how to apply sources of talent once left untapped; who know how to recruit, how to train, re-train, and retain talent; how to educate, how to motivate, and promote -- those with that knowledge will prosper.

This broader agenda must be part of a more comprehensive effort of affirmative action. The interests of economics and justice are coinciding now like never before. The door is opening wider now than it has ever been -- and we can open it still wider.

Now is the time to extend a hand to all that struggle on the other side -- and devote our energies to a broader agenda of empowerment, that all might join the rolling thunder of majority.

Let us look past the superficial differences that divide us, to the shared principles and better natures we have within us that none among us will be homeless, that no lives will be hopeless, that no children will be left in loveless, lonely rooms or stand in crowded doorways on dangerous streets.

Let us hear the call for justice, and lend a hand to one another -- that no American will want for the advantages unique to America. In this new age of freedom, let there be no minorities. Let us usher America to a new age of majority.

Thank you, and God bless you.

# # #

AFFIRM. ACT
WF 2000

over the last two days I've heard from x and y.
Got, as I imagined I would, sound advice -- and yes, just a little constructive criticism.

pursue & prosecute

that is why I've pledged to support, and will sign into law, a measure to gain all the information we can on crimes motivated by religious, racial, or ethnic animosity -- the Hate Crimes Bill.

~~And it's why I'm~~

Affirm. act. will be reduced to a slogan, & opportunity a dream, unless we --

This Commission and this administration share a conviction deeply felt, and it's a responsibility I take very seriously: to assure that equal opportunity has real meaning -- and that we as a nation lead by example.

~~I take very seriously our responsibility~~

affirmative action is no longer just a matter of social responsibility. It's not just a matter of legal compulsion. It's an ((idea whose time has come)).

So today I'll be focusing on affirmative action in every sense of that phrase. Not merely through the traditional social perspective, though America is nothing if not compassionate. Not merely through the altruistic impulse, though .

The disabled, women, veterans, minorities, older workers -- all in growing demand like never before -- must be enabled and prepared for jobs now being created by technology and economic growth.

Nobody talks much about it, but the interests of economics and justice are coinciding. The door is opening wider now than it has ever been. Now is the time to extend a hand to all still struggling on the other side, to help them through that door to ~~an opportunity called~~ tomorrow that waits more urgently than ever, on the other side.

in demand. Needed.

In the future, the market economy will make it a fact of life -- because the success or failure of American enterprise, like the American experiment itself, will depend on the quality of those engaged. Like any enterprise, those who know how apply sources of talent once left untapped; how to recruit, how to train, re-train, and <u>retain</u> talent; how to educate, motivate, and promote

SAVE

At every step we should be asking ourselves, what works. Because there's never "one answer" to the challenges we face in America. There are many creative solutions -- and we have to be willing to try them all.

~~STRIKE DOWN ALL BARRIERS TO ADVANCEMENT, FREE ALL PEOPLE.~~

We are committed to a new kind of empowerment that puts choice in hands of people

That means new ideas, like school vouchers to give poor parents the power of an alternative, and choice in where to send their kids. More tenant control and ownership of public housing. Tax credits for child care without restrictions of any kind, to give parents more flexibility and choice.

Here at home, we don't need **more** government. We don't need **less** government. We need capable government -- and a renewed sense that government exists to empower people. America's best hope is the creative talent she's had all along -- through a revitalized democracy that applies ~~the forces of the free market,~~ choice, and decentralization -- emphasizing what works.

We come from a tradition that seeks power to give it away -- to states, localities, private enterprise, community groups, citizens of every kind. It's a tradition that goes back 200 years. A legacy our founding fathers left us, that the world has re-learned only recently: **Democracy... is another way of saying opportunity.**

→ NO BARRIERS TO ADVANCEMENT,
NO INSIDE TRACKS, TWO-TIERED SYS.,
NO GLASS CEILING
NO TOKENISM, FAVORITISM,
BIAS, HANDICAPS
GENUINE NEGLECT
RUTHLESS LEADERS

injustices that are only perpetrated / contributed to by tokenism...

We take a stand together, do the right thing, & do it right.

SAVE

I told a Philosopher of the 12th C, in a Guide to the Perplexed, who said "Anticipate charity by preventing poverty."

P.P.H.,
Pete

see Mitchell letter & principles

-- those with that knowledge will prevail. And that broad agenda -- the agenda of empowerment -- must be part of a more comprehensive goal for affirmative action.

For the legal profession -- for so long, so effective at squeezing justice out of the clash of opposing views -- I think some of the best new opportunities will lie in crafting ways to facilitate cooperation.

I've offered Frank Aranson Denver you today:
we oppose discrimination and bias of every kind, in any form, against anyone.

There's a natural tradition that distrusts bureaucracy. Just compare the time you spend in your local fastfood restaurant to the time you spend in your nearby government agency, and you'll know what I'm talking about.

In the 1980's we faced extremes of greed on Wall Street and the homeless on mainstreet. And we struggled to overcome obstacles less tangible but no less troubling than the Berlin Wall: false divisions and barriers between left and right, have's and have-nots, black and white.

I want Americans to think about the goals and values they now, as I've always done
share -- not the differences that divide them. The commonwealth and well-being of our nation demand that we find strength in shared principles. Because behind the false barriers, beyond the heat of politics, we all want the same things: A just society. Opportunity. Prosperity.

with hope, that the 1990's might be a thoughtful decade, more committed to community. **It is time to reaffirm the values we share.**

Like many before me, I sought the Presidency for a single purpose -- and I believe that government has a singular responsibility -- **to use power to help people.** America transcends adversity, and finds her highest expression and greatest power, in **diversity.**

Ours is a nation of imagination. Of principle, and tolerance. Of quiet strength. Faith. And freedom.

So the government of such a nation should be active -- but not invasive. Democratic -- but not bureaucratic. And it should show restraint and a healthy humility -- for if the crumbling of centralized bureaucracies and the collapse of dictators has reminded us of anything, it is this: The center of power is <u>not</u> an entrenched bureaucratic elite -- it is the people. And **the best government does not <u>rule</u> -- it <u>serves</u>.**

SAVE!

TO: STEPHANIE LAUDNER - GOP DALLAS (CONT'D)

THERE'S A COUNTRY & WESTERN SONG CALLED "MOMMA, DON'T LET YOUR BABIES GROW UP TO BE COWBOYS." WHAT IT DOESN'T TELL YOU IS THAT A COWBOY CAN GROW UP TO BE GOVERNOR OF TEXAS.

I'M AFRAID THE DEMOCRATS AREN'T GOING TO LIKE WHAT CLAYTON WILL DO TO THE TRUTH IN THIS CAMPAIGN. HE'S GOING TO TELL IT.

I HAVE A MESSAGE FOR ANYONE OUT THERE WHO THINKS THE NEXT GOVERNOR X OF THIS STATE WILL BE A WHITE-HAIRED GRANDMOTHER WITH A FEISTY PERSONALITY AND A GOOD SENSE OF HUMOR: BARBARA BUSH HAS NO INTEREST IN ELECTIVE OFFICE.

IF THE DEMOCRATS WIN THIS ELECTION, IT WILL BE "OK" TO HIGHER TAXES AND "OK" TO MORE GOVERNMENT SPENDING. THE LAST THING TEXAS NEEDS IS TO HAVE THE GOVERNOR'S OFFICE TURNED INTO THE "OK CORRAL."

see Ben Hooks on C.B.

John Hughes

Whitney Young

Roy Innis

~~against quotas. Early C.R. movt. was against quotas~~

Bush has to support affirm. action → define it: full eq. under law

and ~~oppose~~ quotas

↓

a stigma

quotas cloud the issue.

A color blind society
is not one blind to injustice

Majority of black Am's are ~~opposed~~ to quotas
There is no dignity in injustice.

Woodrow Wilson

don't discredit the achievements
of black Am's.

want no question marks,
no asterisks

end discrim of all kinds
not by inducing it against a few

We should not divide by groups -- class division.
do it by the numbers

Should be
empowering all Am's, not in overriding
dividing, not dividing in a point by #s game
statistics are not the arbiters of justice

Make sure that noble intentions don't have unintended consequences

looking at a trade deficit on oil alone of $100 billion.

Mr. President, the Senator from Alaska intends, over an extended period of time, to speak on this danger that is moving at a very rapid rate. I will be proposing some alternatives to initiate exploration domestically so that we may have some independence, because as sure as I am standing here, one of these days in the not too distant future we are again going to be held hostage by the Mideast, and the public will come to the Halls of Congress and blame those of us who have not seen fit to make adequate allowances for the inevitable. Mr. President, the handwriting is, indeed, on the wall.

I thank the Chair. I yield the floor.

The PRESIDING OFFICER (Mr. BRYAN). The Senator from Florida [Mr. GRAHAM] is recognized.

Mr. GRAHAM. I thank the Chair.

HUMAN RIGHTS ABUSES IN CUBA

Mr. GRAHAM. Mr. President, within the last several weeks, Castro has begun a new and harsh crackdown on human rights advocates in Cuba. He has thrown 11 dissidents into jail, and he has set loose his thugs to harass and intimidate others. All because some of them had the temerity to send a letter congratulating the U.S. delegation to the United Nations Human Rights Commission. The Commission on March 6 approved a United States-sponsored resolution criticizing Cuba's human rights record and calling for a reexamination next year. At a time when Nelson Mandela has been set free in South Africa and when playwright Vaclav Havel is leading Czechoslovakia toward democracy, Castro remains a political dinosaur. People around the world are demanding democracy. Their leaders are listening and responding. But not Castro. He refuses to. He called the latest U.N. resolution disgusting.

What is disgusting is that Castro continues to abuse and intimidate the citizens of Cuba.

One of those citizens is Sebastian Arcos, a human rights leader who once fought alongside of Castro but was later imprisoned for "counterrevolutionary activities." In other words, he opposed Castro and communism. For that, he and his brother Gustavo, who also fought at Castro's side in the revolution, have been subjected to endless harassment by the Castro government.

As part of the latest crackdown, thugs recently surrounded Gustavo's home in Havana, presumably because human rights leaders were meeting to form a united front.

They painted Gustavo's house with slogans like "Death to the Worms" and "Socialism or Death." Castro calls Gustavo and Sebastian cockroaches and vows that the people will crush them.

But we know otherwise. Rather than be crushed, we know that the courage of Gustavo and Sebastian will one day crush Castro and his dictatorial regime.

I ask unanimous consent that a copy of a letter I intend to send to U.N. Secretary General Perez de Cuellar be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
Washington, DC, March 26, 1990.

Hon. JAVIER PEREZ DE CUELLAR,
Secretary General, the United Nations,
New York, NY.

DEAR MR. SECRETARY GENERAL: Fidel Castro within the last two weeks has renewed his harsh crackdown on human rights activists in Cuba, many of whom cooperated with the United Nations in its first-ever investigation of Cuban human rights in 1988.

We are writing to request that you move quickly on the latest resolution approved by the U.N. Human Rights Commission on March 6 calling on the Government of Cuba to honor its repeated guarantees not to subject these individuals to "reprisals, detention, or negative consequences of any nature whatsoever."

In the latest crackdown, Castro rounded up 11 activists in early morning raids on March 12. Mobs of youths also surrounded the houses of two of the most prominent human rights leaders in Cuba, Sebastian and Gustavo Arcos.

The latest arrests brings to 31 the number of people who have detained without trial or been charged with political crimes since U.N. investigators visited Cuba in September 1988.

The recently approved resolution also called on you to provide the texts and results of the oral and written contacts you have maintained with the Castro government on this question. We would appreciate meeting with you to discuss your findings.

In the meantime, we urge the U.N. to do everything in its power to gain the release of those who took such grave risks to advance the cause of human rights.

Sincerely,

Mr. GRAHAM. Mr. President, I welcome cosigners, I call on the Secretary General to act on most recently approved U.N. resolution calling on Castro to respect human rights. Many of those arrested in the recent crackdown cooperated with the United Nations, in its first-ever investigation of Cuban human rights in 1988. Despite guarantees to the contrary, Castro has been harassing these individuals ever since.

The United Nations has a special obligation to those who took grave risks and paid a steep price to bring before the world Castro's systematic abuses of human rights. These individuals deserve the United Nation's continuing involvement, commitment and protection. The Secretary General should act immediately to gain their release.

The PRESIDING OFFICER. The Senator from Utah [Mr. HATCH] is recognized.

Mr. HATCH. Mr. President, I ask the Senator to put me on as a cosponsor. I will be glad to sign that letter.

Mr. GRAHAM. I appreciate it.

Mr. HATCH. I am glad to have been present to hear his remarks today.

Mr. GRAHAM. I express my appreciation to the Senator from Utah. I know of his deep interest in human rights and especially issues affecting the civil rights and human rights of the citizens of Cuba.

Mr. HATCH. I thank the distinguished Senator from Florida. I wish to associate myself with his remarks. I think Castro has done some awful things ever since he has been there and a lot of commentators in this country have allowed him to do so. That happened right up until the time Armando Valladares wrote his book "Against All Hope." Having served more than 20 years in Castro prisons and describing the hideous conditions that exist there, I think we are all indebted to people like Armando Valladares. I think we are indebted to the distinguished Senator from Florida for the work he is doing in this area.

CIVIL RIGHTS ACT OF 1990

Mr. HATCH. Mr. President, I believe the Civil Rights Act of 1990 is fundamentally flawed. We have held four hearings, Mr. President, in the Labor Committee on S. 2104, the so-called Civil Rights Act of 1990. The hearings have made it very, very clear that this bill goes far beyond merely overturning a few Supreme Court decisions from 1989. It overturns numerous decisions, both the Supreme Court and lower court decisons, some stretching back to the 1970's. And its proponents do not even claim that it is aimed at merely overturning the Supreme Court decisions from last year, in any event.

As the Daily Labor Reporter, a nonpartisan newsletter, aptly said in its February 9, 1990, issue, the bill "goes far beyond addressing recent Supreme Court rulings and amounts to a virtual wish list for plaintiffs in employment discrimination litigation."

The bill will work fundamental shifts in title VII of the 1964 Civil Rights Act. It will transform title VII from a statute aimed at conciliation, administrative resolution, settlement and placing a victim of discrimination in his or her rightful place in the work force into a statute in which conflict in the workplace will be exacerbated. Protracted, costly litigation will be the weapon of first resort. The bill will simply be a bonanza for lawyers.

Further, the bill will convert title VII from a statute guaranteeing equal opportunity for individuals, into a statute virtually compelling quotas hiring by all public and private employers of 15 or more persons. Even the Washington Post acknowledged this concern in a March 16, 1990, editorial wherein the Post said:

That issue—quotas—should be taken seriously. It is not just the false fear or red herring that civil rights groups too readily dismiss it as being.

In addition, this bill will severely restrict access to court for certain persons seeking to assert their most fundamental right to equal protection of the laws and the right to be free of the invidious discrimination in violation of Federal statutes. It will deny certain persons the opportunity for a full trial on the merits of such a claim with the full right of discovery and the right to appeal.

That is abominable. People have to start reading this bill and look at what it does.

I want to quote a few sentences of the testimony of James Henson, a Birmingham, AL, firefighter. Mr. Henson ranked sixth on a promotion list, but was passed over because of his race in favor of someone ranked 85th, in order to implement a consent decree in a case to which Mr. Henson had not been a party. In addition, Mr. Henson had done a number of things to educate and train himself and to get advanced understanding and experience that the other candidate had not done.

Mr. Henson said:

I am a working-class man. I am not responsible for any past discrimination by the city of Birmingham. I did not cause any discrimination and should not have to pay the price for it. The city of Birmingham should pay the price for its own wrongs. I am not a lawyer, but I think I can tell when I have been treated unfairly.

Mr. Chairman, all I am seeking is a day in court to show I am a victim of unlawful discrimination. I filed suit promptly after I was denied a promotion [on the basis of my race] . . . I am pleased that the Supreme Court has ruled that I am entitled to a day in court. I urge this committee not to take away my opportunity to show that I have been discriminated against.

Mr. Henson happened to be a white firefighter. He was denied this promotion solely because he was white. And the promotion went to a man who was 79 positions below him on the list for this job. He was sixth. The other man was 85th. Though black, that was the sole reason why he was chosen over Mr. Henson.

Mr. President, had Mr. Henson participated in discrimination, I would have no sympathy for him. But he absolutely had nothing to do with it, and his testimony showed that. Nobody can deny it.

Mr. President, I ask unanimous consent that Mr. Henson's testimony and the testimony of some of the other witnesses, along with my opening statements at the hearings be printed in the RECORD at this point.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

OPENING STATEMENT ON S. 2104, THE CIVIL RIGHTS ACT OF 1990, SENATOR ORRIN G. HATCH, FEBRUARY 23, 1990

Mr. Chairman, all of us agree that one of the most important functions of government is to guarantee equal opportunity under the law. Discrimination on the basis of race, ethnicity, religion, handicap, and gender is immoral and contrary to the most fundamental ideals of our country.

Over the past 25 years, a rich and broad mosaic of federal civil rights laws, ranging from employment, public accommodations, federally aided programs, to housing, institutionalized persons, and more, have been put in place. I have no doubt that more needs to be done to combat the evil of discrimination in our society and hope that we can work together to achieve this important goal.

The Civil Rights Act of 1990 is designed to overturn several recent Supreme Court cases. In fact, it overhauls two federal statutes, throws out years of Supreme Court and appellate court decisions, and conflicts directly with several core concepts of American justice.

Some areas of the legislation have merit. For example: I have concluded that Section 1981 should be amended to ban racial discrimination in the terms and conditions of contracts, as well in their formation and enforcement. Thus, the Patterson case, in my view, should be overturned. Moreoever, I believe that Title VII should be amended so that persons can challenge allegedly discriminatory seniority systems at the time a person is aggrieved by such a system. Thus, the Lorance decision should, in my view, be overturned. I have introduced legislation, prepared and supported by the Admininistration, which achieves these salutary objectives.

On the other hand, Mr. Chairman, I don't believe we have to overhaul the American legal system to ensure equality. We don't have to award some groups more legal rights than others to guarantee the civil rights of all Americans. We don't have to make quotas the only legal employment policy in order to provide equal opportunity.

The major problem ares in the bill are as follows:

1. This bill is a litigation bonanza for lawyers.

2. Sections III and IV so dramatically change Title VII that the only way to avoid being sued is to hire solely by numbers, to use quotas for hiring and promotion.

3. Under Sections III and IV of this bill, hiring the most qualified applicant may no longer be an acceptable defense to a charge of discrimination.

4. Sections III and IV of the bill conflict with the fundamental principle that one is innocent until proven guilty. The bill for the first time will shift the burden of proof from the plaintiff to the defendant in disparate impact cases.

5. Section VI conflicts with the fundamental principle that every American should have the same right to his or her day in court.

6. This bill would even overturn a Justice Brennan decision as to what constitutes intentional discrimination.

Mr. Chairman, I want to compliment you for holding four days of hearings on this bill. I look forward to working with you on the other days of hearings to ensure that we have the benefit of all available expertise. S. 2104 is an extremely complicated bill that will affect millions of Americans. We must not legislate by label but take all the steps necessary to understand the legal ramifications of what is being proposed.

ADDENDUM TO SENATOR HATCH'S OPENING STATEMENT

In the *Watson* v. *Fort Worth Bank and Trust* case, decided in 1988, Justice O'Connor warned us about the real risk of imposing quotas on the American people if the Title VII disparate impact theory is misused. In that case, the Supreme Court actually extended the application of the disparate impact theory to subjective employment practices, a great victory for civil rights plaintiffs. She then went on to say, basically, everything I said in my opening statement:

"We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prohphylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically provided that employers are not required to avoid 'disparate impact' as such;" citing a specific provision of Title VII (Section 703(j)). "Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII,'" quoting Justice Blackmun. *Albemarle Paper Co.*, 422 U.S., at 449, 95 S.Ct., at 2390 (Blackmun, J., concurring in judgment).

Thus, Justice O'Connor acknowledged that: "extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent"—at least until legislation like S. 2104 becomes law, if it ever does—"and it should not be the effect of our decision today."

". . . We recognize, however, that today's extension of [the disparate impact] theory into the context of subjective selection practices could increase the risk that employers will be given incentives to adopt quotas or to engage in preferential treatment. Because Congress has so clearly and emphatically expressed its intent that Title VII not lead to this result, 42 U.S.C. Section 2000e-2(j), we think it imperative to explain in some detail why the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger that Congress recognized."

And then Justice O'Connor, in her four member plurality opinion, laid out the standards for proving a disparate impact case. These are the very same standards adopted by a majority of the Court, with the addition of Justice Kennedy, in Wards Cove.

In Wards Cove, the Court held:

In order to use statistical evidence to establish a prima facie of disparate impact, you must make a comparison between the percentage of qualified minorities in the relevant labor pool and the percentage of minorities in the job in question. To compare the percentage of minorities in an employer's unskilled jobs to their percentage in skilled jobs, is "nonsensical," as Justice White said.

A plaintiff must then demonstrate that the disparity results form the employment practice(s) he or she is challenging, not merely assert that the employer's entire set of hiring practices results in an imbalance.

This seems an obvious requirement for a prima facie case. As Justice White said, "To hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead statistical imbalances in the composition of their work forces.'"

Once the plaintiff makes a prima facie case by showing a relevant disparity resulting form the employer's practice(s), the employer has the burden of producing evidence of a legitimate reason for the employment practices in question.

That is, the employer's burden is to produce evidence that its challenged practice(s) serves in a significant way legitimate employment goals; the employer need not produce evidence that the practice is necessary or essential to effective job performance. The latter is an impossible burden for employers to meet. It would cause an erosion of standards and force employers to adopt quotas in order to avoid liability.

The burden of persuasion in these cases remains with the plaintiff—an elementary part of how our civil justice system works. The plaintiff under Title VII must prove discrimination has occurred, the defendant is not required to prove his innocence, i.e. that he has not discriminated. Thus, once the employer produces evidence of the legitimacy of the practice in question, the plaintiff must show that the proffered business justification is a pretext or otherwise not legitimate. This is how the federal rules of evidence operate. Federal Rule of Evidence 301.

Even then, if the plaintiff cannot prevail on the business justification question, he or she may still prevail by coming forward with alternative employment criteria that reduce the disparate impact of existing employment practices. But these alternatives must be equally effective in serving the employer's legitimate employment goals.

There is nothing unusual about this. It has all been said by the Court before. E.g. *New York Transit Authority v. Beazer*, 440 U.S. 568, 587 n.31 (1979); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 413 and n.7, 425 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 432 (1971); See also *Watson v. Ft. Worth Bank and Trust*, 108 S.Ct. 2777, 2787-2791 (1988); *NAACP v. Medical Center*, 657 F.2d 1322, 1334-1336 (3rd Cir. 1981).

These standards reflect prior Supreme Court precedent in each particular, including *Griggs*, not a departure from precedent. They implement the disparate impact standard in a sensible way, they do not overturn it.

OPENING STATEMENT, SECOND HEARING ON CIVIL RIGHTS ACT OF 1990, SENATOR ORRIN G. HATCH, FEBRUARY 27, 1990

I join the Chairman of the Committee in extending appreciation and welcome to our witnesses this morning. We will be hearing from Mr. Donald Ayer, Deputy Attorney General of the United States, several former members of the Equal Employment Opportunity Commission, and others regarding this legislation.

None of us will argue that discrimination does not exist today. We have all seen its ugly head. We need strong and effective implementation of our civil rights laws. Where there is a need to improve civil rights enforcement, I will be a strong advocate for such improvement.

We agree, Mr. Chairman, that some change in these laws is desirable. I have introduced legislation prepared and supported by the Bush Administration to overturn the Supreme Court's decisions in the *Patterson* and *Lorance* cases. But, Mr. Chairman, I cannot support wholesale changes in our essential civil rights laws when such changes, in effect, overturn many time-honored principles—principles which are dear to every American.

This legislation would shift the burden of proof to defendants in disparate impact cases, meaning that one is guilty until proven innocent. This legislation would severely limit the right of certain workers affected by a consent decree, to challenge that decree in court when they claim to be harmed by it. This would deny Americans their equal right to their day in court. By introducing punitive and compensatory damages and jury trials to Title VII, the legislation provides a windfall for attorneys and creates an incentive to engage in lengthy litigation rather than to settle differences. I submit to my colleagues here in the Senate that this incentive moves our nation no further toward the kind of society we seek—one in which irrelevant factors such as race play no role in employment decisions.

Some of the aspects of this bill which will be covered today are of particular interest. With the exception of the *Patterson* case, which we both agree warrants redress, the significant changes contained in Sections 5 and 8 of this bill do not even purport to be a "restoration" of the law to where it was before the Supreme Court's 1989 term. They clearly represent a substantial departure from the Civil Rights Act of 1964.

Section 5 of this bill would overrule *Price Waterhouse v. Hopkins*, a plurality decision written by Justice Brennan which was a victory for civil rights plaintiffs. This section goes further than that opinion by reversing the general rule that, in employment cases, a plaintiff must show that the defendant's unlawful conduct caused the injury. The change here is significant. This bill would allow punitive and compensatory damages and attorneys fees even in cases where an employer has proven that it would have made the same decision for nondiscriminatory reasons.

Section 8 of this bill proposes, though not in response to any Supreme Court decision, to expand Title VII to make punitive and compensatory damages, including damages for pain and suffering, available in disparate treatment cases.

I am concerned that this would change Title VII from a statutory scheme aimed at conciliation and the administrative resolution of allegations into one in which litigation is the first, not last, resort. To change the Act in a way that would discourage rather than encourage the prompt and equitable resolution of employment disputes could, in the long run, heighten rather than lessen racial and other conflicts in the workplace. Indeed, one provision of the bill, section 9, makes it illegal to condition settlements on the waiver of attorneys fees, thus overturning yet another Supreme Court decision in *Evans v. Jeff D.* This will make it even more difficult to settle cases; this will delay, not foster, simple justice.

Mr. Chairman, I reiterate that we both seek equality of opportunity in the workplace. Unfortunately, there are certain principles of justice which would be turned on their heads if this legislation were enacted in its present form. I find it discouraging that we are asked to overturn these fundamental rights of citizens in order to prove our support for equal opportunity. This is strictly an unfair exchange for everyone.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH, MARCH 1, 1990

Thank you, Mr. Chairman. Today we consider the *Wards Cove* v. *Atonio* decision. By overturning the *Wards Cove* v. *Atonio* decision, and "jimmying" the rules of proving a case of disparate impact discrimination, S. 2104 would work a radical transformation of Title VII. It would convert Title VII from a statute focusing on equal opportunity for individuals to one presumptively requiring, indeed virtually compelling, quota-type hiring and promotion for groups.

Under Sections 3 and 4 of S. 2104, all a plaintiff needs to do to win a Title VII lawsuit is to show that an employer has a racial, ethnic, or gender imbalance in a job—without identifying any particular employment practice as having caused the imbalance. Period. For example, suppose that 20% percent of the accountants in a labor market are members of a particular racial or ethnic group. Suppose further that only 10% percent of the accountants in an accounting firm in that labor market are from that group. That business is going to be found guilty of racial discrimination unless the business can not only prove its innocence, but do so under a virtually impossible standard. An employer could only avoid liability if he meets a burden of persuasion that all of his job criteria either did not contribute to the imbalance or are essential to effective job performance. This burden would be virtually impossible to meet, and one which finds no precedent in Supreme Court decisions.

In order to avoid liability under this extraordinary burden, employers would have to hire and promote on a quota basis to avoid these disparate impact lawsuits—to avoid, in short, what Justice O'Connor called "expensive litigation and potentially catastrophic liability." This precise concern was expressed by Justices White, O'Connor, and others in several cases, including *Wards Cove* v. *Atonio* and *Watson* v. *Forth Worth Bank and Trust*.

In short, rather than requiring nondiscrimination and equal opportunity, Title VII's touchstone would become proportional representation and equal results on the basis of race, ethnicity, and gender—in other words, quotas, however surreptitiously adopted or euphemistically described.

I believe the Administration is dedicated to preventing this terrible result, and I join them in that resolve. Attorney General Thornburgh said on February 7, 1990: "The Administration's firm commitment to eliminate employment discrimination also means that we continue to oppose racial quotas. Discrimination is wrong no matter at whom it is directed. The Administration, therefore, opposes any legislation aimed at overturning three * * * Supreme Court decisions," including *Wards Cove Packing Co.* v. *Atonio* The Attorney General described this decision and two others, including *Martin* v. *Wilks*, as "decisions rooted in the Court's opposition to racial quotas, which we share. We urged the Court to reach the decisions it did in each of these cases; we agree with them, and will oppose any legislation that seeks to overturn them."

As Stuart Taylor, Jr., observed in a recent issue of Legal Times: "Under [this] bill * * * the beneficiaries of disparate-impact suits would not necessarily be victims of discrimination. And the defendants would not necessarily be guilty of anything but hiring and promoting the people they consider the best qualified."

No one should be fooled by irrelevant language in the bill intended to camouflage its import. Sections three and four are the operative provisions of the bill. Those sections overturn Wards Cove by stacking the rules of proving a disparate impact against employers in the manner I mentioned earlier. The concern in this bill is not about court-

ordered remedies or conciliation agreements. It is the radical revision in the standard of disparate impact liability and misuse of statistics that create the severe quota threat of S. 2104. The bill's denial that it addresses "affirmative action," which is not defined in any event, is irrelevant. The operative language of sections three and four create the problem I described.

I might add that Wards Cove is fully consistent with the *Griggs* v. *Duke Power Company* decision, and Griggs remains good law today. Moreover, whether or not Griggs has led employers in the past to use quotas is totally irrelevant to this bill. This bill does not codify Griggs, it twists Griggs completely out of shape. It is S. 2104, and how it distorts Griggs, that is the source of my present concern.

I look forward to hearing the witnesses today.

STATEMENT OF SENATOR ORRIN G. HATCH, MARCH 7, 1990

Thank you, Mr. Chairman. One of the most cherished rights we enjoy as Americans is the right to our own day in court when we believe we have been actually harmed. S. 2104 is a harsh, illiberal effort to strip effectively certain innocent Americans of their opportunity to assert equal protection claims under the Constitution, and employment discrimination claims under federal statutes, in their own lawsuits. This could well be the first serious effort in recent years to restrict access to the courts for persons who wish to assert fundamental constitutional claims to equal protection of the laws and basic statutory rights to be free of invidious discrimination.

We will hear a great deal of lawyer talk about due process and what the Constitution does and does not require. And that, of course, is extremely important. But we must also keep in mind the impact of what we do on the lives of people asserting the most fundamental rights of all in our society. An individual who is not a party to an employment discrimination case, and who has not been joined under the Federal Rules of Civil Procedure, should not be bound by the result in that case. This is so, in my opinion, even if that individual has less formal notice of a proposed order or consent decree, or even of the underlying lawsuit prior to the proposal of an order or consent decree. Unless an individual is a party to a case or actually represented in the case, as in a class action, he or she should have the right to make his or her own claims of racial or gender discrimination and denial or equal protection of the laws in an independent lawsuit. Such an individual should have the right to do so within the appropriate statute of limitations from the time he or she claims to be actually harmed.

Indeed, this bill allows for just such a subsequent lawsuit for some persons, but not others. Supporse the EEOC or Department of Justice files a lawsuit against an employer on behalf of employees or job applicants who are women or members of a particular racial or ethnic minority group. The persons on whose behalf the government is suing are not parties, but assume that they have the notice S. 2104 describes. If the employer settles the case by consent decree, or judgment is entered against the employer, S. 2104 preserves current case law which permits those women or minority employees to bring a subsequent lawsuit against that very same employer seeking greater relief for themselves. And I think that is fine.

S. 2104, however, effectively slams the courthouse door in the fact of innocent employees, not parties to the case, if they are later harmed by the very same consent decree or judgment. That is wrong. Let those innocent nonparty employees have a chance to bring their subsequent claim, too.

This transparent double standard is an unedifying example of the extent to which modern American liberalism has departed from the principle of equal justice under law.

Does Section 6, by overturning *Martin* v. *Wilks*, seek greater finality in employment discrimination cases? Yes and no. The greater finality is sought only against innocent third persons but not with respect to civil rights plaintiffs.

Charles Alan Wright, Arthur Miller, and A. E. Cooper, in their noted work, Federal Practice and Procedure (1981), wrote:

"The initial presumption that nonparties are not bound by a judgment has been stated in many cases. This presumption draws from the due process right to be heard * * * It is conceivable that some day this basic postulate may be eroded by courts that believe that one full and fair litigation of an issue is sufficient without regard to the identity of the parties. It is much better, however, to resist any such erosion. Our deep-rooted historic tradition that everyone should have his own day in court draws from clear experience with the general fallibility of litigation and with the specific distortions of judgments that arise from the very identity of the parties."

I intend to resist any such erosion.

There is some irony, Mr. Chairman, in Section 6. Other parts of S. 2104 overturn the Lorance decision. Thus, the bill permits persons like the women in Lorance to sue an employer at the time they are harmed in fact by a seniority provision adopted with a discriminatory intent. I agree with that, and the bill I have introduced, S. 2166, reverses that decision. But lets let every American have his or her right to a day in court at the time the individual is actually harmed.

Finally, Mr. Chairman, S. 2104 is not merely content effectively to slam the courthouse door in the face of innocent third parties in the future. By applying Section 6 retroactively, this bill would literally throw current litigants asserting constitutional equal protections claims and discrimination claims right out of court and into the street without opportunity for redress. And I suppose we will do that in the name of civil rights.

STATEMENT OF JAMES W. HENSON BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE, MARCH 7, 1990

Mr. Chairman, I am James Henson, an employee of the Birmingham Fire & Rescue service. I am a plaintiff in the case which was called *Martin* v. *Wilks* in the Supreme Court of the United States. I believe racial discrimination is wrong no matter who it is directed against. I sued the City of Birmingham because I was denied a promotion on the basis of my race. I am pleased that the Supreme Court has ruled that I am entitled to a day in court. I urge this committee not to take away my opportunity to show that I have been discriminated against.

I joined the Birmingham Fire Department in 1976. At that time, blacks had been in the department for several years. I am not responsible for any wrongs that may have occurred before or since that time.

I had previously been the chief of a small suburban fire department but wanted to join a large department where my opportunities would be greater. I worked hard and earned a 2 year college degree in Fire Science and became a qualified paramedic.

In 1983, I spent months studying for the promotional exam and out of over 100 people that took the test, placed No. 6 on the list. When the Chief interviewed me for a promotion he said that I would not be promoted because I am white. The Chief said that he had no choice in the matter because 50% of the promotions had been set aside for blacks under the Consent Decree the City had entered into 2 years earlier.

Carl Cook, the black firefighter who got my promotion, as shown on this chart, was ranked No. 85 while I was No. 6 on the the list. Mr. Cook had been with the Department 9 years while I was only there 6, so he got more seniority points than I did. Mr. Cook was not qualified as a medic, had no Fire Science degree, had never worked as the leadworker or acting officer and had no prior firefighting experience. I had all of these qualifications. Despite my better qualifications and starkly higher test scores, the Fire Chief told me I would not be promoted because I am not black. Moreover, Mr. Cook was never identified as a victim of past discrimination, but received preferential treatment solely due to his race. Finally, several years later I received my promotion to Lieutenant and thereafter I was promoted to Captain. During those years, my career was on hold and I lost pay and seniority solely due to my race. Aside from these tangible losses, this has been a demoralizing experience for me and my family.

I am a working class man. I am not responsible for any past discrimination by the City of Birmingham. I did not cause any discrimination and should not have pay the price for it. The City of Birmingham should pay the price for its own wrongs. I am not a lawyer, but I think I can tell when I have been treated unfairly.

Mr. Chairman, all I am seeking is a day in Court to show I am a victim of unlawful discrimination. I filed suit promptly after I was denied a promotion. I had no knowledge of the details of the litigation which resulted in the consent decree. If I get the trial and appeal and the Courts find that the City's conduct was legal, I can accept that and know that in America everyone is entitled to a day in Court. What I cannot accept is having the City's agreement shoved down my throat with no opportunity to a full and fair trial to show that this is wrong.

Thank you.

STATEMENT OF RAYMOND P. FITZPATRICK, JR., BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE, MARCH 7, 1990

Mr. Chairman, I am Raymond Fitzpatrick of Birmingham, Alabama. I represent the nonminority firefighters of the Birmingham Fire & Rescue Service in *Martin* v. *Wilks*. Thank you for the opportunity to appear before this Committee to comment on Section 6 of S. 2104.

Martin v. *Wilks* was a correct decision which Congress should leave undisturbed. The Supreme Court reaffirmed the fundamental principle of due process that all Americans are entitled to a day in Court when they believe they have been wronged. I wish to make it clear that *Martin* v. *Wilks* is a decision designed to further the due process guaranties embodied in the Constitution, and any legislative action in this area must meet due process scrutiny. Those who claim that the Supreme Court was merely interpreting the Rules of Civil Procedure are wrong. The Supreme Court quoted Justice Brandeis when it held: "it is a principle of general application in anglo-American jurisprudence that one is not bound by a judgment . . . in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."

The Court recognized that this fundamental due process principle was incorporated

into the Rules of Civil Procedure by the permissive language of Rule 24 governing intervention and the mandatory joinder provisions of Rule 24. It is a principle which, both as a matter of due process and fundamental fairness, Congress should not disturb.

The fairness of this principle is demonstrated by the facts of the Birmingham litigation where the nonminority firefighters filed both lawsuits challenging the quota plan and a motion to intervene in the consent degree litigation. In 1975, the United States filed suit against the City of Birmingham and the Personnel Board, a separate agency which screens applicants for City jobs. The Personnel Board's entry-level Police Officer and Firefighter examinations were found to violate Title VII, but not the Constitution, and the District Court ordered a hiring quota. The City of Birmingham was not found guilty of any discrimination. Nobody has ever challenged that entry level order. In 1979, the District Court held a second trial on the legality of other tests and screening devices used by the Personnel Board. There was no attack made on any Fire Department promotional examination. The City faced a potential backpay claim of $5 million. Rather than wait for ruling, in 1981, the City secretly negotiated a Consent Decree in which it agreed to 50% quotas for promotions to Fire Lieutenant, quotas for all other jobs with the City of Birmingham, and paid only $265,000 to the victims of past discrimination. Mayor Arrington has described this arrangement as the "best business deal" the City had evern made.[1] Indeed it was, for the City settled the case on the backs of innocent nonparties who themselves were not guilty of committing any discrimination.

The Birmingham Firefighters Association appeared at the District Court's Fairness Hearing to oppose the quotas and urge the Court to require participation by the nonminority employees in the settlement process. In addition, before approval of the decree,[2] the Firefighters Association and two of its members moved to intervene so they could contest the legality of the proposed decree. At the urging of the Lawyers Committee and the City of Birmingham, the District Court refused to allow intervention, claiming we were five years too late.

The Firefighters appealed. Again, the City and Lawyers Committee opposed intervention saying the firefighters were years too late, should have intervened when the suits were filed in 1975, and had no standing to contest the quotas because there had been no injury. In addition, the Lawyers Committee told the 11th Circuit that the Firefighters should not be allowed to intervene because they were free to file separate litigation to challenge the City's actions.[3] The Eleventh Circuit held that intervention was not necessary because individual firefighters who are denied promotion should file separate suits after they are in fact denied a promotion.[4] Following the 11th Circuit's decision, my clients pursued their suits under Title VII and the Fourteenth Amendment. The District Court summarily deemed its decree valid and bound the nonminority firefighters to the terms of the Consent Decree they had no part in making. The District Court required the employees to show that the City was not following the decree. We again appealed and the 11th Circuit[5] and the Supreme Court[6] held that it was wrong to bind my clients to a settlement they had no part in making. The Supreme Court remanded the case for a trial on the validity of the City's race-based affirmative action plan.

Despite nine years of litigation, my clients have only now been afforded an opportunity to demonstrate that the City's quota plan is outside the limits of permissible affirmative action. I urge the Committee to leave that decision intact and wish to make the following substantive comments regarding this bill.

Section 6 has a number of problems which I wish to outline for the Committee:

1. The provisions governing the hearing of objections in part (A) of section 6 are violative of due process. A Fairness Hearing does not provide adequate protection to nonparties. Nonparties lack the tools of discovery to prepare for a hearing, have no subpoena power or other rights of parties and, most important, have no right to appeal when the district court signs the consent decree. *An objector is not a party and does not have the rights of a party.*[7]

2. The notice provisions of parts B and C also do not meet due process requirements. The Court has upheld the termination of nonparty claims only in very limited statutory proceedings, such as bankruptcy or probate proceedings, where there is a clear framework of rules to require *actual* notice to affected individuals, with a full complement of due process guaranties. There are no guidelines regarding notice in this bill which even attempt to meet due process standards to ensure actual notice to affected individuals. The language of the bill which cuts off claims without service of actual notice on known interested parties is contrary to the Supreme Court's recent due process decision of *Tulsa Professional Collection Services* v. *Pope, 108 S. Ct. 134 (1988).*[8]

I should note that even the kind of notice which may meet due process requirements in bankruptcy or probate proceedings may not pass muster when fundamental personal rights are at stake. In the bankruptcy and probate proceedings rights to a res-personal or real property—must be affixed. Title to property must be clear. In an employment discrimination case, the right to equal protection of the laws and the right to be free of invidious discrimination are at stake.

I wish to stress that even if mandatory intervention might be someday found constitutional in employment discrimination cases, it would not be the fairest or most efficient manner of adjudicating those rights for the reasons stated in *Martin* v. *Wilks*.

3. While terminating the right of nonparties to seek court review of their claims when harmed by the implementation of a decree, the bill makes it clear that the standards of intervention remain unchanged. In other words, intervention applications at the time of approval of a decree will be met with claims of untimeliness and lack of standing. As demonstrated by the facts of the Birmingham case, by the time a consent decree is announced, intervention is no option at all.

4. The inconsistency and unfairness of the bill is also demonstrated in part (2)(B) of section 6. While nonparties, who are usually nonminorities, are precluded from ever having a meaningful day in Court, the bill expressly preserves the rights of the beneficiaries of the decree, usually minorities or women, to seek further or additional relief in other proceedings against the employer that is a party ot the decree.

5. This bill will not reduce litigation, rather it will cause a proliferation of unnecessary motions to intevene by persons who

---

[1] 1985 trial, PX 403.

[2] Intervention was sought on August 4, 1981. The decree was entered on August 21, 1981.

[3] Brief of John W. Martin, et al., Appellees at 10, No. 81-7761 (11th Cir. 1982).

[4] *United States* v. *Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).

[5] *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2 1492 (11th Cir. 1987).

[6] *Martin* v. *Wilks*, 490 U.S. ——, 104 L.Ed.2d 835, 109 S.Ct. 2180 (1989).

[7] A fairness hearing does not provide nonparty objectors with an adequate opportunity to be heard. See, Comment, Collateral Attacks on Employment Discrimination consent decrees, 53 Chi.L. Rev. 147, 181 n.139 (1986) (use of a Fairness Hearing to dispose of nonminority claims is the most extreme view). The fairness hearing held in this case by the district court did not provide objecting parties with the benefits normally accorded to parties in litigation. Thus, the objectors were not able to engage in discovery, could not call witnesses or offer evidence, and, most importantly, could not appeal from the proceedings of the district court. Indeed, despite over nine years of continuous litigation, no appellate court has ever addressed the validity of Birmingham's plan, either on its face or as it applies to the firefighters.

The fairness hearing process, whereby nonparties are given the opportunity to voice their concerns through objections, does not rise to the level of the full hearing necessary to terminate the substantive rights of nonparties. Rather, a fairness hearing is much like the predeprivation conference in *Cleveland Bd. of Education* v. *Loudermill*, 470 U.S. 532 (1985) where the charged employee is given the right to appear before the decisionmaker to coax, object and respond to the proposed deprivation, but not call witnesses or cross-examine those of the employer. Indeed, Loudermill provided that after a deprivation of the employee is entitled to a full hearing. Employees who are denied a promotion on the basis of race are certainly entitled to no less. The firefighters' suits are akin to the full post deprivation hearing required by Loudermill.

[8] The practical effect of the doctrine of mandatory intervention is that parties to a consent decree may obtain a consent judgment from a court and make that judgment binding against all third parties. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950) requires that in such a circumstances, interested parties are entitled to the "best notice practicable." If a person's identity and whereabouts are known, the party seeking to bind another must mail or personally serve specific notice of the action. *Mullane*, 317-318.

In *Mullane*, the Court struck down a state statute permitting notice by publication to known beneficiaries in a proceeding for judicial settlement of trust accounts despite the fact that the trustee knew their identities and addresses. It made no difference that Mullane received actual notice of the proceeding and represented the interests of known beneficiaries. The Court held, at a minimum, individual notice by mail was required to be given to known interested parties. *Mullane*, 318-320.

In *Tulsa Professional Collection Services* v. *Pope*, 108 S.Ct. 1340 (1988), the Court again upheld the duty to give adequate notice by mail to known interested parties. The *Tulsa* Court struck down an Oklahoma statute permitting notice by publication to known creditors in a state probate proceeding. The Oklahoma statute permitted notice by publication for 2 consecutive weeks in a local newspaper. The publication commenced after the state probate court opened the estate upon request of the executor or administrator of the estate. The Court found that when private parties trigger a state statute of limitations through commencement of judicial proceedings there is sufficient state action to implicate the Due Process Clause. In such circumstances "due process is directly implicated and actual notice generally is required." 99 L.Ed.2d at 577. The party giving such actual notice bears the burden of "reasonably diligent efforts . . . to uncover the identities . . ." *Id.* at 578. The Court held that if the interested nonparties "identity was known or reasonably ascertainable," then termination of appellant's claim without actual notice violated due process. *Id.* at 579.

The notice must be sufficient to apprise nonparties of the nature of the decree-approval proceedings, the effect of failure to seek intervention, as the time limit for motions to intervention. Comment, *Collateral Attacks on Employment Discrimination Consent Decree*, 53 Chi.L.Rev. 147, 160-1 (1986). Adequate notice must apprise the potentially affected nonparty of the procedure for resolving claims at a hearing so as to permit the objector to adequately prepare for the hearing. *Memphis Light Water and Gas Division* v. *Craft*, 436 U.S. 1, 13 (1978).

might never have a stake in the litigation at great cost to them. Under this bill, every time an employer is sued under Title VII, the employees of that employer, as well as the prospective employees of that employer, must intervene to preserve their right to contest a decree which might possibly affect their rights if they seek a promotion in the future.[9]

The Supreme Court in *Martin* v. *Wilks* recognized that the existing rules provide a framework to allow parties to negotiate consent decrees yet ensure finality:

1. The existing parties to litigation are in the best position to determine who may be potentially affected by the relief sought in the litigation. Federal Rule of Civil Procedure 19 places the burden on the existing parties and the court to join all interested parties in litigation.[10]

2. Large numbers of similarly situated persons may be joined into the litigation through the class action mechanisms of Rule 23. In such a case, the Court must ensure that the proper notice is given to class members and that the interests of class members are fully and adequately represented. Moreover, unlike objectors at a Fairness Hearing, a class which is approved by the Court has the right to appeal from the entry of a decree which affects its rights.

We believe that racial discrimination should be identified and eliminated and the victims should be given a full remedy, but not one that infringes on the rights of innocent third parties.

If the Birmingham decree is valid and the city has acted lawfully, then the Courts will rule against my clients and we must accept that ruling. If it is not, then my clients have been done an injustice, are entitled to be heard, and should receive fair compensation and an end to wrongful conduct.

This bill is not content with just prospective application. Under its transition rules, it seeks to throw any employment discrimination case involving a prior decree out of court on a retroactive basis. Given the efforts the Birmingham Firefighters made to intervene before entry of the decree, this would be extremely unfair. My opponents would succeed in immunizing their racial program from appellate scrutingy forever.

This Committee should understand that in our multiethnic society, a decree which gives preferential relief for one group may, at the same time, impact adversely upon other minorities or females. While we believe this bill is primarily aimed at white males, it will also cut off the rights of Hispanics, women and other minorities seeking to make progress in the workplace.

The Supreme Court recognized that allowing suits such as Mr. Henson's will not create chaos but preserve the fundamental right of all of a day in court. While we believe section 6 does not provide a constitutional framework for adjudication of the rights of nonparties and the principle of *Marting* v. *Wilks* is good public policy, the retroactive application of the act is shockingly wrong and unfair.

Thank you.

STATEMENT BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES, FOR THE U.S. CHAMBER OF COMMERCE BY JAMES C. PARAS, ESQ., MARCH 1, 1990

Good morning. My name is James C. Paras. I am a Senior Partner in the San Francisco law firm of Morrison & Foerster and a member and past Chairman of the U.S. Chamber of Commerce's Labor Relations Committee. I am also a member of the governing Council of the Labor and Employment Law Section of the American Bar Association. Accompanying me today is Nancy Reed Fulco, Human Resources Attorney for the Chamber. Thank you for affording the Chamber this opportunity to discuss the impact of the proposed civil rights legislation on the business community.

Since the passage of Title VII of the Civil Rights Act of 1964, this country has made tremendous strides both in eradicating employment discrimination and in eliminating artificial barriers to employment while at the same time protecting an employer's right to make reasonable and nondiscriminatory employment decisions. However, proponents of S. 2104, the Civil Rights Act of 1990, claim that the Supreme Court has recently made "an abrupt and unfortunate departure from its historic vigilance in protecting civil rights." 136 Cong. Rec. S 1018 (Feb. 7, 1990). Based upon this assumption, S. 2104 is offered to overrule numerous Supreme Court decisions handled down over the past decade. With few exceptions, propoonents contend that the bill would merely restore prior law and, therefore, presumably have little impact on employers who already have been striving to comply with existing employment discrimination laws.

From the perspective of the business community, nothing could be further from the truth. S. 2104 represents a multifaceted revision and expansion of the employment discrimination laws that have developed over the past 25 years. If enacted, it would dramatically alter the balanced between the

---

[9] The questionable standing of nonminority individuals to participate and their uncertainty about whether they need to bear the expenses of litigating mean that third parties will often discover that their rights have been compromised but that it is already too late to move to intervene. The proponents of the bill claim a collateral attack bar saves judicial resources and litigation costs. On the contrary, such a rule will encourage protective and often unnecessary intervention applications which will unduly expand the breadth of discrimination litigation. In fact, under such a rule, every employee of every employer sued for race discrimination may be placed in the position of having to hire counsel to intervene to protect his or her position in the workforce. Such a burden has never been placed on strangers to litigation. See, *Chase National Bank* v. *Norwalk*, 291 U.S. 431, 441 (19330 ("law does not impose . . . the burden of voluntary intervention"). See also, *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984) (individual unlitigated claims of class members not precluded despite the fact that other class members intervened to assert individual claims).

In order to have standing, a party must have a recognizable interest which is traceable to the defendant's allegedly unlawful conduct. *Allen* v. Wright, 468 U.S. 737 (1984); *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979). The rules of Article III standing apply to intervenors as well as original parties to the litigation. *Diamond* v. *Charles*, 476 U.S. 54 (1986).

The City of Birmingham has some 3,000 employees. Over 600 are Birmingham Fire & Rescue Service ("BFRS") employees. It is wholly unrealistic to require each individual BFRS employee to take notice in 1975 through newspaper stories of the pendency of litigation, to learn that the litigation involves rights to promotional positions rather than hiring discrimination, to foresee that their employer will settle rather than litigate and that they will be the ones to bear the burden of that settlement through implementation of the quotas. Such an individual's interest in the litigation would certainly be speculative at best.

Similarly, in 1981, it was unreasonable to require hundreds of BFRS employees to seek to intervene in order to protect their right to a promotion which they might decide to seek in the future and which might be denied if they obtain a score high enough to be certified. Moreover, only a small portion of those passing the Fire Lieutenant's examination are evern certified.

The union also cannot act as the surrogate for the employees. It represents a broad spectrum of employees, black and white, officers and privates, those with seniority and those without, as well as those who intend to seek promotion and those who do not. See, *Wygant*, 476 U.S. 281 n.8.

Given the speculative nature in 1975 of the Firefighters' interest in the consent decree litigation, it is certainly unreasonable to place the burden on the individual nonminority employees of the City, not to mention persons who are not yet City employees, to intervene in the litigation. See *Safir* v. *Dole*, 718 F.2d 475 (D.C.Cir. 1983) (Scalia, J.) (Safir's possible future reentry into the shipping business deemed too speculative to confer standing). Moreover, protective intervention adds to the high cost of litigation of the existing parties as well as subjects the intervenor to the possible assessment of attorney's fees if the defendant is ultimately deemed liable. See *Diamond* v. *Charles*, 476 U.S. 54, 70 (1986); *Reeves* v. *Wilkes*, 754 F.2d 965 (11th Cir. 1985). Such costs and risks are simply too high to preserve the future rights of nonparties to object to a potentially illegal consent remedy.

Moreover, the claim that the firefighters should have intervened in the decree case contradicts the position which the City took in the appeal from the intervention proceedings that the Firefighters lacked a litigable interest which would support intervention. In 1983, the City told the Eleventh Circuit that the appellants lacked standing. See J.A. 549 ("with respect to the promotional goals the Firefighters fail to show a sufficient direct and personal injury to its members"). Similarly, the Lawyers Committee claimed the appellants lacked "standing to seek appellate review of the consent judgments." Brief of John W. Martin, 23, *United States* v. *Jefferson County*, No. 81-7761 (11th Cir.).

[10] Consent decree parties have an adequate remedy through joinder of nonparties under rule 19, F.R.Civ.P. Such a mechanism clearly provides the nonparty with a full complement of due process safeguards by notice, through a summons, a date certain after which default may be entered, the tools of discovery, the opportunity to be heard through a full evidentiary hearing, and, most important, the right to appeal any adverse decision. Just as the employer believes the nonparty should perceive its interest and intervene, so too may the employer perceive the interest of the nonparty and join the nonparty at the appropriate time. The employer has sophisticated counsel with knowledge of the proposed consent decree and the skills to perceive the potential interest of the nonparty while the nonparty has no counsel or intimate knowledge of the federal court proceedings. Had Birmingham wished to bind the Firefighters to its settlement, it could have joined them under Rule 19 or refrained from opposing intervention. The fact that joinder will involve some cost should be of no consequence. See, Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 Univ. of Chicago Legal Forum 103, 144-153. Given its opposition to intervention, the city should not now be allowed to complain. Each time a complex claim of discrimination is brought before the courts involving diverse and competing interests, there are significant costs in terms of the litigation expenses and liability exposure of the parties as well as the allocation of scarce judicial resources. If the City desires to engage in a settlement the cost of which some third party is likely to bear, it should pay the price of either joining those parties in the litigation or facing the claims of those third parties in the future. Shifting the entire cost of settlement to innocent third parties should not be permitted. As Mayor Arrington has testified, the consent decree was "the best business deal [the City] had ever struck." J.A. 528. Congress should not countenance "business deals" at the expense of strangers to the litigation.

In ensuring the rights of the Firefighters to due process, the Supreme Court found that the Firefighters' claims against their employer are due to be heard in the context of independent suits. Such a rule is a reasonable procedural device which preserves the due process rights of nonminorities to have their claims heard. Firefighters believe their suits are the preferable means of resolving these types of claims, in view of the ability of the court not only to consider the facial validity of a decree-emboided plan, but also the conduct of the parties in implementing the plan. See, e.g., *Johnson* v. *Transportation Agency*, 480 U.S. ___, 107 S.Ct. 1442 (1987) (goal should be flexible based on the availability of minorities in relevant labor pool at the time of the preferential promotion rather than fixed at the time the plan is adopted); *Fullilove* v. *Klutznik*, 448 U.S. 448, 480-481 (1980) (Court only approved facial validity of set-aside statute and did not foreclose future challenges on a case-by-case basis).

goal of eliminating discrimination in society and the goal of preserving a vital and efficient business environment capable of competing in an increasingly global economy. This is so because S. 2104 would substantially increase the burdens and risk of liability for *every* employer in this country, including the most exemplary.

The most troubling aspects of the proposed legislation include the bill's adoption of a virtually irrebuttable presumption in favor of a quota system; penalization even of those employers who successfully prevent impermissible factors from affecting the outcome of employment decisions; substantial and often open-ended expansion of the time for raising discrimination complaints by some employees, while ironically shortening the time for raising such complaints by other similarly situated employees; injection of unpredictable and perhaps uncontrollable elements of damages in employment discrimination cases; and reduction of incentives for discrimination claimants to settle their cases and restore work relationships. In the section-by-section analysis that follows, these problems with S. 2104 will be addressed.

I. ANALYSIS

A. Section 4: Adverse impact analysis

One of the principal thrusts of S. 2104 is to overturn the Supreme Court's decision in *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), and in the process substantially to rewrite the adverse impact analysis utilized by the Supreme Court for the past two decades. Contrary to the impression created by its title, Section 4 of the bill would not "restore" any preexisting Supreme Court interpretation of Title VII. Instead, this Section would legislatively overrule not only the *Wards Cove* decision but also a number of other Supreme Court decisions, including the Court's seminal decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). By shifting the burden to the employer to prove, in the absence of quotas, that it did *not* discriminate and that the factors utilized in its employment process were not only reasonable but also indispensable, S. 2104 would leave employers with little choice but to adopt quota systems in order to protect themselves from substantial liability.

1. Title VII Currently Preserves an Employer's Right to Establish Selection Criteria with a Potentially Adverse Effect on Protected Groups Provided the Selection Criteria Are Job-Related:

At the outset it should be noted that Congress never intended Title VII to force employers to abandon reasonable predictors of job success that have been adopted without the taint of discriminatory intent. Instead, as the Supreme Court's development of the disparate treatment and adverse impact models of proof establishes, only practices that are intentionally discriminatory or that create obstacles to equal employment that are not reasonably related to job performance are prohibited by Title VII.

In *Griggs* itself, a unanimous Supreme Court observed that there had been substantial concern prior to the adoption of Title VII regarding whether the new law could be construed to require employers to select employees based upon their protected status, rather than their employment qualifications. To allay this fear, "Proponents of Title VII sought throughout the debate to assure the critics that the Act would have *no* effect on *job-related* tests." *Griggs*, 401 U.S. at 434 (emphasis added). Consistent with Congressional intent, Senator Case of New Jersey and Senator Clark of Pennsylvania, comanagers of the Senate bill, issued an influenial memorandum explaining that Title VII, as written, "expressly protects the employer's right to insist that any prospective applicant . . . must meet the applicable job qualifications." 110 *Cong. Rec.* S 7247. In a separate memorandum, these Senators further stated that "There is no requirement in Title VII that employers abandon bona fide qualification tests 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 . . .*". *Id.* at S 7213 (emphasis added). From these statements, the *Griggs* court concluded that selection criteria are permissible despite their adverse impact on protected groups if they are "demonstrably a *reasonable* measure of job performance." *Griggs*, 401 U.S. at 430 (emphasis added).

As the Court's subsequent decision in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978), reflects, sound jurisprudential and societal reasons support Congress's original intent not to interfere with an employer's right to rely upon legitimate job-related selection criteria. In *Furnco*, plaintiffs challenged an employer's reliance upon personal and outside recommendations concerning applicants' job qualifications. The Court of Appeals ruled in favor of the plaintiffs and ordered the employer to implement a new hiring process based upon an evaluation of written employment applications. In reversing this decision, the Supreme Court noted "[t]he dangers of embarking on a course such as that chartered by the Court of Appeals here, where the court requires businesses to adopt what it perceives to be the 'best' hiring procedures. . . . Not only does the record not reveal that the court's suggested hiring procedure would work satisfactorily, but also there is nothing in the record to indicate that it would be any less 'haphazard, arbitrary, and subjective' than *Furnco's* method. . . . Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Id.* at 578.

2. Section 4 of the Bill, Rather than *Wards Cove*, Is Inconsistent with Prior Adverse Impact Decisions of the Supreme Court:

Two principal theories of proof under Title VII are "disparate treatment" and "adverse impact." Under the disparate treatment theory, an employer is liable if it *intentionally* treated a member of a protected group less favorably than other persons because of the former's protected status. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Under the adverse impact theory, an employer need not have possessed any discriminatory intent. Instead, the employer is liable if it utilized "artificial, arbitrary, and unnecessary barriers to employment" that had a disproportionately adverse impact upon members of a protected group. *Griggs*, 401 U.S. at 431. In the words of the *Griggs* court, such unreasonable employment criteria could not be allowed to become the "masters of reality." *Id.* at 433.

Prior to 1988, each Supreme Court case adverse impact decision had involved "standardized employment tests or criteria." *Watson* v. *Fort Worth Bank and Trust*, 108 S. Ct. 2777, 2785 (1988). In *Watson*, the Supreme Court broadly expanded the scope of adverse impact analysis to encompass not only standardized or objective employment factors but also nonstandardized or subjective factors as well. This means that very aspect of the employment decision making process, whether articulated or unarticulated, can now be examined under the adverse impact theory.

Wards Cove Packing Co. v. *Atonio*, 109 S. Ct. 2115 (1989), is the first Supreme Court case to examine the adverse impact analysis following the expansion of that analysis in *Watson*. In *Wards Cove*, the Court summarized the adverse impact analysis as follows: First, the plaintiff must identify the specific employment practices that the plaintiff contends are discriminatory and establish that, in fact, each challenged practice adversely impacts members of a protected group. *Id.* at 2124-25. Second, in the event that the plaintiff establishes that certain practices have such an adverse impact, the employer must produce evidence that each of the challenged practices "serves, in a significant way, the legitimate employment goals of the employer. [Citations omitted.] The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practices. A mere insubstantial justification in this regard will not suffice. . . .". *Id.* at 2125-26. Finally, once the employer has introduced evidence of reasonable business justifications for the challenged practices, the plaintiff must come foward with evidence of alternative practices that could equally serve the employer's legitimate interests with a lesser adverse impact on protected employees. *Id.* at 2126-27. The burden for establishing that the employer is relying upon non-job-related practices remains on the plaintiff.

The tripartite analysis followed in *Wards Cove* is entirely consistent with prior Supreme Court precedent. With respect to the plaintiff's prima facie case, there is simply no dispute that plaintiffs have been required to identify and establish the adverse impact of specific employment practices in each Supreme Court adverse impact case preceding *Wards Cove. Se, e.g., Griggs*, 401 U.S. 424 (high school diploma and aptitude test requirements); *Albermarle Paper*, 422 U.S. 405 (aptitude tests); *Washington* v. *Davis*, 426 U.S. 229 (1976) (written tests); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979 (drug use policy); *Connecticut* v. *Teal*, 457 U.S. 140 (written test); *Watson*, 108 S. Ct. 2777 (subjective promotion evaluations). Similarly, in *Teal*, the Supreme Court rejected "bottom line" analysis and required adverse impact analysis to be applied separately to each aspect of anemployment process. *Teal*, 457 U.S. 440.

With respect to a defendant's rebuttal obligation, the Supreme Court likewise has consistently held that an employer must show that its practices are, in fact, "job-related" or possess a "manifest relationship" to the employment in question. *Wards Cove*, 109 S. Ct. at 2130 n.14 (Stevens, J. dissenting) (quoting *Teal, Beazer, Dothard, Albermarle Paper*, and *Griggs*.) This is true even in cases such as *Griggs*, which used the alterative formulation "business necessity." In elaborating upon the meaning of business necessity in *Griggs*, the Court immediately explained that "If an employment practice which operates to exclude [a member of a protected group] cannot be shown to be *related to job performance*, the practice is prohibited." *Griggs*, 401 at 31. Nowhere in *Griggs* did the Supreme Court say that a challenged practice had to be essential, indispensable, or otherwise absolutely required in order for a business to function.

An issue not expressly resolved in *Griggs* and subsequent Supreme Court decisions is the precise degree of proof required by a defendant at the rebuttal stage. Although the Supreme Court had used words such as

"demonstrating," "proving," or "showing" to describe the defendant's rebuttal obligation, it had never discussed whether this was a burden of production or persuasion. In *Wards Cove*, the Supreme Court concluded that the defendant carried a burden of producing evidence of its "job-relatedness" defense, but that the plaintiff retained the burden of proving that the defendant had, in fact, relied on arbitrary or unreasonable practices that adversely affected a protected group. This is entirely consistent with the Court's resolution of the same issue in the context of disparate treatment analysis. *Burdine*, 450 U.S. 248. Moreover, it would seem anomalous to impose a higher burden of proof upon defendants in cases involving alleged intentional discrimination.

Finally, if a defendant has identified legitimate job-related reasons for its employment practices, it has always been the plaintiff's burden to identify and establish that alternative practices could equally serve the defendant's interests with a lesser impact upon protected groups. *See, e.g, McDonnell Douglas*, 411 U.S. at 801; *Albermarle Paper*, 422 U.S. at 425.

Section 4, in combination with the definitions found in Section 3 of the bill, would substantially alter the adverse impact analysis developed by the Supreme Court since the early 1970s in several major respects.

First, it would relieve the plaintiff of the requirement of challenging specific employment practices. Instead, it would permit the plaintiff to rely exclusively on "bottom line" statistics indicating an overall imbalance in the work force. In the absence of any further evidence, the plaintiff may prevail based upon such bottom line statistics alone. This conflicts not only with the Supreme Court's *Teal* decision but also with Section 703(j) of Title VII, which expressly states that employers are not required to maintain numerical balances or grant preferential treatment to eliminate numerical imbalances.

Second, Section 4 would raise the standard of justification for challenged business practices from its current "reasonable measure of job performance" standard to one requiring evidence that the practices are not only reasonable but also "essential to effective job performance." This elevation of the degree of justification required from businesses squarely conflicts with prior Supreme Court decisions, which have held that manifestly job-related selection criteria do not have to be essential or absolutely required in order to be sustained. *Davis*, 426 U.S. at ——, *Beazer*, 440 U.S. at ——. In addition, it runs directly into the problem identified in *Furnco* of requiring courts to assume the difficult, indeed impossible, burden of ascertaining what hypothetical practices would be essential to a given business.

Third, by placing the burden of persuasion upon defendants to establish the necessity or indispensability of their business practices, Section 4 would relieve the plaintiff, indeed even the court, of determining whether there are any alternative practices that would have a lesser impact on minority groups. Instead, Section 4 would impose upon the defendant the burden of establishing that there is no possible alternative to the way its business is operated that might lessen the adverse impact upon protected groups.

In this regard, it is interesting that proponents of S. 2104 attempt to justify its shifting of the burden of proof to the employer by observing the virtual impossibility of proving a negative fact, i.e., the absence of any conceivable business justification for a challenged practice. As the foregoing indicates, *Wards Cove* never imposed such an obligation on a plaintiff. A plaintiff's only obligation under *Wards Cove* and its predecessors was to meet the specific job-relatedness justifications proffered by the defendant in its rebuttal. This is consistent with the purposes underlying both disparate treatment and adverse impact analysis, which is the orderly and focused presentation of evidence. *Cf. U.S. Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711 (1983) (disparate treatment model "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination"). *Id.* at 715 (quoting *Furnco*, 438 U.S. at 577). In contrast, under Section 4, a defendant could no longer satisfy its rebuttal obligation by establishing that the practices in question are, in fact, reasonably related to legitimate job expectations. Instead, the defendant will carry the much higher, and in many cases impossible, burden of having to establish that no conceivable alternative practices could be adopted that would be equally effective in accomplishing the defendant's business goals.

3. Section 4 Will Inevitably Lead to the Adoption of Quotas by Employers:

There is no question that Title VII, as currently written, does not require employers to adopt quota systems. Indeed, Section 703(j) of Title VII expressly states that employers are not required and logically cannot be penalized for failing to adopt quotas or preferences of members of protected groups. This has led the Supreme Court to avoid the adoption of legal rules "leaving any class of employers with 'little choice' but to adopt such measures." *Watson*, 108 S. Ct. at 2788 (quoting *Albermarle Paper*, 422 U.S. at 449 (Blackmun, J. concurring)).

Consistent with past Congressional intent, the sponsors of S. 2104 belie any interest in imposing quota systems through the language of Section 4. This denial, however, is unconvincing.

When the *Watson* Court expanded adverse impact analysis to every aspect of employment, not just discrete and objective selection criteria, it expressed an obvious and common sense concern that "the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures," such as quotas. *Watson*, 108 S. Ct. at 2787. The articulation of adverse impact analysis in *Wards Cove* was carefully designed to ensure that this concern did not come to fruition.

Section 4, on the other hand, places business planners in the dilemma of having to choose between quotas and the legal requirement of proving that each and every aspect of the employment process, in addition to the overall process itself, is not only reasonable and manifestly related to bona fide job requirements but is also essential or indispensable. The sponsors of S. 2104 give no explanation to how this latter standard can be met, much less any evidence that it can ever be met. Nor is there any legal precedent explaining how an employer can *prove* that common employment practices, e.g., relying on job recommendations, or supervisory evaluations, or the overall employment process itself, are essential. Thus, at a minimum, employers without an effective quota system in place would face unpredictable and extremely risky prospects of litigation.

Effective business planning requires reasonably accurate predictions about the legal effect of employment decisions. The legal uncertainties implicit in the defense burden imposed by Section 4 would deprive businesses of the ability to make such predictions concerning the likelihood of establishing a business necessity defense. Accordingly, the most reasonable alternative for many businesses would be the adoption of quotas. Even this, of course, would not provide absolute protection, because employees harmed by the quotas may also be able to prevail in a reverse discrimination lawsuit. Thus, Section 4 truly represents a "no win" proposition for employers.

B. Section 5: Mixed motivation

Section 5 of the bill nominally is offered to overturn the Supreme Court's decision in *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989). In *Price Waterhouse*, the Supreme Court addressed the standards applicable to "mixed motive" cases, i.e., cases in which legal and illegal factors allegedly entered into an employment decision. The plaintiff had asserted that proof of an impermissible factor playing any part in the employment process resulted in a finding of liability against the employer, regardless of whether the impermissible factor affected the outcome of the employment decision in question. The defendant, on the other hand, claimed that the plaintiff must prove that the impermissible factor actually altered that decision.

The court selected a middle ground between the positions advocated by either party. First, the Court held that a plaintiff establishes a prima facie case by showing that an impermissible factor entered into the decision making process. *Id.* at 1785–86. Thereafter, a defendant can avoid liability only by proving that the impermissible factor did not alter the ultimate decision. This requires the defendant to prove by a preponderance of evidence that legitimate, nondiscriminatory reasons would have led to the same result in the absence of the prohibited factor. *Id.* at 1786–88.

Justice O'Connors concurring opinion explored more fully an issue left unanswered by Justice Brennan's plurality decision. This issue involved the importance that impermissible factors must have played in the decision process. *Id.* at 1790–91 and n.13. Justice O'Connor concluded that a plaintiff, at least, must etablish that the impermissible factor played a "susbstantial" role in the deliberative process before the employer is burdened with the requirement of proving that permissible factors dictated the same result. As Justice O'Connor noted, this requirement is supported by the consensus of circuit courts that have addressed this issue, which had uniformly required proof that discriminatory factors "played a significant or substantial role in the contested employment decision" before shifting the burden of proof to the defendant. *Id.* at 1804 (quoting the Court of Appeals; decision below in *Hopkins* v. *Price Waterhouse*, 825 F.2d 458, 470 (D.C. Cir. 1987)).

Section 5 of the bill differs from *Price Waterhouse* in two principal ways. First, its use of the term "motivating factor" appears to conflict with the requirement that the alleged impermissible factor must have been a substantial or significant factor in the employment process. Thus, a plaintiff can establish a prima facie case by showing that the impermissible factor played a role in the minds of any person involved in the decisional process, no matter how insignificant the role may be. There is simply no reason to shift the burfen of proof to the employer based on trivial or insubstantial evidence.

Second, Section 5 goes substantially beyond the position of Justice Brennan and his colleagues in *Price Waterhouse*. As noted above, Justice Brennan's plurality decision permitted the defendant to absolve itself of any laibility if it could carry the substantial

burden of proving that the prohibited factor did not alter the ultimate decision. As written, Section 5 only allows the defendant to reduce its financial exposure with proof that the impermissible motive had no actual effect on the employment decision in question. The defendant would still be found liable for employment discrimination and required to pay the plaintiff's legal fees no matter how strong its evidence that the plaintiff was not denied any employment opportunity for a prohibited reason.

This latter result of Section 5 is a dramatic alteration of Title VII. As originally enacted, it was clear that Title VII only prohibited discriminatory *actions*, not *thoughts*. As Justice O'Connor observed, in response to claims that Title VII would becomes a "thought control bill," the influential Senator Case stated that "There must be some specific external act, more than a mental act. Only if he does the act because of the grounds stated in the bill would there be any legal consequences." 100 *Cong. Rec.* S 7254 (1964). Section 5 would impose a finding of liability and attorney's fees upon employers even in the absence of a finding that any employment decision was brought about by illegal motivation.

Finally, from a business perspective, businesses cannot control the thoughts of each and every employee involved in the decision making process. The best an employer can do is to establish an employment process that, through an effective system of checks and balances, prevents decisions from being made for illegal reasons. If an employer is successful in this endeavor, it should be rewarded, not penalized, by the law.

C. Section 7: Statute of Limitations

Although advertised as a response to *Lorance* v. *AT&T Technologies*, 109 S. Ct. 2261 (1989), Section 7 of the bill represents a major rewrite of Title VII by allowing a charge to be filed at any time within two years of the time an unlawful practice occurred "or has been applied to affect adversely the person aggrieved, whichever is later." Under current law, charges must be filed within 180 days after an employee receives notice of an unlawful employment practice. *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980). Sections 7(a)(1) and (a)(2) of the bill would dramatically extend Title VII's statute of limitations, without any justification. Section 7(a)(1) would extend the time limits for filing a charge from 180 days to two years. Section 7(a)(2) would extend that time limit even further by starting the running of the limitations period at the time that the adverse action *impacts* the employee, rather than the time that the employee has *notice* of the adverse action. In essence, Section 7(a)(2) would overrule *Delaware State College* v. *Ricks*.

There is no basis for this dramatic extension of Title VII's time limits. A primary goal of Title VII is the *prompt* resolution of employment discrimination claims. This goal not only advances the potential for reconciliation and the reestablishment of a nondiscriminatory work relationship but also diminishes the chance of harm to innocent coemployees, whose career and other expectations are often built on prior employment decisions. Permitting an employee to wait for more than two years before filing a charge of discrimination is wholly inconsistent with the goal of prompt resolution of employment disputes. Moreover, it is simply unfair to permit an employee to wait to exercise a right while the memories of witnesses fade, documents are lost or misplaced, and back pay is accruing. An individual should not be permitted to "grow" potential back pay award while the employer goes without notice of any problem, in the workplace. If employers are given prompt notice of a problem by the early filing of a charge, they can correct it and provide reasonable compensation to any victims of discrimination. Without prompt notice, the problem may go uncorrected, and employer's back pay liability will be increased unjustifiably. Moreover, by unnecessarily expanding an employer's back pay liability, this extended limitations period may well impede another fundamental purpose of Title VII—conciliation and settlement of cases.

Title VII's 180-day limitations period has served both employers and employees well for over 25 years. The same 180-day rule applies under the National Labor Relations Act and has succeeded in protecting employee rights under that Act for more than 50 years. We are aware of no public outcry or need for a change in Title VII's statute of limitations and fail to see any benefit from this dramatic and unwise change.

D. Section 8: Remedies

Although the sponsors of this bill claim that it represents merely a "technical restoration" of the law and an attempt to fill "gaps" in the law, in fact Section 8 constitutes a wholesale revision of Title VII's enforcement provisions by providing for jury trials as well as awards of both compensatory and punitive damages. The rationale for this radical change is to "make the remedies available for sex, religion and ethnic discrimination claims under Title VII the same as the remedies now available under Section 1981 for racial discrimination." This ill-conceived attempt to alter dramatically the Title VII landscape should be rejected.

There is no good reason why the remedies available under Title VII should mirror the remedies available under Section 1981. Indeed, the opposite is true—there are good reasons why the remedies should differ. Section 1981 is not coextensive in its coverage with Title VII. Section 1981 covers only racial discrimination and is applicable to all employers; while Title VII establishes a coordinated mechanism for remedying employment discrimination. Unlike Section 1981, Title VII offers victims of discrimination assistance in investigating their claims, competent counsel to represent them, and a waiver of court costs. This comprehensive scheme is designed to facilitate prompt resolution of employment disputes, with an emphasis onconciliation and settlement. Section 1981, on the other hand, merely provides a private right of action, without any administrative support mechanism. These differences underlie the distinctions between the remedies available. Indeed, it was on the basis of these differences that a unanimous Supreme Court first recognized the availability of compensatory and punitive damages in Section 1981 actions. *Johnson* v. *Railway Express*, 421 U.S. 460 (1975). As the court noted "the remedies available under Title VII and under Section 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* at 454.

Rather than effectuating the purposes of the Title VII, the availability of compensatory and punitive damages will undermine the Act's goals—by impeding the prompt resolution of employment disputes through conciliation and settlement. The availability of compensatory and punitive damages will provide an irresistible incentive to litigate. Employees ar unlikely to accept reasonable pretrial settlement offers if they know that there is a possibility that they will be awarded a windfall in the form of punitive damages if they go to trial. This is particularly true under Title VII because the system contains no incentives for the employees to accept a reasonable settlement offer—the employee pays neither court costs nor attorneys' fees while the Equal Employment Opportunity Commission handles the charge. Claims are not likely to be settled where there is such a significant "upside" and no corresponding "downside" to litigating.

Recent experience in California has shown that the availability of compensatory and punitive damages turns employment litigation into a high-stakes lottery in which everyone—employees, employers, and the courts—loses. Once compensatory and punitive damages became available in California, wrongful discharge litigation went out of control. The courts were overwhelmed with cases, and juries seemed to lose touch with reality. Between 1980–1986, employees won more than 70 percent of the cases tried before juries, and the average award was more than $645.000.[1] Million-dollar verdicts to single plaintiffs were not uncommon, and one verdict in Santa Clara County exceeded $50 million. *Haun* v. *NEC*, Case No. ——— (1986). Punitive damages comprised a big part of these awards. The average punitive damage award was over $520,000. *Rand Study* at p. 25; *see also Stemming the Tide* at p. 406 (the average punitive damages award in 1982-1986 was $494,000). In recognition of the problems that these irrational verdicts created, the California Supreme Court recently determined that compensatory and punitive damages should not be recovered in most wrongful discharge cases. *Foley* v. *Interactive Data*, 47 Cal. 3d 654 (1988).

A major problem with punitive damages is the lack of any guidance to juries as to when and in what amounts punitive damages should be awarded. As Professor Gould noted, "juries in these cases often impose liability and large damage awards according to their own standards of fairness rather than the legal instructions provided by the judge." *Stemming the Tide* at p. 406. This creates not only greater uncertainties for business planners but also great inequities between successful plaintiffs who may receive widely varied awards based on similar conduct and harm. The standard articulated in the bill do little to resolve this concern. Although the bill's standard tracks the standard articulated by the Supreme Court in *Smith* v. *Wade*, 461 U.S. 30 (1983), it provides little guidance to courts or juries as to when punitive damages should be awarded. Indeed, because the bill adopts a "reckless disregard of the rights of others" standard, and because international discrimination necessarily involves a disregard of others' rights, punitive damages would seem to be available in virtually every case involving intentional discrimination. Surely, the sponsors of the bill did not intend this result.

Compensatory and punitive damages are simply a bad idea in Title VII litigation. By producing unreasonably large verdicts, they will increase the costs of goods and services, make the market less efficient, and reduce the availability of jobs. They will encourage employers to retain incompetent employees for fear of litigation, thereby making the work force as a whole less productive. These are real, weighty concerns. As the *Foley* court recently noted, "the expansion of tort remedies in the employment context has potentially enormous consequences for th

[1] J. Dertouzos, "The Legal and Economic Consequences of Wrongful Termination," Rand Corporation Study R-3602-ICJ (1988); ("Rand Study"); Gould, Stemming the Wrongful Discharge Tide: The Case for Arbitration, 13 Emp. Rel. L.J. 404 (1988) ("Stemming the Tide").

stability of the business community." 47 Cal. 3d at 669.

Moreover, punitive damages are at odds with a fundamental premise of Title VII—that victims of discrimination be compensated for the injuries that they actually suffer. Punitive damages are a windfall to plaintiffs, who are entitled to receive full compensation for their injuries, but nothing more. Title VII currently provides victims of discrimination with adequate compensation for their injuries and, thus, punitive damages are not necessary to fill any "gap."

The proponents of compensatory and punitive damages argue that the availability of these remedies will have a desirable deterrent effect. However, given the skyrocketing costs of employment litigation, no further deterrent is necessary. Experience has shown that the average cost of defending a single plaintiff employment discrimination action through trial can be between $100,000 and $150,000, and often it is much more. Of course, the employer must also pay the employee's attorney's fees and costs if the employee prevails. Thus, an employer who discriminates is facing at least $200,000-$300,000 in litigation costs alone. This is more than ample deterrence for any employer.

Finally, we note that this issue has recently been debated by the Senate in the context of the Americans With Disabilites Act (ADA). For many of the reasons articulated above, Congress determined that compensatory and punitive damages were not appropriate in the employment discrimination context. Indeed, Senator Durenberger explained the elimination of the compensatory and punitive damages provision from ADA as follows:

"We also took great effort to address the concerns many had over the punitive nature of the remedies section. Instead of allowing punitive and compensatory damages as originally introduced, the bill before us today parallels current civil rights legislation under Title II and VII of the Civil Rights Act of 1964 . . . *This change will help avoid some of the excessive and unnecessary litigation the original bill would have caused.*" (Emphasis added).

Vol. 135 *Cong. Rec.* No. 112, S 10721 (Sept. 7, 1989) (Statement of Senator Durenberger). This approach was fully debated and rejected last fall, and there is no reason to reopen that issue here.

E. Section 9: Attorneys fees

We have serious concerns about the bill's attorneys fees provisions. First, Section 9 of the bill will have a dramatic effect on settlement offers under Rule 68 of the Federal Rules of Civil Procedure. Rule 68 provides that if a timely pretrial offer of settlement is not accepted and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." The purpose of Rule 68 is to encourage voluntary settlements and relieve overcrowded court dockets by creating a disincentive to unreasonable rejections of fair settlement offers.

In *Marek* v. *Chesny*, 473 U.S. 1 (1984), the Supreme Court held that a party who rejects a Rule 68 settlement offer and thereafter is awarded less than the offered amount at trial cannot recover either fees or costs for any post offer work, where the statute authorizing recovery of attorneys' fees defines attorneys' fees as part of the "costs." Title VII currently defines attorneys fees as part of the costs. 42 U.S.C. 2000e-5(k). By striking out the phrase "as part of the" from Title VII's costs provisions, Section 9(3) makes recovery of attorneys' fees independent of the recovery of costs. This change apparently is intended to permit Title VII to circumvent the holding of *Marek* v. *Chesny*. Thus, if Section 9 is enacted, Title VII plaintiffs will be free to reject Rule 68 settlement offers without any fear of the loss of attorneys' fees should they not recover more than the offered amount at trial.

This attempt to reduce the risk of rejection of a reasonable settlement offer is both misguided and contrary to the purposes of Title VII. As previously noted, one of the fundamental goals of Title VII is the *prompt* resolution of employment disputes through conciliation and settlement. Section 9 undercuts this goal by making rejection of reasonable settlement offers risk-free to Title VII plaintiffs. It will also result in unnecessary, costly litigation. An individual should not be permitted to recover attorneys' fees and costs for work performed after rejection of a settlement offer where he does not recover more than the offered amount at trial. Under these circumstances, the settlement offer would have fully compensated the individual for his losses and should have been accepted. Nor should defendants be required to pay attorneys' fees to plaintiffs on amounts expended to prosecut post-offer claims because such claims are, by definition, worthless. Thus, the changes proposed by Section 9 are unwise and unwarranted and should be rejected.

The Chamber also has serious concerns about Section 9(4). Section 9(4) of the bill would foreclose court approval of Title VII's settlements unless "a waiver of all or substantially all attorneys's fees was not compelled as a condition of settlement." The bill's sponsors argue that this section is intended to overrule *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), and that it would simply bar "forced" waivers of attorneys' fees claims in consent decree settlements. But the language of Section 9(4) goes far beyond that modest objective and should, in any event, be rejected.

There is no good reason to overrule *Evans* v. *Jeff D.* Contrary to the impression created by the rhetoric supporting Section 9(4), *Evans* v. *Jeff D.* does not mandate "forced waivers" of attorneys' fees claims. In *Evans* v. *Jeff D.*, the Supreme Court merely held that a District Court has the power to approve a consent decree settlement that includes a waiver of attorneys' fees. Thus, *Evans* v. *Jeff D*, does not stand for the proposition that parties to a Title VII *must* waive their attorneys' fees; rather, it holds only that they *may* waive those claims. Thus, plaintiffs and their counsel remain free to reject any settlement offer they deem unreasonable. In addition, they may address limitations on the waiver of fees or the ultimate allocation of settlement proceeds in the event of such a waiver in their retainer agreements.

This is a sound, reasonable result. There is no good reason for parties to Title VII litigation to be foreclosed from waiving attorneys' fees claims as part of the negotiated settlement. To the contrary, there are many good reasons for parties to be permitted to, and perhaps encouraged to, waive fees claims during settlement negotiations. For many Title VII actions, particularly those seeking injunctive relief, the attorneys' fees awards are the largest monetary exposure facing defendants. Obviously, to the extent that plaintiffs are permitted to waive all or part of those claims, Title VII actions will be more easily settled. Indeed, foreclosing any waiver of attorneys' fees would often pose an absolute barrier to settlement. In *Evans* v. *Jeff D.*, the court recognized these problems and reached the correct result. We have heard no public outcry against that decision and fail to see why it should be reversed. Indeed, we note that the Attorneys General in more than 42 states, three protectorates, and one major city filed amicus briefs *supporting* the result reached by the court in *Evans* v. *Jeff D.* That decision is correct and should be permitted to stand.

Moreover, although the bill's sponsors suggest that Section 9(4) is limited to court ordered consent decrees, the language of Section 9(4) is not narrowly drawn. Section 9(4) refers to a "consent order or judgment." As drafted, it could easily be read to apply to the settlement of any Title VII claim. For obvious reasons, this result would be folly. Experience has shown that attorneys' fees awards in single plaintiff Title VII actions often dwarf the amounts recovered by plaintiffs. H. Newburg, *Attorney Fee Awards*, ch. 11 (1986). Given this large exposure, few defendants would be willing to settle single plaintiff cases unless they could obtain a waiver of any attorneys' fees claims. Thus, by foreclosing settlement of fee issues as part of a package settlement, Section 9(4) would greatly impede settlement of single plaintiff Title VII cases. The bill's sponsors surely cannot intend this result.

II. CONCLUSION

The sponsors of S. 2104 avidly assert that their bill is intended to overturn a number of recent Supreme Court decisions and restore the law to its prior state. As the previous discussion demonstrates, however, this bill would go much further. Indeed, S. 2104 represents a blatant effort to inject concepts into the law that are directly in conflict with the principles upon which Title VII was founded, including, most importantly, the principle of basing employment decisions on merit and merit alone. This effort to alter the fundamental precepts of Title VII law, as articulated by Congress and the Supreme Court since 1964, threatens to make numerical quotas the very artificial "masters of reality" originally condemned in the *Griggs* decision.

The misguided notion that appears to underlie much of the bill is the conclusion that Title VII is not working well. However, there is no empirical basis for this assumption. Moreover, anyone with even rudimentary knowledge of the changes that Title VII has wrought in the American workplace knows that Title VII has been and continues to be a powerful vehicle for the eradication of employment discrimination. In light of this history of progress, it seems that the prime beneficiaries of the bill would be the lawyers who would reap potentially vast monetary rewards from the expanded incentives for litigation that the bill provides.

Most importantly, the changes to Title VII sought in this bill offend the basic premise of equality upon which our democratic and constitutional society is founded. Although the substitution of quotas for merit can never be justified, it is particularly inappropriate in this time of intense and growing international competition. The touchstone of any national legislation to be passed by this or any ensuing Congress should be the removal, not the creation, of artifical barriers to merit based on employment.

STATEMENT OF DONALD B. AYER, DEPUTY ATTORNEY GENERAL, BEFORE THE COMMITTEE ON LABOR AND HUMAN RESOURCES, FEBRUARY 27, 1990

Mr. Chairman, distinguished members of the Senate Committee on Labor and Human Resources:

It is an honor to appear before you today to testify regarding the U.S. Supreme Court's rulings last term involving civil

rights issues, and S. 2104, entitled the Civil Rights Act of 1990. The Administration has a strong commitment to the civil rights of all people. We believe that there must be strong remedies to root out discrimination wherever it may exist. Unfortunately, racism and bigotry cannot be viewed as wholly problems of the past. As the President said in his State of the Union message: "Every one of us must confront and condemn racism, anti-semitism, bigotry, and hate. Not next week, not tomorrow, but right now. Every single one of us."

We congratulate the Senate for passing, with Administration backing, the Hate Crimes Statistics Act, which, once enacted, will help us to get a better picture of this problem and to focus our resources where they are most needed. In the first year of this Administration, the Department of Justice indicted some 89 defendants in 56 separate cases for criminal civil rights violations. We filed or participated in 34 cases under the new Fair Housing Act amendments, which only became effective as of March 12. And we filed a dozen employment discrimination cases. As our activities suggest, we are using vigorously the tools available to us and, for the most part, we find those tools effective.

The Supreme Court last Term issued some thirteen decisions that touched one aspect or another of civill rights law. In some of these cases, the government had urged the position adopted by the Court. In others, the Court disagreed with the government. Thereafter, the President and Attorney General both pledged last June that the Administration would carefully monitor the application of these decisions in the lower courts to determine their effect on meritorious civil rights claims and respond accordingly.

We have done exactly that. Based on our own studies and comments from groups, including the NAACP Legal Defense and Education Fund, we have concluded that of the five most significant decisions, two reach results that merit legislative action. Thus, we believe that Congress should amend the law to require a different result from that reached by the Supreme Court in *Patterson* v. *McLean Credit Union*, —— U.S. ——, 109 S. Ct. 2363 (1989), and *Lorance* v. *AT&T Technologies, Inc.*, —— U.S. ——, 109 S. Ct. 2261 (1989). Accordingly, the Administration supports legislation that has been introduced by Senators Thurmond, Dole, Hatch and Coats (S. 2166) to address the problems created by these cases. With regard to three other cases, based on our review of how these rules have been applied,[1] we see no need for corrective action.

In supporting legislative action in some areas and opposing it in others, we are guided by a fundamental principle that grows out of our history, and is now a part of the fabric of our law: that people should not be judged or dealt with according to the color of their skin or certain other irrelevant personal traits. We take this as a common value that all decent people can agree upon. I will begin by discussing those areas where we think this principle dictates the enactement of new legislation.

In *Patterson*, *supra*, an employee brought an action pursuant to 42 U.S.C. 1981, alleging that her employer has harassed her on the job, failed to promote her, and ultimately discharged her, all because of her race. The Court held that Section 1981 is limited by its terms to prohibiting discrimination in "mak[ing] and enforc[ing] contracts," and does not extend to "problems that may arise later from the conditions of continuing employment." *Patterson*, —— U.S. at ——, 109 S. Ct. 2372. Thus, the Court held, the statute prohibits discrimination, whether governmental or private, in the formation of a contract, and in the right of access to a legal process that will enforce established contract obligations without regard to race. According to the Court, however, the plaintiff's allegations of harassment on the job addressed only conditions of employment and were not actionable pursuant to Section 1981.

The *amicus* brief filed by the Department of Justice, on which my name appears, argued for a somewhat broader reading of Section 1981, which would have extended its coverage to claims of harassment that would constitute a violation of state contract law. Our review of the cases applying *Patterson* over the last eight months further leads us to the conclusion that the Court's reading leaves a gap in the fabric of our civil rights laws that must be filled. We therefore support corrective legislation to ensure that section 1981 will apply to the performance, breach, and termination of contracts to the same extent that it does to their making and enforcement. At the same time, we believe that it is appropriate to codify the holding of *Runyon* v. *McCrary*, 427 U.S. 160 (1976), that section 1981 prohibits private, as well as governmental discrimination.

In *Lorance*, *supra*, female employees challenged a seniority provision pursuant to Title VII, claiming that it was adopted with an intent to discriminate against women. Although the provision treated all similarly situated employees alike, it produced demotions for plaintiffs, who claimed that the employer had adopted it with the intent to discourage women from entering a particular line of employment.

The Supreme Court held that the claim was barred under Title VII's statute of limitations, because the time for plaintiffs to file their complaint began to run when the employer adopted the allegedly discriminatory seniroity system. The Court distinguished the situation where a seniority system discriminates on its face, acknowledging that in such a circumstance each application of the policy constitutes a new violation. However, where, as in the case before it, the provision is neutral on its face (although discriminatory both in purpose and effect), the Court concluded that only the initial enactment constitutes a violation.

The United States, and the EEOC, filed an *amicus* brief, on which my name appeared, supporting the plaintiffs. We argued that the plaintiffs' demotions were not merely the inevitable effects of the prior allegedly discriminatory adoption of the seniority system, but were instead direct, present applications of the seniority system, the effects of which had until then been only theoretical, and, as such, were "unlawful employment practices" that independently triggered Title VII's statute of limitations.

The rule adopted by the Court could have the result of shielding intentionally discriminatory seniority systems from attack by people who never have had an opportunity to challenge them. The discriminatory reasons for adoption of a seniority system may become apparent only when the system is finally applied to affect the employment status of the employees that it covers. Moreover, such an application surely focuses the controversy between an employer and an employee more sharply and permits more precise litigation. In addition, a rule that limits challenge to the period immediately following adoption of a seniority system will promote unnecessary and unfocused litigation. Employees will be forced to challenge the system before it has produced any concrete impact, or forever remain silent. Other employees, who are hired after the statute has run following adoption of a seniority system, will be barred from ever challenging the adverse consequences of that system, regardless how severe they may be. Such a rule fails to protect sufficiently the important interest in eliminating employment discrimination that is embodied in Title VII.

The Administration therefore supports an amendment to section 706(e) of Title VII of the Civil Rights Act of 1964 that would restart the period for filing a charge each time an employee was injured by the application of a seniority system that was alleged to have been adopted with disciminatory intent.

We urge Congress to move quickly to enact these two important changes. At the same, we strongly believe that four other major changes proposed by S. 2104 should not be adopted. We are convinced that three of last Term's decisions, *Wards Cove Packing Co. v. Atonio*, — U.S. —, 109 S. Ct. 2115 (1989); *Martin v. Wilks*, — U.S. , 109 S. Ct. 2180 (1989); and *Price Waterhouse v. Hopkins*, — U.S. —, 109 S. Ct. 1775 (1989), should be left intact.

In *Wards Cove*, the Court addressed three important issues concerning the burdens of proof in a lawsuit alleging that an employer's hiring practices have had the effect of discriminating in violation of Title VII. After reaffirming that statistics may form the basis for a prima facie case of disparate impact, and that the statistics must compare the employer's workforce to the pool of qualified job candidates, the Court addressed the issue of causation. The Court held first that a plaintiff must identify the specific employment practices that have produced the challenged disparate impact. Thereafter, the Court addressed the burdens imposed on the parties once a plaintiff has established a prima facie case of discrimination. It held that the employer's burden is to produce evidence that the "challenged practice pursues, in a significant way, the legitimate employment goals of the employer." *Wards Cove*, — U.S. —, 109 S. Ct. at 2125-26. Finally, the Court held that the burden of persuasion always remains with the plaintiff, and that the plaintiff may defeat the employer's evidence by showing that reasonable alternatives would serve the employer's purpose equally well.

This seems to us to be a sensible and efficient allocation of litigation responsibilities. Asking the plaintiff to identify the specific practices that produce a disparate impact before employers are asked to justify them is consistent with traditional rules allocating burdens of proof. This allocation of responsibilities strikes us as more efficient than allowing plaintiffs simply to allege that a hiring system produces a disparate impact and forcing employers to demonstrate that each individual employment practice within that system does not have a disparate impact. In view of the liberal discovery rules and the record-keeping requirements of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 *et seq.* (1988), we do not think that this requirement of specificity should unduly burden plaintiffs.

Indeed, the Court's prior "disparate impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities,"

[1] These decisions are *Wards Cove Packing Co.* v. *Atonio*, —— U.S. ——, 109 S. Ct. 2115 (1989); *Martin* v. *Wilks*, —— U.S. ——, 109 S. Ct. 2180 (1989); and *Price Waterhouse* v. *Hopkins*, —— U.S. ——, 109 S. Ct. 1775 (1989). We also oppose any legislation aimed at *City of Richmond* v. *J.A. Croson Co.*, —— U.S. ——, 109 S. Ct. 706 (1989).

Wards Cove, — U.S. at —, 109 S. Ct. at 2124, and plaintiffs have always targeted those specific practices. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (high school diploma requirement); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements for prison guards); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1977) (employment tests and seniority systems); *Connecticut v. Teal*, 457 U.S. 440 (1982) (written examination); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (subjective judgment of supervisor).

In our view, the Court also correctly held that its formulation of the applicable substantive standard is fully justified as an appropriate balancing of the interests of employers and employees. Courts have used varying terminology in defining that standard. The standard molded by the Court from those prior formulations has sufficient teeth to ensure that employers do not use practices of dubious business utility, while not pressuring employers to resort to hiring and promotion quotas, and respecting the needs of employers to preserve legitimate management prerogatives. We find it unlikely that this formulation of the standard for a business justification will preclude the assertion of meritorious claims, particularly since the plaintiff may still prevail by showing that other reasonable business practices would satisify the employer's need without producing a discriminatory effect.

Likewise, we think that the burden of persuasion remains with the plaintiff throughout a disparate impact case, just as it does in a case alleging intentional discrimination, *see Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256-58 (1981), and just as it generally does when causation is an element of a violation. *See* Restatement (Second) of torts § 433B (1965). We think it would be unjustifiable to impose a greater burden on an employer who is alleged to have violated Title VII by employing a practice that produced a disparate impact than on one who is alleged to have engaged in purposeful discrimination.

We are convinced that the Court thoughtfully balanced the competing interests and produced a workable distillation of some eighteen years of precedents applying the disparate impact standard. Indeed, the Court in large part adopted the approach urged by a brief filed by the United States. We believe that plaintiffs will be able to pursue successfully meritorious claims, and employers will not be unduly burdened in defending claims of discrimination and will not be encouraged to resort to quotas to ward off the threat of lawsuits based on statisical imbalances.

At the same time, we believe strongly that the changes proposed in S. 2104 would have serious adverse consequences. By altering all three of the conclusions reached by the Supreme Court, and placing on the employer the ultimate burden of identifying his own practices leading to a statisical imbalance and proving them to be "essential" to the conduct of his business, the proposal puts an employer in a nearly impossible position. It would be difficult for an employer not to adopt a silent practice of quota hiring and promotion in an effort to protect himself from the real probability of litigation and liability wherever a statistical imbalance is shown.

Martin v. Wilks, *supra*, arose in the context of a civil rights action, but it turned on principles of fairness and access to court that apply in every area. The Court held that firefighters, who had not been parties to a consent decree that mandated racial preferences, could have their day in court to contend that the decree violated their civil rights. The Court rejected the so called collateral attack doctrine, pursuant to which some courts had held that once a decree was entered, it could not be challenged, even by individuals who had not been parties to the original lawsuit.

The Court's decision turned on a straightforward application of the Federal Rules of Civil Procedure and underlying notions of due process. The Federal Rules establish procedures for joinder of all interested parties in a case. Under those procedures, anyone who is not joined in a lawsuit, and given an opportunity to appear in court to protect his or her rights, cannot be bound by the final judgment. The Court's decision is a reaffirmation of the fundamental notion that everyone, regardlessof race or gender, it entitled to his or her day in court. The Department of Justice advocated the position adopted by the Court. I did not work on that brief, but I signed a similar brief arguing the same approach a year erlier in *Marino v. Ortiz*, 484 U.S. 301 (1988).

We think tht this decision should have a salutary effect. By requiring early joinder of all those who may be adversely affected by a lawsuit, the decision should enable courts to consider the fully range of interests affected by a proposed decree. The decision should lead to fairer, more carefully considered, and unassailable remedies for discrimination. It will discourage defendants from settling discrimination cases by bargaining away third party rights, rather than making whole the actual victual victims of discrimination. In addition, the participation of all of the affected parties in formulation of a decree should aid in its implementation. Successful, voluntary compliance with Title VII may depend upon the cooperation of a broad range of individuals. Involving as many of those individuals as possible in formulating the decree will lead to smoother and more effective implementation of the remedy for discrimination.

The proposed legislation relating to *Wilks* would reverse, in the context of civil rights consent decrees, the usual practice under our system of civil litigation. Instead of requiring that outsiders be joined by the parties to litigation if they are to be bound, the legislation would put the burden on outsiders to inject themselves into a dispute between others. Persons with no current interest in issue must be on the lookout for ongoing litigation whose resolution may at some point impact upon them.

Neither the burden on these non-litigants to join or be bound, nor the burden on the judicial system of such expanded and unfocused lawsuits, is wise as a matter of policy. Nor do we believe that it is fair to bind, as the proposed bill does, anyone who has actual notice of the lawsuit, or who lacks actual notice but whose interests are adequately deemed protected by others, or, failing that, wherever "reasonable efforts" are made to give actual notice. Indeed, we believe that serious due process issues are presented.

In *Price Waterhouse v. Hopkins*, — U.S. —, 109 S. Ct. 1775 (1989), the Court ruled in favor of a woman who alleged that she had been denied partnership by her accounting firm on account of her sex. In that case, the Court faced a so called mixed motive case in which plaintiff alleged that her sex had supplied part of the motivation for her rejection for partnership. The Court held that once she had established by direct and substantial evidence that sex played a part in the decision, the burden shifted to the employer to show that it would have reached the same direction had sex not been considered.

The proposed legislation takes the startling step of allowing a damage recovery based solely on the discriminatory thoughts of an agent of the employer, which have no consequence to the plaintiff. For, contrary to the Court's conclusion that Title VII is not violated where the employer proves that the adverse action would have resulted even in the absence of any discriminatory motive, the proposed legislation recognizes a violation and a damage remedy in that circumstance. I believe that this would be the first instance ever in American law where damages could be recovered solely for thinking bad thoughts.

We also need to be clear on one other point. As this Committee is aware, the President, and the Attorney General have strongly supported the Americans With Disabilities Act (ADA), and have worked closely with Congress, and the disability community to devise the version that passed the Senate with Administration support. I was not personally a party to that process. Accordingly, others are in a better position to answer detailed questions concerning it. However, I do think it is important to make the following point.

Title I of the ADA, as agreed to, dealing with employment, incorporates by reference remedies available under Title VII. It was very clear at the time of our discussions that the fact that these remedies were limited to injuctions, back pay, and other equitable relief that can be obtained without triggering the Constitution's civil jury requirement was critical to the Administration's agreement.

In light of the fact that legislation altering these remedies has now been introduced, our continuing support for the ADA hinges on the clarification that the remedies provisions of the ADA will not be affected by the proposed Kennedy-Hawkins amendment of the remedies available under Title VII. This will require amending the reference to Title VII in the Senate version of the ADA. We look forward to cooperating with this Committee and others to assure that the goal of bringing 43 million disabled Americans into the mainstream of American life through passage of the ADA, a goal that we all share, is not thwarted by disagreements about other areas of the law.

In summary, we believe that the Supreme Court acted prudently and correctly, and in reasonable interpretation of existing statutes and case law, in its decisions in the *Wards Cove*, *Wilks*, and *Price Waterhouse* decisions. These decisions should be allowed to stand.

At the same time, with regard to *Patterson* and *Lorance*, we urge Congress to act quickly to enact our proposals. It is apparent that the Administration and the sponsors of S. 2104 are in substantial agreement on these issues, and we propose that S. 2166, the Administration's Bill, therefore be acted upon expeditiously.

I would be pleased to respond to any questions.

TESTIMONY OF DAVID A. MADDUX, THE NATIONAL RETAIL FEDERATION, BEFORE THE COMMITTEE ON LABOR AND HUMAN RESOURCES, FEBRUARY 27, 1990

Mr. Chairman and Members of the Committee:

I am David A. Maddux, a Partner in the law firm of Sheppard, Mullin, Richter & Hampton. I have represented employers in labor and employment law matters for the past thirty years. I started practicing law in 1959, which was the year in which the State of California enacted its California Fair Employment Practices Act which prohibited discrimination in employment. A substantial portion of my practice at all times since has involved employment discrimination mat-

ters before both the California Fair Employment and Housing Commission, the Equal Employment Opportunity Commission, State Courts and United States District Courts.

I appear on behalf of the National Retail Federation. I am Chairman of its Subcommittee on Wage, Hour and Equal Employment Opportunity Law.

The National Retail Federation is the nation's largest trade group which speaks for the retail industry on matters of governmental and public policy. Created by a recent merger between the American Retail Federation and the National Retail Merchants Association, the organization represents the entire spectrum of retailing, including 27 national and 50 state retail associations. In addition, the Federation membership encompasses over one million U.S. retail establishments employing nearly 16 million people and accounts for more than one-quarter of the GNP.

I greatly appreciate this opportunity to appear before you and testify on the Civil Rights Act of 1990. The views I will express are based primarily upon my years of experience representing retailers, many of whom are members of the National Retail Federation, in employment discrimination matters.

The Bill has been publicized as a response to recent "conservative" attacks by the Supreme Court upon Civil Rights in employment. In fact, its scope goes far beyond the few recent decisions involving discrimination in employment decided at the end of the last term. In reality it undoes and implicitly overrules a decade of the Court's Title VII decisions. Much of the precedent which this proposed legislation will overturn was written and concurred in by the least conservative members of the Court.

COMMENTS CONCERNING SECTION 4 OF THE BILL

The practical effect of Section 4 will be to codify and drastically alter traditional disparate impact analysis. Under the Act as amended, a complaining party could establish a prima facie case simply by demonstrating that a "combination of employment practices or an overall employment process" had a disparate impact upon a protected group. The employer would then have the burden to produce evidence *and* prove by a preponderance of the evidence that the practice or process in question was "essential to [employees'] effective job performance." No other "business necessity" could be used to defend the practice or process.

At the same time, the plaintiff would have *no* burden to demonstrate which practice among a group of practices resulted in the disparate impact. Instead, the employer would have the burden of producing evidence *and* proving with a preponderance of the evidence that none of its practices or process had a disparate impact.

Section 4 of the Bill will also overrule *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989) on the premise that it was incorrectly decided. To the contrary, *Wards Cove*, as demonstrated herein, is entirely consistent with long-existing judicial authority interpreting Title VII.

In *Wards Cove*, the Supreme Court began its opinion by reaffirming that in order to make out a statistically-based prima facie disparate impact case, the plaintiffs must prove there is a disparity between the racial composition of the qualified persons in the relevant labor market and the persons holding the jobs at issue.

The lower court in *Wards Cove* had erroneously permitted the employees to make out a prima facie disparate impact case by presenting statistics which compared the racial composition of the employer's cannery work force (composed primarily of nonwhites, Filipinos and Alaska Natives) with that of the employer's non-cannery work force (composed primarily of whites). The Supreme Court easily indentified the logical fallacy associated with the lower court's reasoning: "Most obviously, with respect to the skilled non-cannery jobs at issue here, the cannery work force in no way reflected 'the pool of *qualified* job applicants' or 'the *qualified* population in the labor force.'" 109 S. Ct. at 2122 (emphasis in original).

Its holding on this point is entirely consistent with *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 308 (1977)[1], in which the Supreme Court held that the "proper [statistical] comparison [in a disparate impact case is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market." Similarly, in *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 585 (1979)[2], the Supreme Court held that in the absence of reliable labor market statistics, the courts may look to statistics that measure the racial composition of "otherwise-qualified applicants" for the at-issue jobs.

Secondly, *Wards Cove* perpetuated the long-standing principle that in a disparate impact case the plaintiff must demonstrate the specific employment practice which is claimed to have the disparate impact on protected class members. The Court said:

"Consequently, on remand, the courts below are instructed to require, as part of respondents' prima facie case, a demonstration that specific elements of the petitioners' hiring process have a significantly disparate impact on nonwhites." 109 S. Ct. at 2125.

Section 4 of the Bill would undo *Wards Cove* by allowing a complaining party to establish that an employment practice or "an overall employment process" (Section 3(o)) is "unlawful" when it results in a disparate impact upon a protected group. Since "overall employment process" is such a broad term, an employer could be found liable under the Act as amended based upon statistical disparity that was simply accidental.

Requiring employers to defend against claims that unidentified employment practices violate Title VII places them in an impossible position. In order to avoid liability, employers would have no option other than to adopt strict racial quotas at all levels of their organization. This result was by no means the original intent of Title VII. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 449 (1975).[3]

Wards Cove is also consistent with *Connecticut* v. *Teal*, 457 U.S. 440 (1982)[4], a case in which the Supreme Court held that an employer could not avoid liability in a disparate impact case simply by relying upon the "bottom line," racially balanced result of an allegedly discriminatory promotion practice. In *Teal*, one part of the promotion process involved a test which had a disparate impact on minorities. Analogously, in *Wards Cove*, the Supreme Court held that employees who *challenge* an employment practice should not be able to establish a disparate impact case simply by showing racial *imbalance* "at the bottom line."

The point is simple. If an employer cannot avoid liability by resting upon a favorable "bottom line" result, an adversely affected employee should not be able to prove liability solely by showing an unfavorable "bottom line" result. The real issue is whether a particular employment practice or selection device has a prohibited effect on the protected class. It will be impossible for the Courts to properly decide this issue if the plaintiffs can continue to hide it.

Furthermore, the *Wards Cove* Court's holding that the burden of proof remains with the disparate-impact plaintiff at all times is perfectly consistent with prior precedent. *See, e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 108 S. Ct. 2777, 2790 (1988) (O'Connor, J.); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256-58 (1981);[5] *Croker v. Boeing Co.*, 662 F.2d 975, 991 (3d Cir. 1981). Section 4 of the Bill will overrule these cases. It is also contrary to Fed. Rule of Evid. 301, which clearly provides that a shift in the "burden of going forward with evidence" does *not* impose on a party "the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast."

Curiously, the proposed amendment says nothing about a complaining party's option under existing law to challenge a business necessity defense that has been put forth by the responding party. This option is clearly reaffirmed in *Wards Cove*. In fact, it has been long established that the complaining party may attempt to prove that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [business] interests. . . . Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). The Act as amended is silent regarding this element of traditional disparate-impact analysis.

In addition, proposed Section 703(k)(2) provides that "[a] demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection." The term "required by business necessity" is defined in proposed Section 701(o) (Section 3 of the Bill) as "essential to effective job performance." This definition severely limits the business necessity defense in disparate impact cases.

There are many instances in which employers have non-discriminatory business reasons for taking job action. It would be highly intrusive and simply bad public policy to inflict liability upon employers by restricting the "business necessity" defense to situations in which the employment practice is "essential to effective job performance." For example, if the Bill is passed in its present form, employers could be liable thereunder whenever they effect a reduc-

[1] Justice Stewart's opinion for the Court was joined in by Chief Justice Burger and Justices White, Marshall, Blackmun, Powell and Rehnquist, and concurred in by Justice Brennan. Justice Stevens dissented.

[2] Justice Steven's opinion for the Court was joined in by Chief Justice Burger and Justices Blackmun, Stewart and Rehnquist. Justice Powell concurred in part and dissented in part. Justices Brennan, White and Marshall dissented.

[3] Justice Stewart's opinion for the Court was joined in by Justices Douglas and Brennan and concurred in by Justices Marshall and Rehnquist. Justice Blackmun concurred in the judgment. Chief Justice Burger concurred in part and dissented in part. Justice Powell took no part in the consideration or decision of the case.

[4] Justice Brennan's opinion for the Court was joined in by Justices White, Marshall, Blackmun and Stevens. Chief Justice Burger and Justices Rehnquist and O'Connor joined Justice Powell's dissenting opinion.

[5] Justice Powell wrote the opinion for a unanimous Court composed of Chief Justice Burger, and Justices Brennan, Stewart, White, Marshall, Blackmun, Rehnquist and Stevens.

tion in force for economic reasons that results in a disparate impact upon protected employees. Thus, a race-neutral reduction in force could be cast pursuant to proposed Section 703(k)(1)(A) as an "employment practice" resulting in a disparate impact on the "basis of race, color, religion, sex, or national origin." This would be true even if, for example, the reduction in force arose from contracting out a function which resulted in a large savings for the employer.

In one recent case, *Spaulding* v. *University of Washington*, 740 F.2d 686, *cert. denied*, 469 U.S. 1036 (1984), certain past and present members of the University of Washington School of Nursing faculty challenged the University's compensation practices under 42 U.S.C. § 1983, the Equal Pay Act and Title VII of the Civil Rights Act of 1964. The plaintiffs alleged the University's compensation practices discriminated against them on the basis of sex.

The Court of Appeals affirmed the lower court's dismissal of plaintiffs' claims in part on the ground that the employer was constrained by market forces in setting its wages. The court opined:

"For Title VII purposes, simply labelling an employer's action 'policy or practice' is not sufficient. What matters is the substance of the employer's acts and whether those neutral acts are a non-job-related pretext to shield an invidious judgment. [¶] Every employer constrained by market forces must consider market values in setting his labor costs. Naturally, market prices are inherently job-related, although the market may embody social judgments as to the worth of some jobs. Employers relying on the market are, to that extent, 'price takers.' They deal with the market as a given, and do not meaningfully have a 'policy' about it in the relevant Title VII sense. Fringe policies, which are discretionary, are altogether another matter. Additionally, allowing plaintiffs to establish reliance on the market as a facially neutral policy for Title VII purposes would subject employers to liability for pay disparities with respect to which they have not, in any meaningful sense, made an independent judgment." 740 F.2d at 708.

As the Ninth Circuit readily recognized in *Spaulding*, uncontrollable market forces can result in actions by an employer that have a disparate impact upon a protected class of employees. Under the amended Act, however, the University of Washington would probably be found liable, notwithstanding the fact that it engaged in no "act" with respect to the complaining parties. This result is even more certain given the vague and overly broad definition of "group of employment practices" as "an overall employment process." Proposed Section 701(n) (Section 3 of the Bill).

Another example arises from *Wambheim* v. *J.C. Penny Co., Inc.*, 705 F.2d 1492 (9th Cir. 1983) in which the Ninth Circuit considered whether or not Penny's "head-of-household" rule which allowed employees to obtain medical and dental insurance for a spouse if the employee earned more than half the couple's combined income violated Title VII.

Although the rule clearly had a disparate impact on female employees the court affirmed the trial court's decision that the major cost considerations involved established a legitimate business jurstification for the rule.

The Bill as proposed would compel a contrary holding and the result would ignore the economic realities of the situation.

As these examples demonstrate, there is a plethora of situations in which preservation of a broader business necessity defense is compelled by sound public policy. Congress cannot predict, as it sits here today, the many situations in which an employer may have legitimate nondiscriminatory business or public policy reasons for adopting employment practices that may have a disparate impact upon one group or another.

COMMENTS CONCERNING SECTION 5 OF THE BILL

The practical effect of Section 5 of the Bill is to provide that a violation of the Act is established when the complaining party demonstrates that a prohibited practice was a motivating factor of any employment decision even though the decision was motivating by other factors. The Section further provides that if the responding party, usually the employer, "establishes" that it would have taken the same action in the absence of any discrimination, then the complaining party would not be entitled to such remedies as reinstatement and back pay.

On the other hand, even though the respondent establishes that it would have taken the same action in the absence of any discrimination, under Section 8 of the bill it will still be liable to the complaining party for general compensatory damages (including pain and suffering and damages for emotional distress) and punitive damages, all of which can be awarded by a jury.

This Section has been apparently proposed to reverse the effect of the United States Supreme Court dicision in *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989). It would however, in reality, change the law of the land as it has existed in "mixed motive" employment discimination cases for many years, and would impose on defendant employers the burden of general compensatory and punitive damages in circumstances where *no liability at all* would have been imposed under longstanding legal precedent.

The so-called "mixed motive" doctrine arose in the context of Section 8(a)(3) of the Labor Management Relations Act which made it unlawful to discriminate against employees based on their union activities or sympathies. The National Labor Relations Board in *Wright Line, Inc.*, 251 NLRB 1083, 105 LRRM (BNA) 1169 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), held that the General Counsel of the National Labor Relations Board had the burden of proving that the employee's protected conduct was a substantial or motivating factor in the employees discharge. The Board then held that if there was another legitimate reason for the discharge the employer could avoid a violation of the Act by proving that the discharge rested on the employee's *unprotected* conduct, and that the discharge would have occurred in any event.

The National Labor Relations Board's *Wright Line* principle was given express approval by the United States Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In *Transportation Management*, the Court held that even though the General Counsel of the Board met his burden by proving that the employee's protected conduct was a substantial or motivating factor in the discharge of the employee, the employer could avoid a *violation* of the *Act* by proving by a *preponderance of the evidence* that the discharge rested on the employee's unprotected conduct as well and that the discharge would have occurred in any event. The Court, relying on National Labor Relations Board precedent, characterized the doctrine as one where the employer could prevail by presenting an "affirmative defense", which under normal rules of burden of proof, placed upon the employer the burden to sustain its affirmative defense by a *preponderance of the evidence*. The burden of proving a fact by a preponderance of the evidence is met when the person having the burden persuades the trier of fact that it is more likely than not that the asserted fact is true.

Transportation Management was in accord with and relied upon in the United States Supreme Court's decision in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), which dealt with the discharge of a teacher and the board of education's refusal to reinstate him for his exercising his constitutionally-protected right to free speech. The Supreme Court found that the trial court had erred by not determining whether the board had shown by a *preponderance of the evidence* that it would have refused reinstatement in the absence of the teacher's protected conduct.

Thus, *Price Waterhouse v. Hopkins*, in deciding that once a plaintiff in a Title VII case shows that his or her protected status played a motivating part in an employment decision, the defendant may avoid a *finding of liability* only by proving that it would have made the same decision even if it had not allowed the protected status to play such a role, was simply swimming in the mainstream of long-standing judicial authority on this issue.

Indeed, the *Hopkins* opinion was written by Justice Brennan and joined in by Justices Marshall, Blackmun and Stevens. Justices White and O'Connor concurred. Chief Justice Rehnquist and Justice Scalia joined Justice Kennedy's dissenting opinion. The *Hopkins* plurality joined unanimous courts in *Mt. Healthy*, an opinion participated in by Chief Justice Burger and Justice Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist and Stevens and *Transportation Management*, an opinion participated in by all of the above-named Justices except Justice Stewart who was succeeded by Justice O'Connor in the Court's October 1981 Term.

Thus, it is respectfully suggested that it would be the wrong result to impose the threat of serious monetary liability arising from general compensatory and punitive damages on employers who would have taken the same action but for the alleged discriminatory motive, in the face of holdings requiring a contrary result by all of the Justices who decided *Transportation Management, Mt. Healthy* and *Hopkins*.

In addition, there is a question concerning what burden The Bill proposes to place on the defendant by its use of the word "establishes" in describing the employer's burden in Section 5(b) of The Bill. In the definitions section the term "demonstrates" is defined. "Establishes" is not.

It is also respectfully suggested that it is an inappropriate allocation of judicial resources to process burdensome and time-consuming jury-trial litigation where the facts would clearly establish that the employer had a legitimate business reason for its employment decision which would have been made irrespective of the plaintiff's protected status.

One could conjure the simple example of two employees who conspired in a common scheme to steal from their employer. Once the employer found out about the scheme, he would probably terminate both employees. If a jury determined that the employer happened to harbor some wholly unrelated feelings of prejudice against one of the individuals, who happens to be a protected class member, the likley and somewhat nonsensical result would be that he or she would be entitled to recover general compensatory and punitive damages. Of course, the equally guilty non-protected employee would be

entitled to nothing. Clearly such a result has not logical support.

COMMENTS CONCERNING SECTION 8 OF THE BILL

The practical effect of the proposed amendment to Section 706(g) of the Act (Section 8 of the Bill) will be to provide for jury trials and compensatory and punitive damages in cases of intentional discrimination. In this connection, it should be noted that essentially all individual disparate treatment cases involve intentional discrimination. The result of the proposed amendment will be to take federal discrimination cases out of the expert hands of the EEOC and place them in the private hands of litigants and their lawyers. Once such cases are settled with the payment of money, they will be dismissed and the facts surrounding the allegedly discriminatory behavior of the employer will be effectively buried. (It is standard practic in most cases for employers to insist upon confidentiality provisions in settlement agreements). Although the private litigant and his or her lawyer may be better off after the case has been settled, there is absolutely no guarantee that the employer will not continue discriminating against other employees who were *not* party to the litigation.

Punitive and compensatory, damages are also available for violations of California's primary antidiscrimination law, the Fair Employment and Housing Act ("FEHA"). *Commodore Home Sys., Inc. v. Superior Court*, 32 Cal. 3d 211, 649 P.2d 912 (1982). Unfortunately this has resulted in our standard practice under the FEHA for plaintiffs' attorneys to request a right-to-sue letter and commence a civil action long before the Department of Fair Employment and Housing has had a chance to investigate, conciliate and/or seek redress of claimed discrimination. Similarly, under the Act as amended, plaintiffs' attorneys, driven by a contingent-fee arrangement, will likely seek to by-pass the EEOC entirely and commence litigation in the federal courts. The focus will shift from the remedy of employment discrimination process, which Title VII was enacted to accomplish, to a process which creates higher litigation stakes fueled by large dollar contingent fee awards. An additional likely result will be a sharp increase in federal court jury trial litigation which will further burden the federal court system.

Further, the proposed amendment to Section 706(g) of the Act contains *no* definitions for a jury to look to in deciding whether to award punitive damages against an employer. The lack of a clear definition as well as the relatively low standard of proof (preponderance of the evidence as contrasted with "clear and convincing evidence" in California) will leave an employer without an understanding of the kind of conduct it should avoid in order not to be punished by an award of punitive damages.

Additional problems created by Section 8 of the Bill arise from the fact that it would impose compensatory damages and punitive damages on top of an existing remedial scheme which already grants to successful plaintiffs the right to recover lost wages, back pay and reinstatement or front pay.

Since the issues of Title VII violation and reinstatement or front pay (where reinstatement is not feasible) are issues for the court—not the jury—while compensatory and punitive damage claims are jury questions, a serious and complex issue involving judicial economy arises. The act provides absolutely no guidance as to how to avoid the possibility of inconsistent results as between judge and jury.[6]

COMMENTS CONCERNING SECTION 9 OF THE BILL

The practical effect of Section 9 of the Bill is to prohibit a "waiver" of attorney's fees as a condition of settlement of a Title VII action. As a result of proposed Section 706(k), it is likely that settlement of actions that have been commenced under the Act as amended will be significantly discouraged. It has long been the practice of parties in employment discrimination suits to combine a settlement of all claims, as well as any attorney's fees, into a lump-sum figure. Generally, the defendant provides the plaintiff and his or her attorney with a check and leaves it to the plaintiff and the attorney to divide the proceeds. The Act as amended prohibits the "waiver" of attorney's fees as a condition of the settlement. This provision will likely create tremendous uncertainty regarding appropriate attorney's fees at a stage in the proceeding when both parties are earnestly seeking to conclude litigation.

It is foreseeable that although the parties in a particular action may agree upon the amount of money the defendant should pay the plaintiff in settlement of his or her legal claims, the parties may be thousands of dollars apart with respect to the amount of attorney's fees the plaintiff's attorney should receive. Disagreements between the parties (and their lawyers) about this issue will inevitably end up before a federal judge who will have to decide, among other things, the reasonableness of the fees after reviewing in detail all the time the plaintiff's attorney has put into the case and his or her relative experience in the area. This provision will likely create rancor between the *attorneys*, just as the *parties* have come to an understanding as to the value of the case. There do not appear to be any overriding public policy reasons for encouraging attorneys to have more of a monetary stake in the outcome of these cases than they already have. No evil exists which this Section is needed to correct.

I appreciate the opportunity to testify before the committee and I would be pleased to answer any questions you may have.

TESTIMONY ON BEHALF OF NATIONAL ASSOCIATION OF MANUFACTURERS AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT, BEFORE THE COMMITTEE ON LABOR AND HUMAN RESOURCES, FEBRUARY 27, 1990

Mr. Chairman, members of the Committee, my name is Lawrence Lorber. I am a partner in the law firm of Kelley Drye & Warren. I am submitting this testimony on behalf of the National Association of Manufacturers ("NAM") and the Society for Human Resource Management ("SHRM") (formerly the American Society for Personnel Administration).

The National Association of Manufacturers is a voluntary business association of more than 13,500 member companies and subsidiaries, large and small, located in every state. Members range in size from the very large to the more than 9,000 smaller manufacturing firms, each with fewer than 500 employees. NAM member companies employ 85 percent of all workers in manufacturing and produce more than 80 percent of the nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council.

The Society for Human Resource Management is the world's largest association for human resource professionals with over 44,200 members representing employers who employ over 53 million individuals. As the leading professional association for human resource managers, SHRM has a vital interest in legislation impacting on almost every aspect of the human resource function.

Both SHRM and NAM have a long background in promoting fair employment practices. NAM's involvement in this area goes back to the 1960s when it was instrumental in promoting Plans for Progress, the forerunner of our affirmative action policies. And its efforts continued through the 1980s when NAM took the lead in establishing the consensus which preserved the policy of affirmative action as a viable component of our nation's employment structure. SHRM's efforts in this area are as equally long-standing. SHRM played a vital role in training the human resources profession to understand and implement the concepts of equal employment opportunity in the workplace when the laws were first passed. In the 1980s SHRM's activities included the preparation and filing of an Amicus Curiae brief before the Supreme Court in the landmark affirmative action case of *Johnson v. Santa Clara County, California*, arguing that affirmative action was a necessary part of our employment system. SHRM's brief, which I prepared, was cited by Justice Brennan as providing the professional justification for affirmative action. Thus, these two leading organizations bring a long and involved background to the current debate over our equal employment policies.

The Civil Rights Act of 1990 represents a massive restructuring and rewriting of our equal employment laws. Presented as a response to certain Supreme Court decisions of last term, the draft legislation in fact rejects the concept of conciliation and rapid settlement of complaints, which the Congress used as its guidepost in 1964 when Title VII was enacted, and assumes that the only resolution of discrimination complaints is in protracted litigation in a federal court system which is already overburdened. We find this thrust particularly ill-conceived at a time when there is almost universal recognition that the problem our economy faces in the 1990s is not too few jobs but too few trained or trainable employees. A congressional commitment of scarce federal resources to increased federal court litigation seems particularly ill-advised when our country faces such pressing employment problems. In the recent annual economic report issued by the President, the employment concerns of America were identified as the necessity to find skilled workers for the available jobs. The President's Report, which follows upon the Workforce 2000 study issued by the Department of Labor and the many private studies focusing on the employee shortage we are facing identifies the trained labor shortage as a grave problem of national proportions.

Our country has long since outgrown the pernicious "luxury" of discriminatory exclusion. In the increasingly tight labor markets of the 1990s, employers inclined to indulge in discriminatory hiring will pay a high price for it—they will be unable to meet their own need for workers. The protected groups—minorities and women—will comprise the overwhelming percentage of new entrants to the workforce. Employers who are unwilling to hire them for reasons of bias will find themselves increasingly unable

[6] This problem has been resolved by some of the circuits which have addressed it in the context of combined Title VII and Section 1981 actions. They generally hold that the jury's factual determinations on the Section 1981 claims control. *See, e.g., Sherman v. Burke Contracting Inc.*, 891 F.2d 1527 (11th Cir. 1990); *Wade v. Orange County*, 844 F.2d 951 (2d Cir. 1988).

to find qualified workers. Therefore, it is ironic that at a time when business necessity dictates open, nondiscriminatory employment practices, Congress is seeking to place greater rigidities on the labor market. We think this would be counterproductive to expanded workforce opportunities. This legislation, however, ignores these pressing problems and focuses single-mindedly on narrow and technical litigation concerns of interest primarily to lawyers.

The Civil Rights Act of 1990 does not profess to create jobs or provide skills. It does, however, promise to vastly increase contentious litigation. Beginning with the several new definitions to Title VII, the legislation places employers in a position where they have no reasonable opportunity to offer nondiscrimiatory explanations to challenged employment practices. Put into this position, employers will have little choice other than to assure numerical balance in their workforce.

DEFINITIONS

Proposed new definition "n" includes the term "group of employment practices" within the scope of Title VII. This definition, as applied to both disparate treatment and adverse impact cases, would place the entire range of an employer's employment practices under question without providing an employer with any specificity as to which practice is questionable. The legal inquiry would be changed from an examination of a single suspect practice into an open-ended inquisition of an employer if its total workforce did not reflect some idealized numerical balance suggested by a plaintiff. This new defintion rejects long accepted Title VII jurisprudence. In *Connecticut* v. *Teal*, Justice Brennan analyzed the various adverse impact cases since *Griggs* and made clear that Title VII never required the focus to be placed on the overall number of minority or female applicants hired or promoted.

In *Transit Authority* v. *Beazer*, the Supreme Court focused on a single identified employment practice. To permit a lawsuit to be based on a "group of employment practices"—perhaps all practices used by a particular employer and to have that lawsuit triggered because the "overall employment practice" results in a workforce that is numerically deficient—is a profound change in the standard for reviewing personnel practices. It will put pressure on employers to assure that their overall employment practices result in a workforce measured by arbitrary numerical standards, and not productivity or ability.

Proposed new definition "o" would find "business necessity" justifying a selection criterion only if that criterion were proven to be "*essential* to effective job performance." This new definition is a drastic change from the definitions first set forth in *Griggs* v. *Duke Power Company* which has become well settled law during the succeeding nineteen years.

In *Griggs* the Supreme Court first enunciated the theory of adverse impact, and imposed on employers the requirement of showing that a challenged practice was justified by "business necessity". The Court said that the standard of business necessity meant "job relatedness", meaning a selection criterion "having a manifest relationship to the employment in question." The Court in *Griggs* reemphasized congressional intent to allow employers to set their employment standards as high as they wished as long as the business necessity test was met. The various Supreme Court and appellate court rulings subsequent to *Griggs* have made it clear that "business necessity" requires a showing that the challenged practice is predictive of job performance, correlates to important elements of work behavior, or more generally relates to the specific job functions in question. The proposed new definition of business necessity, would overturn these long-standing precedents and impose an impossible burden on employers.

Understanding that the legal review of employment practices does not even begin until there is proof of a numerical imbalance defined as adverse impact under the proposed legislation, employers would have to show that the suspect practice, or the "overall employment process" (see new definition "n") are not only necessary but are "essential". The judgment as to what is "essential" would not be made by the employer but by a judge or possibly a jury, and then in the context of a numerical deficiency rather than actual business needs. The promise of the Congress in 1964, as enunciated in *Griggs*, that employers could establish their own employment standards so long as the standards were consistent with the employer's own business requirements and equal employment principles will thus be consigned to a footnote describing discarded policy. Rather, the law would require employers to accept bare minimum qualifications or performance levels since they would be the only standards which could possibly meet the "essential" test.

SECTION 4

Proposed definition "n" discussed above, would abolish the requirement that a plaintiff identify the cause of a statistical disparity. Proposed subsection 703(k) would also overturn those parts of the Court's holdings in *Watson* and *Wards Cove* related to burdens of proof.

The Civil Rights Act of 1990 would permit a plaintiff's cause of action to be based solely on the statistical "bottom line". That is, a plaintiff need not identify one specific employment practice causing an adverse impact, but could complain generally about a group of practices or point to the overall "employment process" to establish the numerical threshold necessary for a showing of adverse impact. An employer would then have the burden of showing that some or all of its practices—depending upon the scope of the compliant—are *not* causally related to the numerical deficiency. The employer would then be obliged to prove that each of these practices is "essential" to its business. Thus, an employer using a variety of employment practices would have to first parse all of its practices, identify which caused the numerical "discrimination" and then prove that the suspect practice was "essential" to its business.

Proving that some objective selection criterion—such as a college degree—is "esssential" to success on a job is difficult enough. But in the context of subjective criteria the task becomes impossible. completely unrecognized in the bill or the accompanying congressional analysis is the fact that the *Watson* and *Wards Cove* cases dealt with non-standardized subjective practices not heretofore dealt with under the impact analysis. The proposed legislation is built on the faulty premise that every employment practice, including interviews, supervisory ratings and the like, can be reviewed with scientifc precision. Unlike the accepted methodology for establishing the job relatedness of objective "pass-fail" instruments or practices such as standardized tests or height-weight standards, where business necessity has never been converted into the legal *sine qua non* which this legislation would mandate, the prospect of proving that it is "esstential" to job performance for a candidate to appear "bright" or "motivated" during an interview would be completely unmanageable, as would be the burden when reviewing the multistage hiring process for management trainees, first line supervisors, public law enforcement positions or other such positions. The very complexity of the employer's burden when dealing with aggregated, subjective employment practices would require decisionmaking aimed at numerical balance, rather than business judgment, in order to avoid the crushing costs which would be required to even attempt to defend challenged criteria.

In *Watson* and *Wards Cove*, the Supreme Court attempted to craft a rational balance allowing long-accepted Title VII obligations, and heretofore unquestioned general litigation burdens to coexist with viable productive employment systems. Proposed subsection 703(k) and the new "definitions" would overturn this balance, while leaving employers essentially defenseless to challenges of subjective practices based on adverse impact analysis.

SECTION 5

Proposed Section 5 of the draft legislation would "deal" with the *Price Waterhouse* case by amending Title VII to find a violation whenever a discriminating factor was shown to have been *a* "motivating factor" in any personnel action *regardless* of the presence or importance of other factors supporting the action. Section 5 is here characterized as "dealing" with *Price Waterhouse* since at the time of the decision it was greeted as a major advance by civil rights advocates and was said to represent the first time the Supreme Court had recognized the well-established concept of mixed motives in the title VII context. The drafters of section 5 clearly intend to expand upon *Price Waterhouse* by finding liability where a discriminatory consideration is *a* motivating factor as opposed to the motivating factor or even a substantial motivating factor. Indeed the mere presence in the mind of the decisionmaker or in the employer's records of any questionable consideration or inartfully phrased concern about an individual would, by the terms of the proposed amendment, doom the employment decision. The legislation would preclude an employer's ability to rebut or refute the inference of discrimination by proving that the factor was irrelevant because of the predominant weight of legitimate factors.

Once obvious result of this section, were it to become law, would be to require legal review of personnel appraisals, supervisory ratings and similar personnel tools while in draft stage in order to scrub or delete any phrase or reference which could be pointed to as a "motivating factor" and which would thereby subject an employer to absolute liability. Employers would almost have to establish legal "thought police" to measure each consideration of a supervisor against the ever-changing legal standards of intentional discrimination in order to insulate the employment process.

The argument by the proponents of Section 5 that *Price Waterhouse* authorizes "a little bit of discrimination" is specious. The Supreme Court crafted an appropriate burden shift by requiring employers to do more than merely articulate an explanation for the "taint." Employers were given a difficult burden of proof to avoid liability. The draft legislation "cures" *Price Waterhouse* by abolishing any opportunity for defense. Strangely, the draft legislation seeks to amend § 706(g) by including the *Price Waterhouse* "defense" in that section. The intent of this placement is unclear. Clearer drafting would have new § 703(1) add at its end "except that a respondent will not commit an unlawful employment practice

where it establishes that it would not have taken the same action notwithstanding the consideration of the prohibited factor."

SECTION 6

In *Martin* v. *Wilks*, a five justice majority of the Supreme Court held that where allegedly race conscious promotion decisions were being made as a result of the operation of a prior consent decree, white individuals who were not party to the proceedings which resulted in the entry of the decree could bring suit alleging that the denial of promotions to them was due to impermissible considerations of race. The four dissenters argued that obedience to the dictates of a lawfully entered consent decree should not expose an employer to collateral attack and potential liability. The Supreme Court was grappling with the competing and equally compelling concepts of affording every individual his or her own day in court with the need to bring finality to litigation.

Proposed section 6 would establish that a person could not challenge the operation of a decree if the person were a party to the proceeding, had notice that the proposed judgment might affect his interests and was given reasonable opportunity to object, or if a court determines that the objections being raised were raised by other persons during the pendency of the consideration of the decree.

Section 6 would leave the adequacy of notice to interested parties as the only grounds available to attack the lawful operation of a decree after it is entered. Apparently it would bring finality to issues even if the underlying decree incorporated race conscious features and was of substantial duration. While employers share the belief that judicial oversight of employment policies not be open-ended and intrusive, we believe that these concerns ought to be tempered somewhat in view of the appropriately strict standards for relief currently followed by the courts in reviewing or imposing race conscious policies. The standards enunciated by the Supreme Court in *Johnson* v. *Santa Clara County* and *Local 28 Sheetmetal Workers* v. *EEOC* ought to allay concern that affirmative relief will unfairly hinder the expectations of nonparty individuals or that a court will usurp the employer's human resources function.

We do believe that rather than rushing to simply "repeal" *Martin* v. *Wilks*, the Congress ought to take sufficient time to study the issues and consider such possibilities as statutory time limits for an employment consent decree or specifying the scope of the fairnes hearing so that adequate notice is in fact provided to all interested or potentially interested or impacted individuals.

SECTION 7

In *Lorance* v. *AT&T Technologies*, the Supreme Court held that a challenge to a seniority system allegedly adopted for a discriminatory purpose must be raised at the time the seniority system is adopted (within Title VII's limitation period) rather than at the time the system has its discriminatory impact. The Court reiterated its view that there was no viability to the "continuing violation" theory of discrimination in this context. The dissenters argued that Congress never intended absolute immunity for tainted seniority systems and that the decision would foster anticipatory litigation.

While the holding in *Lorance* is relatively straightforward and deserving of careful consideration, the legislative response incorporated in section 7 is wholly out of proportion to the holding in *Lorance* and affects significant expansion of Title VII.

Section 7(a)(1) expands the statute of limitations of Title VII from 180 days to two years. There was no "adverse" Supreme Court ruling which triggered this section. There seems to be no rationale for this four-fold expansion of the statute of limitations, nor does there appear to have been consideration of other, parallel changes sure to follow, such as the extension of EEOC's record retention rules to two years and other administrative changes. The legislation is also silent as to the impact of this change on cases filed with deferral agencies. The silence with respect to the status of deferral states apparently will allow simultaneous processing of charges and could create redundant legal actions in different forums. This result would be a direct contradiction of Title VII's fundamental purpose to foster conciliation and settlement of cases.

The drafters have apparently given no thought to the ramifications of this proposal on actual employment processes. It is difficult to imagine the benefit in allowing a grievance to fester for at least two years before triggering the investigative and adjudicative processes of title VII. In that long interim, personnel will have changed, managers shifted, perhaps even ownership changed, yet the employer will have to reconstruct dated events in order to respond. Productive employment will be subject to forgotten land mines of forgotten actions when a charge is filed two or more years after the triggering occurrence.

Section 7(a)(2) reinstates the continuing violation theory by starting the running of the statute of limitations only after a questioned practice has adversely affected the aggrieved party. Thus, the proposed legislation has the effect of overturning *United Airlines* v. *Evans* decided in 1977, not 1987. It is simply inappropriate policy to encourage potential plaintiffs to sit on their rights for an extended period. There seems to be no cogent reason for this other than to increase employer exposure.

SECTION 8

This section would amend Title VII to provide for compensatory and punitive damages where intentional discrimination is shown and, consistent with the principle that such damages fall under the definition of "legal" rather than equitable relief, a jury trial would be provided.

As much as any section of the proposed legislation, this section would change the entire structure of our equal employment laws. The issue of a jury trial and extraordinary relief for discrimination was considered by the drafters of the original Title VII and rejected for a number of sound policy reasons. Those reasons have not changed.

It was the considered view that discrimination issues should be settled quickly, that the employee achieve make whole relief promptly and that the process avoid interminable delay in crowded federal courts. Further, there was concern that juries might be loath to find for minority or female plaintiffs.

Since 1964, Title VII has been interpreted and enforced in a relatively efficient manner, enabling individuals to achieved relief. To the extent there has been criticism, it was that the EEOC was inefficient in conciliating cases and that backlogs were permitted to expand.

Section 8 would not respond to these concerns but would create new problems of vastly increased magnitude. Were this section enacted, any hope of conciliation and settlement through the EEOC would vanish. We would witness instead a national employment law lottery where attorneys would hold out to individuals the promise of six or seven figure judgments, with the accompanying six or seven figure legal fee. The purpose and function of the EEOC would be effectively terminated, and the courts would be inundated with new employment suits.

Nor is this a spectral parade of horrors raised by employers with untold hidden liability. Rather, it reflects the experience in those states with expanding doctrines of wrongful discharge and expanding liability judgments. Employers would be ill-advised to undertake thoughtful self-analysis and corrective action for fear of unleashing a torrent of two-year old "intentional discrimination" litigation with million dollar liability claims. Short of resurrecting the plaintiff's bar, no cogent explanation has been given for this section.

We would also note that the Senate debated this issue when it recently passed the Americans With Disabilities Act ("ADA"). Following long negotiations between the White house and Senate, during which organizations such as SHRM and NAM and the disability community provided input, the Senate rejected the inclusion of compensatory and punitive damages and jury trials for the disabled as inappropriate in the employment title of the ADA. The Senate and the Civil Rights community were correct then. We do not believe that those negotiations were undertaken in other than complete good faith, yet we see a policy reversal in a matter of months. Section 8 has no place in this legislation.

SECTION 11

This section would require all federal civil rights laws to be "broadly construed," effectively providing that the actual statute serve only as the starting point for judicial review rather than providing textual limits on such review. This seems to be a needless invitation to judicial activism and could readily cause confusion. If the "broad construction" were viewed by some to be limiting rather than expanding, we would inevitably have to respond to yet another round of congressional restoration. The Congress should not invite such activism and thereby subject the law to transient determinations of the meaning of "broad construction."

Section 11(b) appears to abolish, in the context of civil rights, the doctrine that subsequent legislation that is more specific or narrow in design operates to limit prior legislation that is more expansive. If this is the intent, section 11(b) ought to be thoroughly debated. We see absolutely no reason legislatively fossilize every piece of civil rights legislation and simply add layer upon layer of additional statutory language. Civil rights and equal employment is not such a fragile concept so as to require this type of legislative shield. As the organizations I am representing today showed in the debate over affirmative action, exposure to such debate, whether in the executive branch or the legislative branch, or before the public, will not shrivel the reach of our equal employment policies. There is no place for Section 11 in the proposed legislation.

SECTION 12

Section 12 of the proposed legislation would overturn the *Patterson* decision. The Administration similarly has introduced legislation to accomplish this purpose. Rather than legislatively "correct" an admittedly strained judicial interpretation, the Congress ought to meet its responsibility by thoroughly examining the ramifications and underlying rationale of the Supreme Court's action.

The *Patterson* case involved alleged racial harassment. Title VII makes racial harassment illegal. The Supreme Court did not endorse racial harassment. It noted that the remedial provisions of Title VII could have been available to the plaintiff. Rather, the

Court questioned, perhaps awkwardly, the efficacy of having multiple statutory forms available to remedy discriminatory activities and attempted by its decision to channel such matters through the congressionally-created scheme of Title VII. The underlying question which the Supreme Court attempted to resolve was whether it made sound policy to have such multiple forums. The Congress ought to take the time to examine whether it makes any sense to have such anomalous situations as litigations in which both Title VII and §1981 are at issue and in which the same facts are tried partly before a judge and partly before a jury, either at the same time or on alternate days, in which different procedural rules and statutes of limitations would apply and different remedies would be available. We believe that the Congress ought to examine whether plaintiffs ought to be required to choose an exclusive forum, and whether equal employment litigation ought not be encumbered with parallel federal, state and common law counts. We would urge that considered legislative attention be devoted to examining and addressing and underlying causes of the Supreme Court's decision rather than rushing to "reverse" the attempt of the Supreme Court to bring reason to an unnecessarily confused and cumbersome situation.

CONCLUSION

Contrary to the representations of its co-sponsors, the Civil Rights Act of 1990 far exceeds its professed aim of "simply" reversing certain Supreme Court decisions. Rather, the draft legislation will effect a sea-change in the treatment of equal employment complaints, converting every charge into a federal court action; making the administrative process of mediation and conciliation an unused and forgotten option and building up a backlog of cases calling on scarce federal court resources.

The draft legislation also reverses the long-settled concept underlying Title VII when it was passed and incorporated in the *Griggs* decision, of letting an employer set its standards as high as it wishes. The legislation would present American industry with the choice of boiling its legitimate employment criteria down to the very few essential elements which would result in a minimally competent workforce or facing lengthy and expensive litigation leading to extraordinary relief in which the statutory deck is stacked overwhelmingly against it. The only other option left to employers is the distasteful one of insuring numerical balance.

Finally, the draft legislation ignores the current procedural and statutory impediments to rapid and equitable resolution of employment complaints. Rather than examining the continued viability of multiple forums and multiple statutory bases for employment litigation the legislation merely perpetuates the current unwieldy and inefficient system.

The issues raised by the Civil Rights Act of 1990 deserve careful and thoughtful analysis. The apparent rush to pass a bill with a minimum of debate and consideration is an unseemly and inappropriate way of treating civil rights. We urge that this committee reflect upon the issues raised in this testimony and join with America's employers in addressing the pressing issues we all face in the 1990s and beyond.

Mr. HATCH. Thank you, Mr. President.

I yield the floor.

ELECTIONS IN TAIWAN: A MOMENT OF TRIUMPH FOR THE TAIWANESE

Mr. PELL. Mr. President, Eastern Europe, Central and Latin America are not the only places in the world where democracy is emerging from the long, cold winter of dictatorship.

In Taiwan, thousands of protestors, mainly students, have gathered in a Taipei city park to declare their support for greater democracy just as Chinese students gathered last spring in Tiananmen Square. However, unlike in China, rather than being brutually suppressed, their voices have real hope of being heard.

We need to support the Taiwanese people in their courageous call for greater freedom and independence from the stultifying oppression of 40 years of Kuomintang rule.

We can take some encouragement from the actions taken by President Lee Teng-hui, a native Taiwanese, who has just been elected to a 6-year term, despite an effort by hardliners in the Nationalist Party to replace him.

Having already taken determined action in the past toward democracy, President Lee will surely heed the call for greater reform at a faster pace. In this spirit, I commend and congratulate him for this leadership.

Last December President Lee presided over the first officially contested elections since 1949. At that time elections were held for 101 seats in the national legislature, the Legislative Yuan, 16 county executive positions called magistrates, several city mayors, and seats on two city councils and the Taiwan Provincial Assembly. The results sent a clear signal that the Taiwanese people want change.

As noted the Deputy Secretary General of the opposition Democratic Progressive Party, Tsai Shih-yuan, "it was a big victory for the opposition!"

The Democratic Progressive Party [DPP] won 38 percent of the popular vote in city and county executive races winning 6 out of 21, including the biggest prize of all—the executive post in Taipei county. The KMT received just 53 percent of the vote rather than the projected 70 percent. In the Legislative Yuan, the DPP increased its membership from 11 to 21 seats, giving it enough members to introduce legislation.

These important victories were achieved despite tremendous odds—the DPP has only 20,000 members and the KMT's is estimated at 1 to 2.5 million out of an electorate of about 12 million—and large hurdles.

The National Democratic Institute for International Affairs [NDI] in an excellent pre-election report, entitled "A Moment In Political Transition: The December 1989 Elections In Taiwan," observed that the "KMT retains near total control of almost all political, social, economic and media institutions in Taiwan," ensuring "the KMT numerous institutional advantages in the current campaign, including control of the television and radio, vast financial resources, a cooperative police and judiciary, as well as considerable informal influence over the most influential economic, social and cultural organizations."

Importantly, the issue of Taiwan's independence was also prominently raised in this election despite legal prohibitions against such discussion. This indicates both new flexibility on the part of the Government as well as the continued importance of this issue to the Taiwanese people. Twenty DPP candidates in favor of independence won election, seven of these to parliament.

However, the elections in December and March also illuminate continued problems in the Taiwanese political system. In the Legislative Yuan elections, for example, only 101 out of 292 were contested. The majority of 162 continue to be filled with holdovers from the mainland and 29 were appointed by the KMT to represent overseas Chinese. The President was elected by a 752 member National Assembly controlled by 668 KMT delegates, also holdovers from 1949. The voice of the Taiwanese people is still a minority voice in their homeland.

But the winds of change can be felt this spring. Following the December elections, President Lee promised more democratic reforms stating that the vote "indicate[d] the various reform measures undertaken by the Government in recent years had failed to meet the public's expectations."

President Lee has met with the demonstrators in Taipei's Chiang K'ai-shek Memorial Park—a clear indication of his desire to accommodate new political voices. He has also proposed a meeting with the DPP and other groups in a national convention to discus Taiwan's problems.

This is clear evidence that change is occurring in Taiwan.

I hope it will lead to substantial reform in several areas, including an examination of possible constitutional changes that would further institutionalize and preserve democratic practices, guarantees for freedom of speech, elections for other members of the Legislative Yuan, loosening of visa restrictions on overseas Taiwanese or Taiwanese-Americans seeking to return to Taiwan, and a release of political prisoners.

In particular, I hope that Shih Ming-Teh will be released. This prisoner-of-conscience has been jailed for 25 years. He is Taiwan's Nelson Mandela. First arrested in 1962, he was jailed until 1977. He was arrested again in January 1980 for his role in the formation of an opposition magazine and demonstrations on behalf of democracy and independence. He has been in jail ever since. His American wife, Linda Arrigo, was deported by the Government. Amnesty for Shih Ming-Teh would send a clear signal of the Government's desire to bury the prob-

A Hearing session

Statement of Principle - Love Knight (Porter, Benson, McLure)

2 pts - strong support of civil rights (Democracy - we've always been a model.
civil right not partisan issue.
But - STATEMENT of PRINCIPLES (to modify/remedy bill).

mention A.D.A. (nothing happened see a week ago.)

Our activities will only be affirmative, positive,
if it avoids any hint of Federalism.

3:29 5/9 MICHAEL JACKSON -- "You're part of the problem."

Job & Bev Geaslin

ON A.D.A. Gill
& Geraldyn Gill

1:30 Bachs
2:00 Nipps 3:00 Catchall group

Mont Tues – listening session w/ Civ Rights groups
ask McCamy, Voigt – get invited

~~Kathi Witherspoon – Connie working on a document~~
~~Margaret Orr – anything?~~
McCottlin
~~Judy Carl Rowe is speaking out. Key decisions.~~

Civil Rights Commission – 6 of them ~~[illegible]~~ behind POTUS.
Welcome. Here today to have Civ. Rights Commission, 50 state committee members
praise and. Pole's nominee is blind
↳ ((handicapped))
POTUS' commitment:
This is anniv. of assurance of Brown vs. Board of Educ.
Thornburg, Cavazos Ackerman { State director
Karl Anderson – NOT THERE
Handicapped
Art Fletcher – Chairman – Looking forward to the Anderson (get bio)
↳ commitment to enforcing laws

A.D.A.

A Negative Vote On Affirmative Action



BY SHELBY STEELE

IN A FEW SHORT YEARS, WHEN MY TWO children will be applying to college, the affirmative-action policies by which most universities offer black students some form of preferential treatment will present me with a dilemma. I am a middle-class black, a college professor, far from wealthy, but also well removed from the kind of deprivation that would qualify my children for the label "disadvantaged." Both of them have endured racial insensitivity from whites. They have been called names, have suffered slights and have experienced first hand the peculiar malevolence that racism brings out of people. Yet they have never experienced racial discrimination, have never been stopped by their race on any path they have chosen to follow. Still, their society now tells them that if they will only designate themselves as black on their college applications, they will probably do better in the college lottery than if they conceal this fact. I think there is something of a Faustian bargain in this.

Of course many blacks and a considerable number of whites would say that I was sanctimoniously making affirmative action into a test of character. They would say that this small preference is the meagerest recompense for centuries of unrelieved oppression. And to these arguments other very obvious facts must be added. In America, many marginally competent or flatly incompetent whites are hired every day — some because their white skin suits the conscious or unconscious racial preference of their employers. The white children of alumni are often grandfathered into elite universities in what can only be seen as a residual benefit of historic white privilege. Worse, white incompetence is always an individual matter, but for blacks it is often confirmation of ugly stereotypes. Given that unfairness cuts both ways, doesn't it only balance the scales of history, doesn't this repay, in a small way, the systematic denial under which my children's grandfather lived out his days?

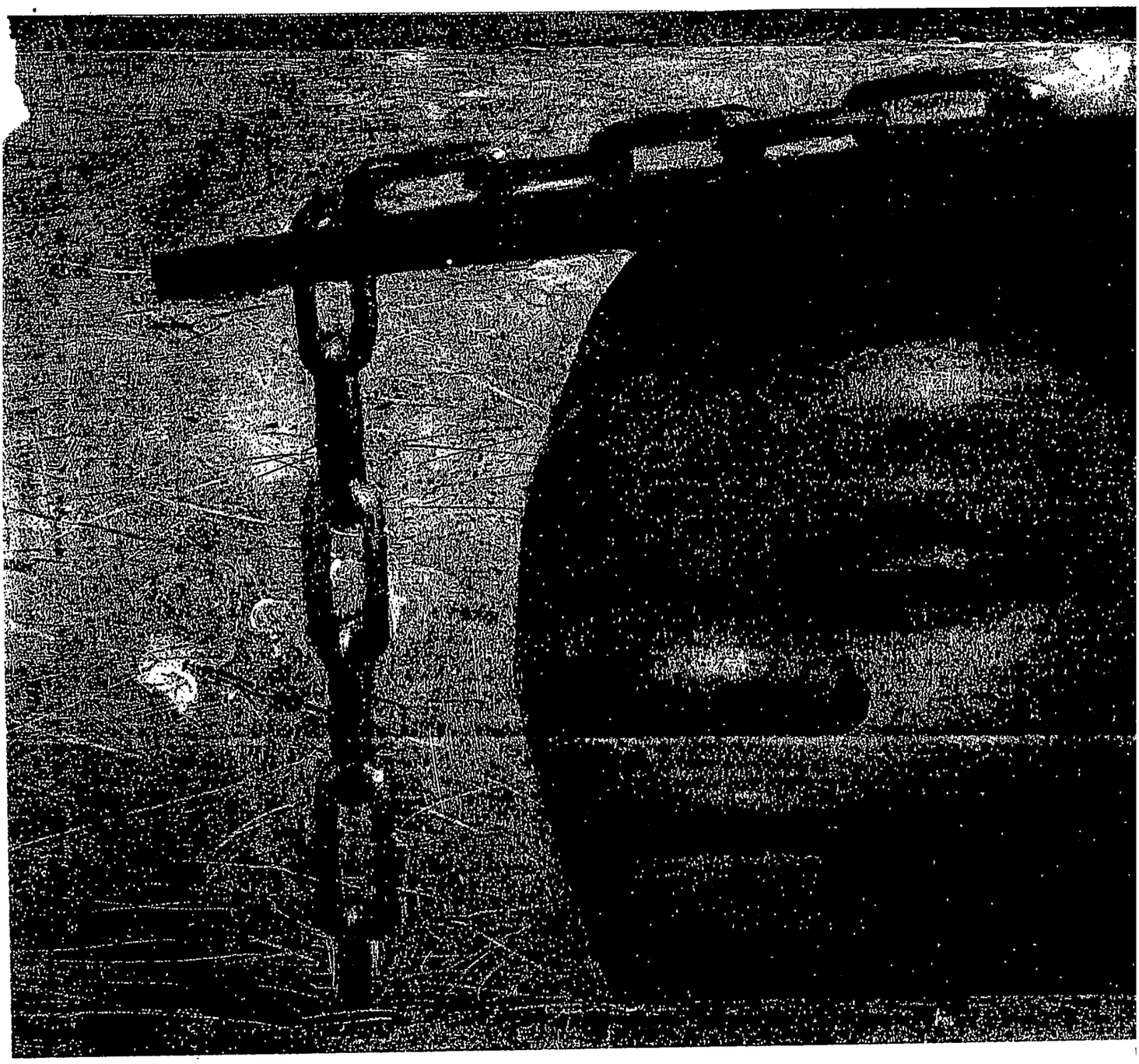
In theory, affirmative action certainly has all the moral symmetry that fairness requires. It is reformist and corrective, even repentent and redemptive. And I would never sneer at these good intentions. Born in the late 1940's in Chicago, I started my education (a charitable term, in this case) in a segregated school, and suffered all the indignities that come to blacks in a segregated society. My father, born in the South, made it only to the third grade before the white man's fields took permanent priority over his formal education. And though he educated himself into an advanced reader with an almost professorial authority, he could only drive a truck for a living, and never earned more than $90 a week in his entire life. So yes, it is crucial to my sense of citizenship, to my ability to identify with the spirit and the interests of America, to know that this country, howe imperfectly, recognizes its past sins and wis to correct them.

Yet good intentions can blind us to the eff they generate when implemented. In our soc affirmative action is, among other thing testament to white good will and to black po and in the midst of these heavy investment effects can be hard to see. But after 20 year implementation I think that affirmative ac has shown itself to be more bad than good that blacks — whom I will focus on in this es — now stand to lose more from it than they g

In talking with affirmative-action admi trators and with blacks and whites in gener found that supporters of affirmative ac focus on its good intentions and detract emphasize its negative effects. It was virtu impossible to find people outside either ca The closest I came was a white male mana at a large computer company who said, think it amounts to reverse discrimination,

Shelby Steele is an English professor at San Jose State University in California. A collection of his essays, "The Content of Our Character," will be published in August.

Photo Copy Preservation



I'll put up with a little of that for a little more diversity." But this only makes him a half-hearted supporter of affirmative action. I think many people who don't really like affirmative action support it to one degree or another anyway.

I believe they do this because of what happened to white and black Americans in the crucible of the 1960's, when whites were confronted with their racial guilt and blacks tasted their first real power. In that stormy time white absolution and black power coalesced into virtual mandates for society. Affirmative action became a meeting ground for those mandates in the law. At first, this meant insuring equal opportunity. The 1964 civil-rights bill was passed on the understanding that equal opportunity would not mean racial preference. But in the late 60's and early 70's, affirmative action underwent a remarkable escalation of its mission from simple anti-discrimination enforcement to social engineering by means of

Affirmative action, the author believes, has proved more bad than good. Blacks, he says, now stand to lose more from it than they gain.

Photo Copy Preservation

quotas, goals, timetables, set-asides and other forms of preferential treatment.

Legally, this was achieved through a series of executive orders and Equal Employment Opportunity Commission guidelines that allowed racial imbalances in the workplace to stand as proof of racial discrimination. Once it could be assumed that discrimination explained racial imbalances, it became easy to justify group remedies to presumed discrimination rather than the normal case-by-case redress.

Even though blacks had made great advances during the 60's without quotas, the white mandate to achieve a new racial innocence and the black mandate to gain power, which came to a head in the very late 60's, could no longer be satisfied by anything less than racial preferences. I don't think these mandates, in themselves, were wrong, because whites clearly needed to do better by blacks and blacks needed more real power in society. But as they came together in affirmative action, their effect was to distort our understanding of racial discrimination. By m ing black the color of prefere these mandates have reburdened ciety with the very marriage of c and preference (in reverse) that set out to eradicate.

When affirmative action grew social engineering, diversity beca a golden word. Diversity is a t that applies democratic principle races and cultures rather than to zens, despite the fact that ther nothing to indicate that real diver is the same thing as proportionate resentation. Too often the result of on campuses for example, has be democracy of colors rather tha people, an artificial diversity that g the appearance of an educational p ty between black and white stud that has not yet been achieved in r ty. Here again, racial preferences low society to leapfrog over the d cult problem of developing black parity with whites and into a cosm diversity that covers the blemish disparity — a full six years after mission, only 26 to 28 percent of bla graduate from college.

Racial representation is not same thing as racial developm Representation can be manu tured; development is always h earned. But it is the music of ir cence and power that we hear in af mative action that causes us to c to it and to its distracting emph on representation. The fact is after 20 years of racial preferen the gap between median income black and white families is gre than it was in the 1970's. None of is to say that blacks don't need p cies that insure our right to eq opportunity, but what we need m of is the development that will le take advantage of society's effort include us.

I think one of the most troubl effects of racial preferences blacks is a kind of demoralizat Under affirmative action, the qua that earns us preferential treatm is an implied inferiority. Howe this inferiority is explained — an is easily enough explained by myriad deprivations that grew ou our oppression — it is still inferior There are explanations and t there is the fact. And the fact mus borne by the individual as a condi apart from the explanation, ap even from the fact that others himself also bear this condition. integrated situations in which bla must compete with whites who n be better prepared, these expla tions may quickly wear thin and pose the individual to racial as wel personal self-doubt. (Of cou whites also feel doubt, but only p sonally, not racially.)

What this means in practical ter is that when blacks deliver th selves into integrated situations t encounter a nasty little reflex whites, a mindless, atavistic re that responds to the color black v negative sterotypes, such as intel tual ineptness. I think this reflex barrasses most whites today thus it is usually quickly repress On an equally atavistic level,

Nobody has the Carlton Combination.

1. Lowest tar. Lowest nicotine.



2. "The taste that's right."



1 mg. tar
0.1 mg. nic.

U.S. Gov't Test Method confirms of all king soft packs:
Carlton is lowest.

King Size Soft Pack: 1 mg. "tar", 0.1 mg. nicotine av. per cigarette by FTC method.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

© The American Tobacco Co. 1990.

Photo Copy Preservation

After 20 years of affirmative action, black and white incomes are farther apart.

black will be aware of the reflex his color triggers and will feel a stab of horror at seeing himself reflected in this way. He, too, will do a quick repression, but a lifetime of such stabbings is what constitutes his inner realm of racial doubt. Even when the black sees no implication of inferiority in racial preferences, he knows that whites do, so that — consciously or unconsciously — the result is virtually the same. The effect of preferential treatment — the lowering of normal standards to increase black representation — puts blacks at war with an expanded realm of debilitating doubt, so that the doubt itself becomes an unrecognized preoccupation that undermines their ability to perform, especially in integrated situations.

I believe another liability of affirmative action comes from the fact that it indirectly encourages blacks to exploit their own past victimization. Like implied inferiority, victimization is what justifies preference, so that to receive the benefits of preferential treatment one must, to some extent, become invested in the view of one's self as a victim. In this way, affirmative action nurtures a victim-focused identity in blacks and sends us the message that there is more power in our past suffering than in our present achievements.

When power itself grows out of suffering, blacks are encouraged to expand the boundaries of what qualifies as racial oppression, a situation that can lead us to paint our victimization in vivid colors even as we receive the benefits of preference. The same corporations and institutions that give us preference are also seen as our oppressors. At Stanford University, minority-group students — who receive at least the same financial aid as whites with the same need — recently took over the president's office demanding, among other things, more financial aid.

But I think one of the worst prices that blacks pay for pref-

(Continued on Page 73)

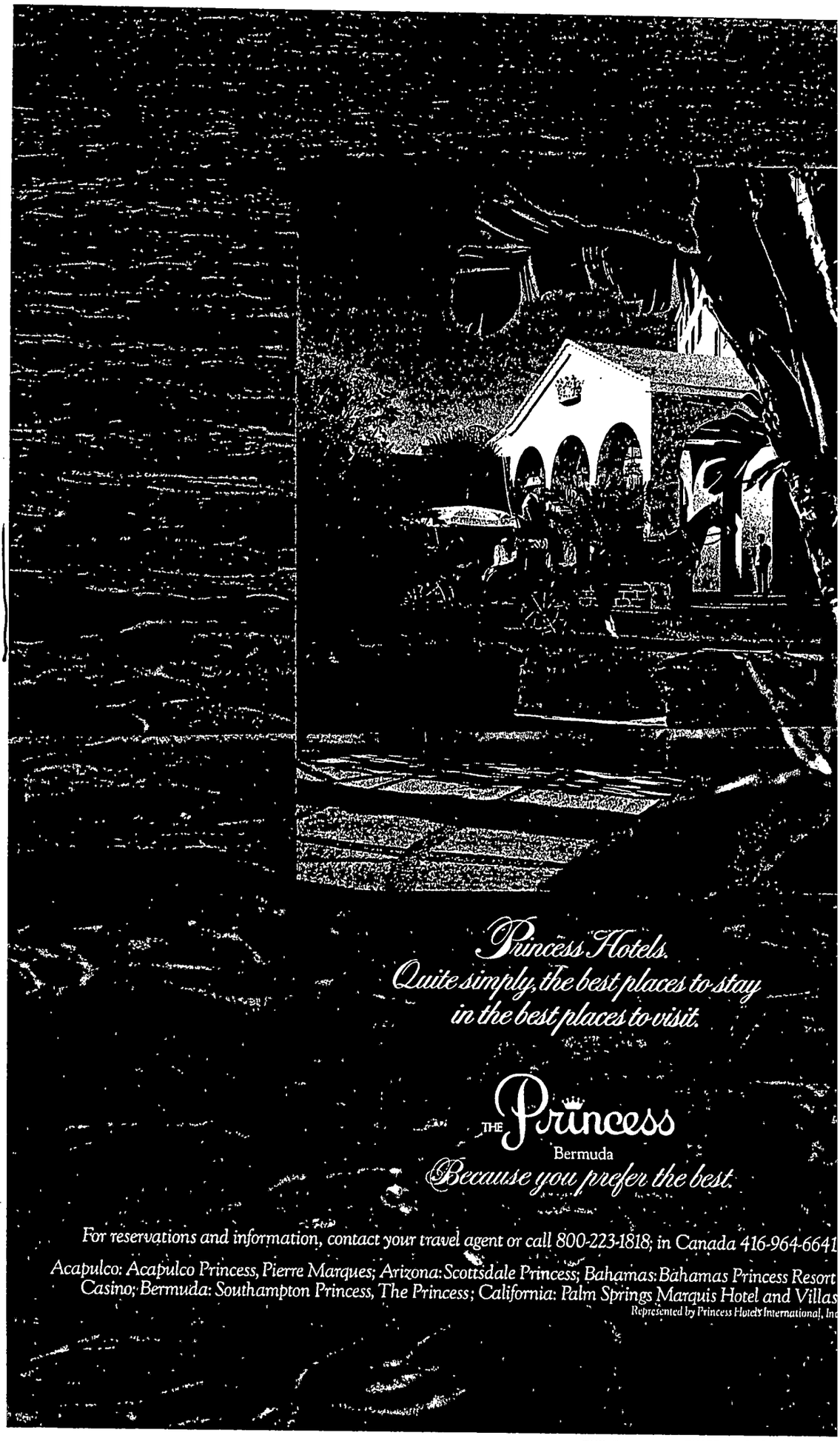


Photo Copy Preservation

BLACKS

Continued from Page 49

erence has to do with an illusion. I saw this illusion at work recently in the mother of a middle-class black student who was going off to his first semester of college: "They owe us this, so don't think for a minute that you don't belong there." This is the logic by which many blacks, and some whites, justify affirmative action — it is something "owed," a form of reparation. But this logic overlooks a much harder and less digestible reality, that it is impossible to repay blacks living today for the historic suffering of the race. If all blacks were given a million dollars tomorrow it would not amount to a dime on the dollar for three centuries of oppression, nor would it dissolve the residues of that oppression that we still carry today. The concept of historic reparation grows out of man's need to impose on the world a degree of justice that simply does not exist. Suffering can be endured and overcome, it cannot be repaid. To think otherwise is to prolong the suffering.

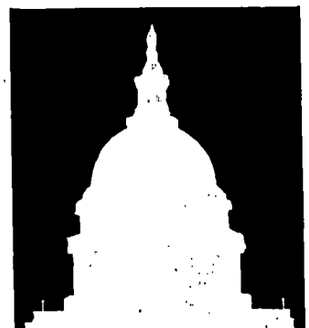
Several blacks I spoke with said they were still in favor of affirmative action because of the "subtle" discrimination blacks were subject to once they were on the job. One photojournalist said, "They have ways of ignoring you." A black female television producer said: "You can't file a lawsuit when your boss doesn't invite you to the insider meetings without ruining your career. So we still need affirmative action." Others mentioned the infamous "glass ceiling" through which blacks can see the top positions of authority but never reach them. But I don't think racial preferences are a protection against this subtle discrimination; I think they contribute to it.

In any workplace, racial preferences will always create two-tiered populations composed of preferreds and unpreferred. In the case of blacks and whites, for instance, racial preferences imply that whites are superior just as they imply that blacks are inferior. They not only reinforce America's oldest racial myth but, for blacks, they have the effect of stigmatizing the already stigmatized.

I think that much of the "subtle" discrimination that blacks talk about is often (not always) discrimination against the stigma of questionable competence that affirmative action marks blacks with. In this sense, preferences make scapegoats of the very people they seek to help. And it may be that at a certain level employers impose a glass ceiling, but this may not be against the race so much as against the race's reputation for having advanced by color as much as by competence. This ceiling is the point at which corporations shift the emphasis from color to competency and stop playing the affirmative-action game. Here preference backfires for blacks and becomes a taint that holds them back. Of course one could argue that this taint, which is after all in the minds of whites, becomes nothing more than an excuse to discriminate against blacks. And certainly the result is the same in either case — blacks don't get past the glass ceiling. But this argument does not get around the fact that racial preferences now taint this color with a new theme of suspicion that makes blacks even more vulnerable to discrimination. In this crucial yet gray area of perceived competence, preferences make whites look better than they are and blacks worse, while doing nothing whatever to stop the very real discrimination that blacks may encounter. I don't wish to justify the glass ceiling here, but only suggest the very subtle ways that affirmative action revives rather than extinguishes the old rationalizations for racial discrimination.

I believe affirmative action is problematic in our society because we have demanded that it create parity between the races rather than insure equal opportunity. Preferential treatment does not teach skills, or educate, or instill motivation. It only passes out entitlement by color, a situation that in my profession has created an unrealistically high demand for black professors. The social engineer's assumption is that this high demand will inspire more blacks to earn Ph.D's and join the profession. In fact, the number of blacks earning Ph.D's has declined in recent years. Ph.D's must be developed from preschool on. They require family and community support. They must acquire an entire system of values that enables them to work hard while delaying gratification.

It now seems clear that the



WASHINGTON WEEK IN REVIEW:

Exploring the issues that shape our times

Each week, noted journalists analyze the events that affect our lives on "Washington Week in Review," public television's longest-running public affairs program.

Now in its 23rd year, "Washington Week in Review" provides a probing in-depth look at what is happening in the nation and the world.

Ford Motor Company, in its 11th consecutive year, is proudly joined by Ford Aerospace in underwriting this informative program.

"Washington Week in Review" is produced by WETA in Washington, D.C. Consult your local listings for day and time in your community.

Ford

heart ache. This is a very personal and sensitive area, and it should always remain a matter of individual choice, but I do think we have to have better methods of letting people know that families can be planned if they are desirous of having such information.

11. DO YOU FAVOR LEGALIZING ABORTION?

This is a complicated area. I do not favor a federal abortion law. It seems to me that this is a matter for the individual states to decide. I, personally, feel that women should have the freedom to choose or not choose abortion and that it should always be done by competent medical personnel.

12. WHAT IS YOUR POSITION ON CHANGING THE SENIORITY SYSTEM OF CONGRESS?

Chairmen of committees should be elected by their peers just as the Congressional leadership is selected. This change would make the committees more responsive to the needs of the people. It will not remove the chairmanships from the effective chairmen. Specifically, I propose that chairmen be elected by the committee members from the five most senior members of the committee. If the present chairman is effective, he will continue to serve as the chairman of the committee.

13. WHAT DO YOU CONSIDER TO BE THE NATIONAL PRIORITIES FOR THE NEXT CONGRESS?

The priorities with which Congress must deal are to reach a just and secure peace, return stability to our economy, find a lasting solution to our rampant crime problems, deal with the preservation of our environment, and seek new ways to upgrade quality of life for all of our people and thus preserve and develop our human resources.

14. WHAT DO YOU CONSIDER TO BE THE RESPONSIBILITIES OF THE UNITED STATES AS A MAJOR WORLD POWER?

The role of the United States as a major world power carries with it awesome responsibilities. It does not include being policeman for the world. But it does entail the maintenance of strength, economic and social as well as military, and a determination to live up to our existing commitments for our own security and the security of the free world. But we cannot allow ourselves to be dragged into conflicts around the world when we have no interest involved. We now know that money will not buy the good will of our world neighbors, nor will increasing world trade in war weapons insure peace. Our main responsibility is to be so secure internally, that by our example, there can be no question that democracy is freedom and justice, and it works.

15. WHAT IS YOUR POSITION ON OPEN-HOUSING?

In April of 1968 the Congress passed the Civil Rights Act of 1968 which included a section providing for fair housing. At that time, I expressed some concern about some of the provisions of the open-housing section. Although the individual homeowner was exempt when he sold directly to a buyer, I felt he should have the right to

sell or rent through a real estate agent. The way the bill was written, however, it was discriminatory toward the real estate agent. I voted for this bill because I did not feel that in all good conscience and fairness I could vote against legislation which would permit a Negro to buy or rent a home of his choosing if he has the money. I put great emphasis in voting for that bill on the anti-riot provisions of the bill, and I think it is significant that the "Chicago Seven" were convicted under this law. I recognized and fought against the imperfections of this bill, but finally voted for it because we must have strong law enforcement and we must, while protecting individual property rights, offer hope and fair play to all Americans regardless of their color.

16. WHAT IS YOUR STAND ON THE ANTI-BALLISTIC MISSLE (ABM) SAFEGUARD SYSTEM?

I am convinced that the initial deployment steps of the ABM have been helpful in getting the SALT talks under way. I supported the initial deployment requested last year and the limited - one additional base - increase this year. I would like to see the SALT talks so successful and with such inspection safeguards that the full deployment of ABM will not be necessary.

17. WHAT CAUSES INFLATION? HOW DO YOU FEEL IT COULD BE STOPPED?

Inflation is caused for the most part by excessive, wasteful government spending and fiscal irresponsibility on the part of labor and business in setting wage and price policies. A curb on wasteful spending by government and restraint by business and labor will be required to stop inflation. During the period from 1960-1968, the federal government spent $60.2 billion more than it took in. This is what has caused the tremendous inflation we have been suffering from. This is what must be stopped. President Nixon has submitted a budget that will permit a surplus, but the Democrat Congress again seems determined to create another deficit. I am working to keep this government spending within the bounds of fiscal responsibility, effectiveness, and efficiency.

18. DO YOU APPROVE OF GIVING FOREIGN AID TO COMMUNIST OR PRO-COMMUNIST COUNTRIES?

No. I have voted in the House against doing this.

19. WHAT IS YOUR ATTITUDE TOWARD THOSE WHO PROTEST THE WAR IN VIETNAM?

Lawful protests are a fundamental right we must protect. Unlawful protests subvert our society and must not be condoned.

20. HOW DO YOU FEEL ABOUT SEX EDUCATION IN THE SCHOOLS?

I think that what is needed is some kind of balance and good taste in handling sex education. Ideally, the school and the home should be able to work together to create a sound balance between scientific knowledge and morality. This is indeed a sensitive subject, and I

Services of Mead Data Central

6TH STORY of Level 2 printed in FULL format.

Copyright (c) 1990 The Washington Post

January 28, 1990, Sunday, Final Edition

SECTION: OUTLOOK; PAGE C1

LENGTH: 1520 words

HEADLINE: Why Blacks Like Bush;
He's Got the Image -- But Soon He'll Need Results

SERIES: Occasional

BYLINE: Juan Williams

BODY:

AS GEORGE Bush stands before Congress this week to deliver his annual State of the Union message, his political power is made stronger by support from a suprising quarter: black Americans.

Blacks are at the heart of the president's overall popularity, says Lee Atwater, chairman of the Republican National Committee. At this point in his presidency, Bush enjoys the highest approval level of any post-World War II president. Atwater believes good feelings about Bush in the black community translate into higher approval ratings across the political spectrum.

In fact, Bush has consistently scored high with black voters since taking office. Last February he had a 61 percent approval rating among blacks; that rating has now climbed to 74 percent -- only six points lower than among whites. Even Americans who are not employed, a disproportionate share of whom are black, give the president a 76 percent approval rating.

Here is a paradox. George Bush served for eight years as vice president to Ronald Reagan, the most unpopular president with blacks in modern history. He ran his successful presidential campaign using the face of Willie Horton -- the black rapist and slasher -- as a frightening logo and drew only about 12 percent of the black vote. Yet now he is almost as popular with the black public as with the white.

How can this be? One explanation, offered by Milton Morris, research director for the Joint Center for Political Studies, the nation's major black think tank, is that most black Americans, like most white Americans, like to like their president. Says Morris, "The black community was dying to express support for someone in the White House and George Bush is the lucky ben eficiary of that desire. And to his credit he has been accessible and willing to be responsive to black issues and concerns."

Atwater doubts that blacks perceived Bush's Willie Horton ads as racist. "If black voters truly thought it was a racial campaign they wouldn't support him," says Atwater. "Black voters understand the furlough issue, the crime issue."

As for Bush's position as Reagan's successor, it seems to have helped rather than hurt him: To a degree, Reagan's adversarial relationship with blacks was the launching pad for Bush's high ratings. "It has been so easy to stand out in sharp contrast to Ronald Reagan when it comes to black people," says Morris.

LEXIS® NEXIS® LEXIS® NEXIS®

Services of Mead Data Central

(c) 1990 The Washington Post, January 28, 1990

But Bush has also taken positive steps to improve his standing with blacks. Most have involved more public relations than substance -- meeting with national and foreign black leaders, speaking at the National Baptist Convention. But these visible acts of leadership have apparently been important in setting the tone for his administration.

"There is no question in my mind that Ronald Reagan would not have met with Bishop Tutu -- Bush did," says Benjamin Hooks, the NAACP director who met only once with Reagan but has had five meetings with Bush during his first year in office.

"I have the impression," Hooks adds, "that Bush comes from the old-line, moderate wing of the Republican party like his father before him. He doesn't trace his political line to Barry Goldwater who turned Republicans away from black people." Unlike Reagan, Bush has not made himself an opponent of affirmative action. After the Supreme Court struck down a contract set-aside plan last year, Bush said he would "not read into that a mandate to me to stop trying on equal employment and on affirmative action generally."

Bush is also praised for appointing blacks to high-level positions. His most visible choices have been Colin Powell, as chairman of the Joint Chiefs of Staff; Constance Newman as head of the Office of Personel Management; Fred McClure as head of congressional liaison ; and Louis Sullivan as head of the Health and Human Services Department.

Although Powell was originally elevated to the influential position of National Security Adviser by Reagan, Bush has garnered far more credit for his appointments.

"I'll tell you one key difference between Bush and Reagan's black appointees," says Armstrong Williams, vice-president of B&C Associates in Highpoint, N.C. and a former Reagan administration appointee. "Bush puts people there because they are qualified." Instead, Williams feels, Reagan's main interest was "statistics -- so he could rattle off how many blacks worked for him."

"No one who saw [Powell] during the Panama crisis was talking about affirmative action -- they were saying what a strong commander he is," says Williams, "and the man who put those people in place, who gave them responsibility and listens to them is George Bush. "

Bush has also pursued a strategy of going beyond black leaders to visit black neighborhoods and homes. Last week he visited a Kansas City community, the week before he was at a public housing project in Alexandria.

"He was comfortable and they were comfortable with him," says Jack Kemp, the housing secretary who accompanied Bush to the housing project.

"They didn't come up and say I want to join the Republican party but they did say 'Keep it up Mr. President -- Don't give up on us.' And when he said to them he wants to do something to reverse 30 years of failed social policy by putting rewards back in life for cleaning up your house, staying in school, and taking jobs, those people are saying to him, 'Yes, sir, we'd be proud to be a part of something that stands for dignity, justice and pride.' "

LEXIS® NEXIS® LEXIS® NEXIS®

Services of Mead Data Central

(c) 1990 The Washington Post, January 28, 1990

"It will not last," says Michael Frazier, legislative aide to Sen. Edward Kennedy (D-Mass.). Pointing to pending measures dealing with discrimination in the workplace, the death penalty and South Africa, Frazier predicts that "Bush will have to take stands on issues of importance to black America in the next year. Let's see if he is still popular by the end of this year."

GRAPHIC: ILLUSTRATION, PETER ALSBERG

TYPE:
FEATURE

SUBJECT:
BLACK; U.S. PRESIDENT

NAMED-PERSONS:
GEORGE BUSH

LEXIS® NEXIS® LEXIS® NEXIS®

George Bush for President.

GEORGE BUSH on AFFIRMATIVE ACTION

George Bush supports affirmative action. As a businessman in Texas, he practiced affirmative action in hiring and promotion of black and hispanic employees. The beneficial effects of affirmative action policies can be seen in the closing gap in wage rates between white and black workers, particularly among the young and college-educated.

However, he is opposed to quotas in Federal or other hiring.

...report ... published ... and ... available for purchase from the Federal Election Comm., ... Washington DC 20463

CW: 11.29.1

AFFIRMATIVE ACTION

QUESTION: DO YOU SUPPORT AFFIRMATIVE ACTION?

ANSWER: I support affirmative action, as it helps bring people up to the starting line on an equal footing. But I have opposed quotas.

SOURCE: JEWISH LIVING MAGAZINE QUESTIONNAIRE from 3rd person.

1977, private citizen George Bush served as host and ...e sponsor of Howard University's "New Directions" ...raising drive.

... July, Candidate for President George Bush appointed ...Fletcher (author of the Affirmative Action Legislation 1974) as Chairman of Blacks for Bush.

BUSH FACTS

George Bush, more than any other candidate, has both the experience and the sensitivity to work in the interest of all the people of the United States. His convictions that minorities must be represented in responsible positions in all areas of government are firm. Bush is equally committed to creating opportunity for minorities in the private sector, and these concerns will be of primary importance to his administration when he is elected to the Presidency.

Specifically, in his numerous positions in private and public life, he has worked to insure the participation of minorities at every turn.

- In the late 1950's he was Chairman of the Midland, Texas United Way Annual Campaign.

- As President and co-founder of ZAPATA Off-Shore Company, George Bush worked hard to train and hire Mexican-Americans and Blacks at all levels of the corporation.

- A Congressman from Houston, Texas from 1966-1970, Bush sponsored and fought for Civil Rights legislation, including the Fair Housing Act.

- In 1970, George Bush became our Ambassador to the United Nations where greater than one-third of his staff was Black. In 1972, he appointed a Black, Arthur Fletcher (recently a candidate for Mayor in Washington, D.C.) to campaign nationwide in support of the United States position on the crucial " 2 China " question.

- In 1972, as Chairman of the Republican National Committee, George Bush initiated a program to attract minorities in large numbers to the Republican Party through increased voter education and registration drives. In those R.N.C. years he also started the National Black Republican Council and was the first Republican official at that high level to meet bi-weekly with members of the National Association of Black Press.

- After 2 years as our Ambassador to China, Bush was brought back to this country to head the Central Intelligence Agency. There, he was the first CIA Director to initiate a program to actively solicit and train minorities for responsible roles in the intelligence community and State Department.

George Bush for President.

GEORGE BUSH ON THE ISSUES

AFFIRMATIVE ACTION

George Bush has long favored action designed to ensure that every American has equal access to opportunity, but he opposes quotas as arbitrary and unfair. The Bakke decision struck down earlier decisions favoring quotas. George Bush supports that decision.

A copy of our report is on file with the Federal Election Commission and available for purchase from the Federal Election Commission, Washington, D.C. 20463

C030000 CIVIL RIGHTS/*RECORD

In 1968, as a freshman congressman. Mr. Bush headed back to his conservative Republican district in Houston after casting a vote in favor of landmark open-housing legislation.

"Somehow it seems fundamental that a man should not have a door slammed in his face because he is a Negro or speaks with a Latin American accent." he said. -- The Sun, January 17, 1988.

Bush is matter-of-fact in acknowledging that he was not out front on civil rights in the '60s. But he reacts strongly to any suggestion that his privileged upbringing might naturally make him insensitive to the needs of minorities and the poor. "Did they ask that of Franklin D. Roosevelt?...Or John Kennedy? The answer is no. They ask it of Republicans who came from backgrounds like mine. They don't ask it of Democrats. See, if I were a Democrat, nobody would think of asking me a question like that because I would be spending more (federal money) on whatever it is. -- Inquirer, February 28, 1988.

"I voted for every piece of civil rights legislation for the four short years I was in Congress," Mr. Bush said in discussing the bill before the veto. "And I don't want to see us positioned - anything to interpret this as being against civil rights." -- New York Times, March 24, 1988.

In April 1968, Rep. George Bush (R -Tex.) voted for a landmark fair housing bill.... Bush said, "I do not want it on my conscience that I have voted against legislation that would permit a Negro, say a Negro serviceman returning from Vietnam, where he has been fighting for the ideals of his country, to buy or rent a home of his choosing if he has the money."

"The place was jammed," he said. "Judging from the boos and catcalls when I was introduced, it was also seething." Bush reminded them of the blacks fighting in Vietnam and asked how they would feel if a black veteran returned "only to be denied the freedom that we, as white Americans, enjoyed?" the crowd gave him a standing ovation, he recalled. -- The Washington Post, March 27, 1988.

"I'm not going to start doing something 7-1/2 years into an administration that I haven't been willing to do before." Bush said at a news conference Thursday in Hartford, Conn., when asked if he supported the veto of the civil rights bill. "I'm not going to try now to distance myself." -- Philadelphia Inquirer, March 27, 1988.

C030000 CIVIL RIGHTS/*GROVE CITY BILL

Bush reiterated his position that the legislation as written was flawed and that he was not going and that he was not going to start contradicting Reagan this late in his term. but he said he supported the bill's underlying intent.

Perhaps Rev. Jackson was talking when he should have been listening," Bush said.

It's not that I'm afraid to do what some of the Democrats are afraid to do go after him," Bush said. "But if he's the nominee, we'll have a chance to discuss civil rights records and I'll lay my record on the ground with anybody." -- (AP), March 25, 1988.

"Don't use past pluperfect, let's go to the future," he urged reporters when asked to clarify his position. "Others will try, the Democrats will try, they will try to get me to say would you have done this different from the president, you owe it to us to tell us. I'm going to say I don't think I do. I'll do it (Civil Rights) exactly the way I spelled out I'm going to do it." -- The Washington Post, March 27, 1988.

C030000 CIVIL RIGHTS/*GROVE CITY BILL

The vice president said he favored the basic premise of the bill, but didn't want to go against the president on the matter. Besides, he said, the legislation was flawed. Jackson has scoffed at that, saying Bush lacks leadership.

"Perhaps Rev. Jackson was talking when he should have been listening," Bush retorted Thursday. "If he's the nominee, we'll have a chance to discuss civil rights records and I'll lay my record on the ground with anybody." -- (AP), March 25, 1988.

"I don't think anybody is going to be judged by one vote in one administration," Bush said when asked about criticism from Democratic presidential hopeful Jesse L. Jackson and others of his support of the veto, overridden by Congress this week. --Washington Post, March 25, 1988,.

Sometimes we forget that civil rights isn't simply a bill, it's a whole state of mind in terms of education, a state of mind in terms of opportunity, a state of mind in terms of education, whatever these things are," Bush said. -- Washington Post, March 25, 1988.

Bush emphasized that he was motivated by his policy of supporting positions taken by the president. Asked if he would oppose Reagan's veto, he said, "I'm not going to start doing that now, which I haven't done for seven and a half years." -- Houston Chronicle, March 22, 1988.

Bush said today that there were "shortcomings" in the bill, but when asked what his specific objections were, Bush offered only one, that the law might impinge on religious organizations and their operations such as day care centers. He did not elaborate. He indicated, however, that he did not have major objections.

As for Jackson's criticism, Bush said: "Perhaps Rev. Jackson was talking when he should have been listening....If he's the nominee we'll have a chance to talk about civil rights records. I'll lay mine on the ground with anybody." -- Washington Post, March 25, 1988.

C030000 CIVIL RIGHTS/*GROVE CITY BILL

Vice President George Bush indicated Monday he supported President Reagan's veto of a major civil rights bill, even as the House and Senate prepared to override the president's action.

"Let me be very frank with you," Bush told a group of his black supporters. "The legislation is imperfect, and the imperfections need to be corrected.

Bush emphasized that he was motivated by his policy of supporting positions taken by the president. Asked if he would oppose Reagan's veto, he said, "I'm not going to start doing that now, which I haven't done for seven and half years." -- Houston Chronicle, March 22, 1988.

"I'm not going to start differing with the president after seven-and-a-half years into the vice presidency,"

"I've stood with the president, and that the legislation needs to be perfected, and I hope it will be." -- The State, Columbia, South Carolina.

Speaking to a black audience, Bush said the bill was "imperfect. The imperfections should be corrected." But then he went on to say he supported its purpose: "The Federal government must require that organizations that get tax dollars comply with our civil rights laws." -- (AP), March 23, 1988.

"I'm not going to start doing that now which I hav'nt done in 7 1/2 years," he told reporters. "I favor the overturning of Grove City." -- Los Angeles Times, March 23, 1988.

"I favor the overturning of Grove City."

Bush said he believed the legislation passed by Congress was "imperfect" and could infringe on religious freedoms. -- Los Angeles Times, March 23, 1988.

Vice President Bush said today that the civil rights bill Congress passed over President Reagan's veto this week should be "fully enforced," and though he continued to cite flaws in the measure he would not say whether he would have vetoed the bill himself. -- New York Times, March 24, 1988.

C030000 CIVIL RIGHTS/*GROVE CITY BILL

Bush adroitly maneuvered around the hard fact that earlier in the day, while campaigning in New Jersey, he had announced his support for President Reagan's veto last week of the Grove City civil rights bill passed by Congress. The bill broadly expands civil rights coverage for institutions receiving federal funds, and Reagan said he wants to "ensure equality" but that the bill is too intrusive.

Bush said in his speech last night that he wasn't going to differ with Reagan on the matter, and he even drew a standing ovation by adding. "The federal government must require that organizations that get tax dollars comply with our civil rights laws. And that's fundamental." -- Washington Post, March 22, 1988.

Even so, he said of the so-called Grove City legislation: "The federal government must require that organizations that get tax dollars comply with our civil rights laws. And that is fundamental." Many in his audience stood to applaud this statement. --Boston Globe, March 22, 1988.

"Let me be very frank with you," Bush told a group of his black supporters. "The legislation is imperfect, and the imperfections should be corrected."..."Having said that, however, the federal government must require that organizations that get tax dollars comply with our civil rights laws. That's fundamental."...Bush told the gathering that civil rights "was not just a matter of social policy, but of fundamental right."..."If I am the Republican nominee," he continued, he continued, "I want to attract to this party -- the party of Lincoln -- the broadest base of Americans possible, and that includes blacks, Hispanics and all minorities." -- Houston Chronicle, March 22, 1988.

"I've said I've stood with the President, and that the legislation needs to be perfected, and I hope it will be." -- The Philadelphia Inquirer, March 22, 1988.

"The pending legislation, let's face it, if we're rational with each other, is imperfect. The imperfections should be corrected.

"Having said that," he added, "the federal government must require that organizations that get tax dollars comply with our civil rights laws. And that's fundamental." -- Washington Post, March 22, 1988.

Bush said he also supported President Reagan's veto of the Civil Rights Restoration Act passed both chambers earlier this year by large margins. Both supporters and opponents of the measure said there was little chance the veto would be sustained.

It was prompted by a 1984 Supreme Court ruling that civil rights laws applied only to a specific program or activity receiving federal aid. Under the decision, for example, the government could not cut off money to a college if the discrimination occurred in a department that did not receive such aid. -- (AP), March 21, 1988.

Asked if he would oppose Mr. Reagan's veto, he said, "I'm not going to start doing that now, which I haven't done for seven and half years." -- New York Times, March 22, 1988.

"I'm not going to start doing that now which I haven't done in 7 1/2 years," "I favor the overturning of Grove City."

Bush said he believed the legislation passed by Congress was "imperfect" and could infringe on religious freedoms.

He told a group of local reporters in Connecticut that with selective veto power he could, as president, shape such a bill to his liking, vetoing those parts he does not like and signing the rest. -- Plain Dealer, March 22, 1988.

"I'm not going to start differing with the president after 7 1/2 years into the vice presidency," Bush said Monday in Hartford, Conn.

"I've said I've stood with the president, and that the legislation needs to be perfected, and I hope it will be."

Bush said that while he considered the legislation "imperfect," he believes "The federal government must require that organizations that get tax dollars comply with our civil rights of every American." -- Orange County Register, March 22, 1988.

Services of Mead Data Central

157TH STORY of Level 2 printed in FULL format.

The Associated Press

The materials in the AP file were compiled by The Associated Press. These materials may not be republished without the express written consent of The Associated Press.

July 11, 1988, Monday, PM cycle

SECTION: Washington Dateline

LENGTH: 346 words

HEADLINE: Don't Take Blacks for Granted, Hooks Tells Democrats

DATELINE: WASHINGTON

KEYWORD:
NAACP

BODY:

Democrats should not take blacks for granted, and Republicans are making a mistake in ignoring the black vote, says NAACP Executive Director Benjamin L. Hooks.

Hooks opened the 79th annual convention of the National Association for the Advancement of Colored People Sunday night with a speech in which he also called on blacks to emphasize self-help.

"It would be a tragic mistake to take us for granted," Hooks said in remarks aimed at the Democrats. "Don't take us for granted."

To the Republicans, he said, "You're making a terrible mistake to continue to ignore the black vote."

Blacks have won an inspiring measure of economic, political and social freedom, Hooks said. But racism and hopelessness persist, he added.

He accused the Reagan administration of abandoning the war on poverty and dismantling civil rights gains.

"The question tonight I propose is: Where do we go from here?" Hooks said.

In answering his own question, he said:

"First of all, we shall go forward to first class citizenship only if we place renewed emphasis on self-help. What good is freedom of thought if you can't think? What good is freedom of speech if you can't speak?"

Hooks praised Jesse Jackson's presidential campaign as "brilliant and incredible" but said the decision to seek or accept the vice presidency "is one that he alone has to make."

About 16,000 people are expected to attend the five-day convention, whose theme is "Vote! Be Heard." Vice President George Bush, the expected Republican presidential nominee, is scheduled to speak Tuesday and

LEXIS® NEXIS® LEXIS® NEXIS®

Services of ead Data Central

Massachusetts Gov. Michael Dukakis, the expected Democratic nominee, is to address the convention Wednesday.

The 11-year-old grandson of Medgar Evers, the field secretary for the NAACP in Mississippi who was shot to death in 1963, spoke earlier Sunday in Arlington National Cemetery.

"If we didn't have those like Malcolm X, Martin Luther King Jr. and Medgar Evers, we wouldn't be free today," said Daniel Evers Everette. "We wouldn't be able to go anywhere we want to. We wouldn't be able to do anything we want to."

LEXIS® NEXIS® LEXIS® NEXIS®

Services of Mead Data Central

150TH STORY of Level 2 printed in FULL format.

The Associated Press

The materials in the AP file were compiled by The Associated Press. These materials may not be republished without the express written consent of The Associated Press.

July 12, 1988, Tuesday, AM cycle

LENGTH: 625 words

HEADLINE: Bush Pledges 'New Day' In Civil Rights If Elected President

BYLINE: By TERENCE HUNT, AP White House Correspondent

DATELINE: WASHINGTON

KEYWORD:
Bush

BODY:

Republican George Bush told blacks Tuesday his presidency would mark "a new day" after the Reagan administration, promising, "I will be personally involved in protecting the civil rights of all Americans."

Appearing before the 79th convention of the NAACP, the vice president promised, "You will be heard, I promise you that. You're going to be called on. You're going to be partners in my presidency."

Bush, sure to be the Republican presidential nominee, also paid tribute to Jesse Jackson, the runner-up in the Democratic presidential primaries.

While saying he had profound policy differences with Jackson, Bush said, "I salute him for running the race, for being heard, and he deserves a salute from us." The audience of several thousand people applauded loudly, and generally gave Bush a warm response.

Bush made no mention of the selection of Texas Sen. Lloyd Bentsen as the running mate of Michael Dukakis, the presumed Democratic presidential nominee. Later in the day, Bush planned to fly to Cincinnati to throw out the first pitch at baseball's All-Star Game.

Republicans traditionally have not had much luck in attracting black voters. The Reagan administration has been criticized repeatedly by blacks, particularly for its record on civil rights and aid to the poor.

Bush, however, has a relationship with many black leaders. In introducing Bush, NAACP executive director Benjamin Hooks praised the vice president's "long and distinguished record of public service" and called him a man "of honor and integrity."

Using a baseball analogy, Bush told the NACCP that as a candidate for president, "I'm not just in the on-deck circle any more, I'm at the plate. And let me just say, it is a new day."

LEXIS® NEXIS® LEXIS® NEXIS®

Services of Mead Data Central

He promised that, "I will have a positive civil rights agenda. I guarantee you I will be personally involved in protecting the civil rights of all Americans. This effort will be at the top of the agenda of my attorney general, and he or she will be directly accountable to me for results."

The audience respounded with applause and cheers.

Bush said he did not intend to concede the vote of any American, but acknowledged it's tough for Republicans to win over blacks.

"I need your help. I know I'll get your constructive criticism," he said, amid chuckles from the audience. "That's all right. You will be heard, I promise you that," Bush said.

Bush said his commitment to include blacks was was not dependent on his receiving a certain percentage of the black vote.

"I'm a realist. You all are realists," Bush said. "I'm going to do better than people think in that regard."

He promised that "I will have minority men and women of excellence as full-scale partners in my administration." He said black leaders like Hooks "will always be welcome at my house, even when my house is your house _ the White House."

Bush credited the Reagan administration with "building a record of economic success" and said that a third of all black families now earn more than $25,000 a year. "But there's much more left to be done," Bush said.

He said the government can be involved in dealing with problems such as pregnancy among unwed black teen-age girls and the high rate of black school dropouts. However, he added, "The answer also lies in the values that are passed on from generation to generation _ values like family, faith, education, the importance of work."

"We must teach kids the difference between right and wrong. We must teach them how to say no to drugs and no to teen-age pregnancy. We must stop the cycle of babies having babies. And we must emphasize the importance of family and work and education."

Bush promised that his first budget would seek a dramatic increase in funding for the Head Start program.

LEXIS® NEXIS® LEXIS® NEXIS®

Services of Mead Data Central

39TH STORY of Level 2 printed in FULL format.

Copyright (c) 1989 Chicago Tribune Company;
Chicago Tribune

July 9, 1989, Sunday, CITY EDITION

SECTION: NEWS; Pg. 6; ZONE: C

LENGTH: 611 words

HEADLINE: Bush will be better for blacks than Reagan, NAACP leader says

BYLINE: From Chicago Tribune wires

DATELINE: DETROIT

BODY:

George Bush will be a better president for black Americans than Ronald Reagan, whose administration ignored black leaders and let civil rights erode, NAACP leader Benjamin Hooks said.

Hooks, speaking Friday before the group's annual convention, which opens Sunday, said Bush has shown a genuine desire to see the United States overcome its history of racism.

"There's no question in my mind that Bush is going to be a better president than Reagan," Hooks said. "It would be hard to be a worse president than Reagan."

The National Association for the Advancement of Colored People, the nation's oldest and largest civil rights group with 500,000 members, predicts 18,000 to 20,000 people will attend its 80th annual convention.

"It's a sad fact that we're still about the same thing we were when we were founded in 1909 - eliminating all forms of racial discrimination," said Hooks, a former Federal Communications Commission member who became NAACP executive director in 1977.

"Racism, sexism are alive and well," he said.

Hooks said Bush, unlike Reagan, has been accessible to black leaders and has met with him and the Congressional Black Caucus, as well as with South African antiapartheid leaders Revs. Desmond Tutu and Allan Boesek.

Hooks said he has known Bush for many years and considers him a member of the Republican Party's Eastern, more moderate wing.

"He wants to do a good job, but he wants to be elected again," Hooks said. "There are various pressures working on him."

Vice President Dan Quayle, 1988 Democratic presidential contender Jesse Jackson and U.S. Housing and Urban Development Secretary Jack Kemp are among those scheduled to address the NAACP convention, which runs through Thursday.

Asked how delegates would receive Quayle, who would be making his first appearance before a black group, Hooks joked: "Oh, he'll get a reception.

LEXIS® NEXIS® LEXIS® NEXIS®

Services of Mead Data Central

(c) 1989 Chicago Tribune, July 9, 1989

Seriously, he'll get a cordial reception, I'm sure. If we didn't want to hear him, we wouldn't have invited him."

A series of U.S. Supreme Court decisions narrowing federal civil rights laws and allowing white workers the right to counter-sue in affirmative action cases will be a hot convention topic, Hooks said.

"The question on the minds of black folks around the country is how we deal with the recent spate of Supreme Court decisions that just emasculate the civil rights laws," he said. "In fact, it's going to get a lot worse before it gets better."

" . . . The Supreme Court has gone absolutely berserk. I can't believe that five people would be so dumb as the majority is in those cases," Hooks said. "It's either dumbness or out-and-out racism and sexism."

In what is viewed by civil rights officials as the most significant ruling, the court on June 12 said white male employees can sue to reopen affirmative action court settlements if they feel they were subject to reverse discrimination. The ruling in Martin v. Wilks threatens to invalidate dozens of settlements involving police, firefighters and other public employees, legal scholars say.

Hooks said the 80-year-old NAACP, which has 500,000 members, is exploring whether to push for passage of federal legislation dealing with affirmative action matters.

A side effect of the Supreme Court's rulings has been interest in the NAACP among some people previously uninvolved.

"I've seen young blacks in professional roles who haven't supported us sending checks and wanting to demonstrate," Hooks said.

Other officials addressing the convention will be Democratic National Committee Chairman Ron Brown, Gov. James Blanchard, Mayor Coleman Young and United Auto Workers union President Owen Bieber.

TERMS: UNITED STATES; OFFICIAL; BLACK; RIGHTS

LEXIS® NEXIS® LEXIS® NEXIS®

Services of Mead Data Central

16TH STORY of Level 1 printed in FULL format.

Copyright (c) 1989 Newsday, Inc.;
Newsday

August 9, 1989, Wednesday, CITY EDITION

SECTION: NEWS; Pg. 15
Other Edition: Nassau and Suffolk Pg. 5, Home Pg. 15

LENGTH: 674 words

HEADLINE: Bush Promises Attempts to End Discrimination

BYLINE: By Marie Cocco. Newsday Washington Bureau

DATELINE: Washington

KEYWORD: NATIONAL URBAN LEAGUE; MEETING; GEORGE BUSH; CIVIL RIGHTS; DISCRIMINATION; MINORITY;

BODY:

President George Bush, in his first speech to a major civil rights organization since taking office, pledged yesterday to "make America open and equal to all" by striking down barriers to minorities' economic advancement and working to ensure that discrimination ends.

"Your problems are my problems," the president told thousands of delegates to the National Urban League convention here. "Today, I offer you my hand and offer you my word. Together, we will make America open and equal to all."

But the president did not spell out new initiatives, and reiterated the list of tax breaks for business investors that he has proposed to spur inner city development.

And Bush avoided any reference to a series of actions by his administration that already have strained relations between the White House and some civil rights leaders. These include Bush's controversial nomination of William Lucas - who last week was rejected as unqualified by the Senate Judiciary Committee - to head the Justice Department's civil rights division, and his decision that no legislation is needed to negate the string of recent Supreme Court decisions sharply limiting affirmative action.

Bush's remarks got a polite reception from the delegates, who interrupted his speech at various points with a smattering of applause. Leaders of the Urban League and several delegates said afterward that while they disagreed with some of the president's views and actions, they were willing to give him more time to match his rhetorical commitment to civil rights with concrete deeds.

Bush said his administration was open to reaching out to minorities, and said: "We will not tolerate discrimination, bigotry or bias of any kind, period."

Bush suggested that affirmative action programs are no longer necessary, because he said a shortage of labor in the coming decade will mean jobs for women, minorities and immigrants.

LEXIS® NEXIS® LEXIS® NEXIS®

Services of Mead Data Central

43RD STORY of Level 2 printed in FULL format.

Copyright (c) 1989 The Times Mirror Company;
Los Angeles Times

July 1, 1989, Saturday, Home Edition

SECTION: Part 1; Page 2; Column 1; National Desk

LENGTH: 608 words

HEADLINE: BUSH MARKS ANNIVERSARY OF CIVIL RIGHTS ACT, URGES EXPANDED FIGHT AGAINST BIAS

BYLINE: By JAMES GERSTENZANG, Times Staff Writer

DATELINE: WASHINGTON

BODY:

President Bush, declaring "the full promise of the civil rights movement has still not been achieved," called Friday for an expansion of the civil rights mission in the United States to encompass the fight against discrimination based not just on race, but on gender, age and physical disabilities.

During the day, the President also offered support to a number of other causes.

He met with Albertina Sisulu, wife of an imprisoned black South African leader and co-president of the United Democratic Front of South Africa, who said later that Bush told her he hoped his Administration would become a catalyst "for bringing about a peaceful change in South Africa." However, she reported, the President balked at her call for "comprehensive, mandatory sanctions" seeking to bring about an end to South Africa's racial separation policy, apartheid.

And, journeying across the Potomac to the flag-bedecked Iwo Jima Memorial in Arlington, Va., Bush gave his backing to a proposed 20-word constitutional amendment that would prohibit the desecration of the American flag.

With an audience of civil rights leaders including the Rev. Jesse Jackson looking on in the White House East Room, Bush marked the 25th anniversary of the landmark 1964 Civil Rights Act, which President Lyndon B. Johnson signed into law on July 2, 1964. The act banned segregation in public accommodations and was followed by laws protecting voting rights and banning discrimination in housing and employment.

Economic Barriers

"The law cannot tolerate any discrimination and my Administration will not tolerate abuse of that principle," Bush said.

"The hard lesson of the passing years is that it has not been enough to wage a war against the old forms of bigotry and inequality," he said. "The lives of the disadvantaged in this country are affected by economic barriers at least as much as by the remnants of legal discrimination."

LEXIS® NEXIS® LEXIS® NEXIS®

Services of Mead Data Central

(c) 1989 Los Angeles Times, July 1, 1989

While "much progress" has been achieved since the Civil Rights Act was passed, Bush said, it is time "to move forward on a broader front, to move forward into the century's final decade with a civil rights mission that fully embraces every deserving American, regardless of race, whether women, children or the aged; whether the disabled, the unemployed or the homeless."

The President's 200 guests included civil rights leaders Martin Luther King III, Benjamin L. Hooks, Vernon Jordan, James Farmer and Rosa Parks, whose refusal to move to the back of a Montgomery, Ala., bus on Dec. 1, 1955, became a landmark in the civil rights movement.

After the ceremony, Jackson complained that as a result of recent Supreme Court decisions restricting affirmative action programs and making it more difficult for plaintiffs to prove workplace discrimination, "we need a meeting of some substance with the President to deal with legislative remedies to offset" the impact of the court decisions.

At the flag ceremony, Bush again showed his dismay with a Supreme Court decision that overturned laws in 48 states that made it illegal to burn the American flag. In a 5-4 decision last week, the court ruled that such statutes violated the First Amendment's protection of free speech.

Using as a backdrop the bronze sculpture of the raising of the American flag on Mt. Suribachi during the victorious World War II battle for the Pacific island of Iwo Jima, Bush said:

"For those who've championed the cause of civil rights here at home, to those who fought for democracy abroad, free speech is a right that is dear and close to all. It is in defense of that right and the others enshrined in our Constitution that so many have sacrificed."

GRAPHIC: Photo, COLOR, Heroic Setting President and Mrs. Bush pose at the Iwo Jima Memorial in Arlington, Va., Friday before Bush gave his backing to a 20-word constitutional amendment that would prohibit the desecration of the American flag. United Press International

SUBJECT:
CIVIL RIGHTS; CIVIL RIGHTS ACT OF 1964; BUSH, GEORGE; FLAGS; DESECRATION; AFFIRMATIVE ACTION; DISCRIMINATION

LEXIS® NEXIS® LEXIS® NEXIS

Central

17TH STORY of Level 1 printed in FULL format.

Copyright (c) 1989 The New York Times Company;
The New York Times

August 9, 1989, Wednesday, Late Edition - Final

SECTION: Section A; Page 24, Column 1; National Desk

LENGTH: 931 words

HEADLINE: Bush Vows Rights Effort on Jobs and Economic Development

BYLINE: By JULIE JOHNSON, Special to The New York Times

DATELINE: WASHINGTON, Aug. 8

BODY:

President Bush renewed the Administration's commitment to equal opportunity today, pledging to rebuild the nation's urban areas by focusing on education, job training and economic development.

''I want to make sure everyone in this room knows just where I stand, just where my Administration stands,'' Mr. Bush told the annual conference of the National Urban League here. ''My Administration is committed to reaching out to minorities, to striking down barriers to free and open access. We will not tolerate discrimination, bigotry or bias of any kind, period.''

Mr. Bush used his appearance, the first by a President before the group since 1977, to continue White House efforts to build support among black Americans and civil rights groups, who were frequently at odds with Ronald Reagan's Administration and who have clashed in recent months with Mr. Bush's.

''Your problems are my problems,'' the President said. ''Today, I offer you my hand. I offer you my word. Together, we will make American open and equal to all.''

Touchy Issues Avoided

But Mr. Bush avoided mention of issues that have recently angered civil rights groups, like the Supreme Court rulings that they said narrowed anti-discrimination laws, or his nomination of William C. Lucas to be head of the Justice Department's civil rights division, a choice that was rejected by the Senate Judiciary Committee.

Mr. Lucas, a black former Executive of Wayne County, Mich., was criticized as lacking the legal experience needed to be the nation's top civil rights enforcement official.

Mr. Bush has won high marks from civil rights groups for embracing affirmative action and working behind the scenes on legislation like amendments to the the Fair Housing Act and the Americans with Disabilities Act.

Weighing against Mr. Bush among some civil rights leaders is his refusal when he was Vice President to criticize President Reagan on his actions on civil rights issues, like his veto of the Civil Rights Restoration Act. That measure was in response to a 1984 Supreme Court decision limiting the scope of

LEXIS® NEXIS® LEXIS® NEXIS®

Services of Mead Data Central

(c) 1989 The New York Times, August 9, 1989

anti-distrimination provisions connected with the use of Federal money. Congress later overrode Mr. Reagan's March 1988 veto.

League Focuses on Business

Today, Mr. Bush was received warmly by the Urban League members, who interrupted his speech with applause several times. He tailored his remarks to the league, a civil rights organization that works closely with businesses and focuses on employment and economic development.

Repeating his support for tax incentives to encourage business enterprises to locate in the inner cities, Mr. Bush said, ''The future of urban America depends on bringing growth to our inner cities.''

John E. Jacob, the league's president, praised Mr. Bush for language that he said sets a new tone for the nation on civil rights, and he said the President's positions on education and drugs were in line with those of the Urban League.

''What we heard from him today is that he has said his Administration will do everything within its power to make sure that discrimination does not exist in this country and that they will fight it with every weapon that they have,'' Mr. Jacob said. ''I think that's important because this nation needs to have not only a reordering of its priorities but a reordering of the nation's atmosphere, to move the nation back toward the center.''

Speech Seen as Lacking Specifics

But Clarence L. Barney, the New Orleans Urban League president, who is chairman of the national group's economic development committee, said Mr. Bush had to be assessed by his policies.

''Though I was very impressed with the tone, style and sincerity of the President's speech, I would like to have seen a greater degree of specificity,'' he said.

He praised Mr. Bush's comment that the nation must ''create conditions for urban growth and economic revival.'' But Mr. Barney said it was unrealistic for black contractors to focus solely on inner cities with hopes of building ''economic wealth out of poverty.''

Mr. Barney said black business leaders ''want to rebuild our inner city neighborhoods, but we don't want to be consigned or restricted to that,'' adding, ''The greatest opportunities are in foreign investment and in rebuilding our infrastructure.'' It is estimated that $1.4 trillion will have to be spent in coming years rebuilding the nation's deteriorating highways, waterways and other public structures.

Appearance Was Monitored

Several civil rights organizations and Administration officials, particularly those who have been involved in skirmishes with the Bush White House, closely monitored Mr. Bush's appearance at the Urban League meeting, which concludes Wednesday.

LEXIS® NEXIS® LEXIS® NEXIS®

Services of Mead Data Central

(c) 1989 The New York Times, August 9, 1989

Ralph Neas, executive director of the Leadership Conference on Civil Rights, a coalition of several groups that helped marshal opposition to the nomination of Mr. Lucas, said, ''Everyone in the civil rights community applauds the new tone that President Bush has set, and this speech is another indication of that tone.''

But despite the oratory, Mr. Neas said, many groups in his coalition are ''deeply disappointed'' that Mr. Bush sees no need for the proposed legislation to counteract Supreme Court rulings that made it harder to bring and win suits charging discrimination.

William Barclay Allen, chairman of the Civil Rights Commission, said in an interview after reading a text of the President's remarks: ''It's nice to have this statement. These are very important problems, but we must also recognize that civil rights is bigger.''

SUBJECT: URBAN AREAS; FEDERAL AID (US); CIVIL RIGHTS; EDUCATION AND SCHOOLS; LABOR; ECONOMIC CONDITIONS AND TRENDS

ORGANIZATION: URBAN LEAGUE, NATIONAL

NAME: BUSH, GEORGE (PRES); JACOB, JOHN E; JOHNSON, JULIE

LEXIS® NEXIS® LEXIS® NEXIS®

chinery, has the capacity to make some miracles for men—if it values men as highly as it values machines.

To find a great design to solve a grave problem labor will have to intervene in the political life of the nation to chart a course which distributes the abundance to all instead of concentrating it among a few. The strength to carry through such a program requires that labor know its friends and collaborate as a friend. If all that I have said is sound, labor has no firmer friend than the twenty million Negroes whose lives will be deeply affected by the new patterns of production.

To say that we are friends would be an empty platitude if we fail to behave as friends and honestly look to weaknesses in our relationship. Unfortunately there are weaknesses. Labor has not adequately used its great power, its vision and resources to advance Negro rights. Undeniably it has done more than other forces in American society to this end. Aid from real friends in labor has often come when the flames of struggle heighten. But Negroes are a solid component within the labor movement and a reliable bulwark for labor's whole program, and should expect more from it exactly as a member of a family expects more from his relatives than he expects from his neighbors.

Labor, which made impatience for long-delayed justice for itself a vital motive force, cannot lack understanding of the Negro's impatience. It cannot speak, with the reactionaries' calm indifference, of progress around some obscure corner not yet possible even to see. There is a maxim in the law—justice too long delayed, is justice denied. When a Negro leader who has a reputation of purity and honesty which has benefited the whole labor movement criticizes it, his motives should not be reviled nor his earnestness rebuked. Instead, the possibility that he is revealing a weakness in the labor movement which it can ill afford, should receive thoughtful examination. A man who has dedicated his long and faultless life to the labor movement cannot be raising questions harmful to it any more than a lifelong devoted parent can become the enemy of his child. The report of a committee may smother with legal constructions a list of complaints and dispose of it for the day. But if it buries a far larger truth it has disposed of nothing and made justice more elusive.

BIAS EXISTS IN UNIONS

Discrimination does exist in the labor movement. It is true that organized labor has taken significant steps to remove the yoke of discrimination from its own body. But in spite of this, some unions, governed by the racist ethos, have contributed to the degraded economic status of the Negro. Negroes have been barred from membership in certain unions, and denied apprenticeship training and vocational education. In every section of the country one can find local unions existing as a seri-

ous and vicious obstacle when th
ployment. Labor must honestly
design the battle plan which will
labor would be unearthing th
against the bleakness of injustic

How can labor rise to the he
cement its bonds with Negroes

First: Labor should accept the
to Negroes and the struggle for
taken actions to eliminate discr
high enough the standard for
should and can set an example f
sades for social justice. You sho
tion of discrimination so that s
or locals may not besmirch the
aware this is not easy nor popul
ular nor easy to achieve. Nor w
you accomplished all of these
Out of such struggle for democ
and the respect of the country,
Negro rights a great crusade.

Second: The political strengt
mation from becoming a Molo
can be multiplied if you tap the
Negroes, given the vote, will v
the same liberal legislation lab

To give just an example of th
I might cite the arresting fact t
pealed the right-to-work law is
Negro vote in that state grew la
er, and it went along with labor
support to assist us in securin
tween success and defeat for u
we need and you have an appar
ognized five years ago a moral
eral of your leaders, including
and Mr. MacDonald and othe
paign to assist the struggling N
circumstances in the South. A t
ed by the ILGWU to begin th
the drive was never begun. Tl
these turbulent, violent years,
many unions thought of as im
meeting the budget to properly
that you tax your treasuries.

ous and vicious obstacle when the Negro seeks jobs or upgrading in employment. Labor must honestly admit these shameful conditions, and design the battle plan which will defeat and eliminate them. In this way, labor would be unearthing the big truth and utilizing its strength against the bleakness of injustice in the spirit of its finest traditions.

How can labor rise to the heights of its potential statesmanship and cement its bonds with Negroes to their mutual advantage?

SPEECH TO AFL-CIO

First: Labor should accept the logic of its special position with respect to Negroes and the struggle for equality. Although organized labor has taken actions to eliminate discrimination in its ranks, it has not raised high enough the standard for the general community. Your conduct should and can set an example for others, as you have done in other crusades for social justice. You should root out vigorously every manifestation of discrimination so that some internationals, central labor bodies or locals may not besmirch the positive accomplishments of labor. I am aware this is not easy nor popular—but the eight-hour day was not popular nor easy to achieve. Nor was outlawing anti-labor injunctions. But you accomplished all of these with a massive will and determination. Out of such struggle for democratic rights you won both economic gains and the respect of the country, and you will win both again if you make Negro rights a great crusade.

Second: The political strength you are going to need to prevent automation from becoming a Moloch, consuming jobs and contract gains, can be multiplied if you tap the vast reservoir of Negro political power. Negroes, given the vote, will vote liberal and labor because they need the same liberal legislation labor needs.

To give just an example of the importance of the Negro vote to labor, I might cite the arresting fact that the only state in the South which repealed the right-to-work law is Louisiana. This was achieved because the Negro vote in that state grew large enough to become a balance of power, and it went along with labor to wipe out anti-labor legislation. Thus, support to assist us in securing the vote can make the difference between success and defeat for us both. You have organizing experience we need and you have an apparatus unparalleled in the nation. You recognized five years ago a moral opportunity and responsibility when several of your leaders, including Mr. Meany, Mr. Dubinsky, Mr. Reuther and Mr. MacDonald and others, projected a two million dollar campaign to assist the struggling Negroes fighting bitterly in handicapped circumstances in the South. A ten-thousand-dollar contribution was voted by the ILGWU to begin the drive, but for reasons unknown to me, the drive was never begun. The cost to us in lack of resources during these turbulent, violent years, is hard to describe. We are mindful that many unions thought of as immorally rich, in truth have problems in meeting the budget to properly service their members. So we do not ask that you tax your treasuries. Instead, we ask that you appeal to your

get any instantaneous results from Congress, knowing its recalcitrant nature on this issue, and knowing that so many resources and energies are being used in Vietnam rather than on the domestic situation. So we don't have any illusions about moving Congress in two or three weeks. But we do feel that, by starting in Washington, centering on Congress and departments of the government, we will be able to do a real educational job.

We call our demonstration a campaign for jobs and income because we feel that the economic question is the most crucial that black people, and poor people generally, are confronting. There is a literal depression in the Negro community. When you have mass unemployment in the Negro community, it's called a social problem; when you have mass unemployment in the white community, it's called a depression. The fact is, there is a major depression in the Negro community. The unemployment rate is extremely high, and among Negro youth, it goes up as high as forty percent in some cities.

We need an economic bill of rights. This would guarantee a job to all people who want to work and are able to work. It would also guarantee an income for all who are not able to work. Some people are too young, some are too old, some are physically disabled, and yet in order to live, they need income. It would mean creating certain public-service jobs, but that could be done in a few weeks. A program that would really deal with jobs could minimize—I don't say stop—the number of riots that could take place this summer.

Our whole campaign, therefore, will center on the job question, with other demands, like housing, that are closely tied to it. We feel that much more building of housing for low-income people should be done. On the educational front, the ghetto schools are in bad shape in terms of quality, and we feel that a program should be developed to spend at least a thousand dollars per pupil. Often, they are so far behind that they need more and special attention, the best quality education that can be given.

These problems, of course, are overshadowed by the Vietnam war. We'll focus on the domestic problems, but it's inevitable that we've got to bring out the question of the tragic mix-up in priorities. We are spending all of this money for death and destruction, and not nearly enough money for life and constructive development. It's inevitable that the question of the war will come up in this campaign. We hear all this talk about our ability to afford guns and butter, but we have come to see that this is a myth, that when a nation becomes involved in this kind of war, when the guns of war become a national obsession, social needs inevitably suffer. And we hope that as a result of our trying to dramatize this and getting thousands and thousands of people moving around this issue, that our government will be forced to reevaluate its policy abroad in order to deal with the domestic situation.

ica in spite of these crippling restrictions is sufficient to refute all of the myths and half-truths disseminated by the segregationist.

Yet we cannot ignore the fact that our standards do often fall short. One of the sure signs of maturity is the ability to rise to the point of self-criticism. We have been affected by our years of economic deprivation and social isolation. Some Negroes have become cynical and disillusioned. Some have so conditioned themselves to the system of segregation that they have lost that creative something called *initiative*. So many have used their oppression as an excuse for mediocrity. Many of us live above our means, spend money on nonessentials and frivolities, and fail to give to serious causes, organizations, and educational institutions that so desperately need funds. Our crime rate is far too high.

CONSTRUCTIVE ACTION

Therefore there is a pressing need for the Negro to develop a positive program through which these standards can be improved. After we have analyzed the sociological and psychological causes of these problems, we must seek to develop a constructive program to solve them. We must constantly stimulate our youth to rise above the stagnant level of mediocrity and seek to achieve excellence in their various fields of endeavor. Doors are opening now that were not open in the past, and the great challenge facing minority groups is to be ready to enter these doors as they open. No greater tragedy could befall us at this hour but that of allowing new opportunities to emerge without the concomitant preparedness to meet them.

We must make it clear to our young people that this is an age in which they will be forced to compete with people of all races and nationalities. We cannot aim merely to be good Negro teachers, good Negro doctors, or good Negro skilled laborers. We must set out to do a good job irrespective of race. We must seek to do our life's work so well that nobody could do it better. The Negro who seeks to be merely a good Negro, whatever he is, has already flunked his matriculation examination for entrance into the university of integration.

This then must be our present program: nonviolent resistance to all forms of racial injustice, even when this means going to jail; and bold, constructive action to end the demoralization caused by the legacy of slavery and segregation. The nonviolent struggle, if conducted with the dignity and courage already shown by the sit-in students of the South, will in itself help end the demoralization; but a new frontal assault on the poverty, disease, and ignorance of a people too long deprived of the God-given rights of life, liberty, and the pursuit of happiness will make the victory more certain.

We must work assiduously and with determined boldness to remove from the body politic this cancerous disease of discrimination which is

preventing our democratic and Cl
Then and only then will we be ab
dream of our American democracy
of equality of opportunity, of privil
a dream of a land where men will n
give luxuries to the few; a dream o
the color of a man's skin determ
dream of a place where all our gift
selves alone but as instruments of
dream of a country where every m
of all human personality, and me
ers—that is the dream. Whenever
bleak and desolate midnight of ma
and glowing daybreak of freedom

YWCA Magazine (December 1960): 4

preventing our democratic and Christian health from being realized. Then and only then will we be able to bring into full realization the dream of our American democracy—a dream yet unfulfilled. A dream of equality of opportunity, of privilege and property widely distributed; a dream of a land where men will not take necessities from the many to give luxuries to the few; a dream of a land where men to not argue that the color of a man's skin determines the content of his character; a dream of a place where all our gifts and resources are held not for ourselves alone but as instruments of service for the rest of humanity; the dream of a country where every man will respect the dignity and worth of all human personality, and men will dare to live together as brothers—that is the dream. Whenever it is fulfilled we will emerge from the bleak and desolate midnight of man's inhumanity to man into the bright and glowing daybreak of freedom and justice for all of God's children.

YWCA Magazine (December 1960): 4–6.

soul-searching analyses and evaluations of the environmental causes that spawn riots. All major industrial and ghetto areas should establish serious biracial discussions of community problems, and of ways to begin solving them. Instead of ambulance service, municipal leaders need to provide preventive medicine. Secondly, these communities should make serious efforts to provide work and training for unemployed youth, through job-and-training programs such as the HARYOU-ACT program in New York City. Thirdly, all cities concerned should make first-priority efforts to provide immediate quality education for Negro youth—instead of conducting studies for the next five years. Young boys and girls now in the ghettos must be enabled to feel that they count, that somebody cares about them; they must be able to feel *hope*. And on a longer-range basis, the physical ghetto itself must be eliminated, because these are the environmental conditions that germinate riots. It is both socially and morally suicidal to continue a pattern of deploring effects while failing to come to grips with the *causes*. Ultimately, law and order will be maintained only when justice and dignity are accorded impartially to all.

PLAYBOY: Along with the other civil rights leaders, you have often proposed a massive program of economic aid, financed by the federal government, to improve the lot of the nation's twenty million Negroes. Just one of the projects you've mentioned, however—the HARYOU-ACT program to provide jobs for Negro youths—is expected to cost 141 million dollars over the next ten years, and that includes only Harlem. A nationwide program such as you propose would undoubtedly run into the billions.

KING: About fifty billion, actually—which is less than one year of our present defense spending. It is my belief that with the expenditure of this amount, over a ten-year period, a genuine and dramatic transformation could be achieved in the conditions of Negro life in America. I am positive, moreover, that the money spent would be more than amply justified by the benefits that would accrue to the nation through a spectacular decline in school dropouts, family breakups, crime rates, illegitimacy, swollen relief rolls, rioting and other social evils.

PLAYBOY: Do you think it's realistic to hope that the government would consider an appropriation of such magnitude other than for national defense?

KING: I certainly do. This country has the resources to solve any problem once that problem is accepted as national policy.

An example is aid to
policy of the federal go
erty; one billion was p
ing the slightest dent in
ple is the fact that aft
when it became policy
military machine the v
took upon itself, throu
sures, the financial rel
European people. If A
allies and ex-enemies,
much greater obligatio
its own no less needy c

PLAYBOY: Do you feel it's fair to r
of preferential treatme
minority group?

KING: I do indeed. Can any fa
gro has been deprived?
turies the Negro was e
potential accrued wealt
of his descendants. *All*
adequately compensate
ploitation and humiliati
gram such as I propose
computaton of two cen
lated interest. In any ca
of economic aid should
benefit the disadvantag

Within common law,
cial compensatory prog
ments. American India
settlement manner. Is
helped to build this cou
er easily applicable prec
labor laws, social secu
manpower retraining p
that America adopted a
millions of veterans aft
far more than a policy o
tate the traditionally
today.

The closest analogy is
bilitation in America wo
breadth of program—w
den on our economy. Ju

An example is aid to Appalachia, which has been made a policy of the federal government's much-touted war on poverty; one billion was proposed for its relief—without making the slightest dent in the defense budget. Another example is the fact that after World War II, during the years when it became policy to build and maintain the largest military machine the world has ever known, America also took upon itself, through the Marshall Plan and other measures, the financial relief and rehabilitation of millions of European people. If America can afford to underwrite its allies and ex-enemies, it can certainly afford—and has a much greater obligation, as I see it—to do at least as well by its own no less needy countrymen.

PLAYBOY: Do you feel it's fair to request a multibillion-dollar program of preferential treatment for the Negro, or for any other minority group?

KING: I do indeed. Can any fair-minded citizen deny that the Negro has been deprived? Few people reflect that for two centuries the Negro was enslaved, and robbed of any wages—potential accrued wealth which would have been the legacy of his descendants. *All* of America's wealth today could not adequately compensate its Negroes for his centuries of exploitation and humiliation. It is an economic fact that a program such as I propose would certainly cost far less than any computaton of two centuries of unpaid wages plus accumulated interest. In any case, I do not intend that this program of economic aid should apply only to the Negro; it should benefit the disadvantaged of *all* races.

Within common law, we have ample precedents for special compensatory programs, which are regarded as settlements. American Indians are still being paid for land in a settlement manner. Is not two centuries of labor, which helped to build this country, as real a commodity? Many other easily applicable precedents are readily at hand: our child labor laws, social security, unemployment compensation, manpower retraining programs. And you will remember that America adopted a policy of special treatment for her millions of veterans after the war—a program which cost far more than a policy of preferential treatment to rehabilitate the traditionally disadvantaged Negro would cost today.

The closest analogy is the GI Bill of Rights. Negro rehabilitation in America would require approximately the same breadth of program—which would not place an undue burden on our economy. Just as was the case with the return-

BROWN v. BOARD EDUCATION

— noble intentions. Debunked doctrine of separate but equal. Children are best educated when ~~not~~ segregated.

(— how much have we to learn from ea. other)

But ~~Brown v. Board~~ put the power to shape in the grip of government.

We want to put that power where it belongs: in the hands of people. Parents (∴ vouchers)

BROWN v. BOARD OF EDUCATION was a 1954 decision of the U. S. Supreme Court that voided state laws and state constitutional provisions requiring or permitting the segregation of white and black children in public schools on the basis of race. Chief Justice Earl Warren, writing for a unanimous court on May 17, 1954, held in *Brown* v. *Board of Education of Topeka* that such laws and provisions denied to black children the equal protection of the laws guaranteed by the U. S. Constitution.

The Topeka (Kans.) Board of Education had established segregated elementary schools. Attorneys for black children contended that the segregated schools were not equal and could not be made equal. A U. S. district court disagreed, but Warren wrote that to "separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone." He added, "Separate educational facilities are inherently unequal." On May 31, 1955, the court asked local courts to require "a prompt and reasonable start toward full compliance" with the decision, and said that local administrative problems should be resolved "with all deliberate speed."

Opponents of desegregation criticized the court's reliance on psychological and sociological data. They contended that the court was in effect passing legislation and was encroaching on states' rights. In later years the Supreme Court struck down attempts by state legislatures and local school boards to avoid compliance.

---

color blind means no quotas:

Nobody wants them

This is about quotas. I'm sure the Dem. leadership will work w/ us to fashion a bill for all Americans, for affirmative, beyond quotas.

[10] I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character. *Ib.*

Photo Copy Preservation

Office of the Attorney General

Washington, D.C. 20530

April 3, 1990

Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
U.S. Senate
Washington, D.C. 20510

Dear Chairman Kennedy:

This letter presents the views of the Administration regarding S. 2104, the Civil Rights Act of 1990. The Administration is determined to help root out racial bias and bigotry and to guarantee equal opportunities for all Americans, and has proposed new legislation to attack discriminatory employment practices. Guided by the same principles, the Administration opposes as inconsistent with equal opportunity any legislation that would encourage quota systems or otherwise divide our society along racial lines. If S. 2104 were presented to the President in its current form, I and other senior advisors would recommend that it be vetoed. The Administration's objections to S. 2104 are discussed below.

Sections 1 through 3 of the bill are, respectively, the short title, statement of findings and purpose, and definitions. The substantive provisions of the bill begin with section 4, which would reverse Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

In Wards Cove, the Court addressed three important stages of a lawsuit alleging that an employer's hiring practices had the effect of discriminating in violation of Title VII of the Civil Rights Act of 1964. First, the Court reaffirmed that statistics may form the basis for a prima facie case of disparate impact. It also reaffirmed that the statistics must compare the employer's workforce to the pool of qualified job applicants or qualified members of the labor force. See, e.g., Hazelwood School District v. United States, 433 U.S. 299, 308 (1977).

A second, related issue addressed by the Court involved causation. Consistent with established precedent, the Court noted that a Title VII plaintiff must identify the specific employment practice that has produced the challenged disparate impact.

The Court then addressed the burdens imposed on the parties once a plaintiff has established a prima facie case of discrimination. The Court held that the employer's burden was to produce evidence that the "challenged practice pursues, in a significant way, the legitimate employment goals of the employer." Wards Cove, 109 S. Ct. at 2125-2126. The burden of persuasion, however, remains with the plaintiff. If the plaintiff does not meet this burden of persuasion, the plaintiff may still prevail by showing that reasonable alternatives would serve the employer's purpose equally well.

S. 2104 would change the law in several respects. First, the bill would permit plaintiffs to allege simply that the end product of all the employer's employment practices was a statistically disparate workforce. The Court's approach seems to us to be a much more sensible, efficient, and fair allocation of litigation responsibilities. Absent the link between specific practices and a resulting disparate impact, employers could be found liable for the numerous innocent factors that can cause statistical imbalance in the composition of a workforce. Liability could be premised entirely on statistics showing "bottom line" racial imbalance, a measure of discrimination that the Supreme Court has appropriately rejected when bottom line balance has been offered as a justification for discriminatory selection devices. See Connecticut v. Teal, 457 U.S. 440 (1982).

Moreover, asking the plaintiff to identify the specific practices that produce a disparate impact before employers are asked to justify them is consistent with traditional rules allocating burdens of proof. This allocation of responsibilities strikes us as more efficient and equitable than allowing plaintiffs simply to allege that a hiring system produces a disparate impact and forcing employers to demonstrate that each individual employment practice within that system does not have a disparate impact, as S. 2104 would. Furthermore, in view of the liberal discovery rules and the record-keeping requirements of the Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607.1 et seq. (1988), we do not think that this requirement of specificity should unduly burden plaintiffs.

Indeed, the Court's prior "disparate impact cases have always focused on the impact of particular hiring practices on employment opportunities for minorities," Wards Cove, 109 S. Ct. at 2124, and plaintiffs have always targeted those specific practices. See Griggs v. Duke Power Co., 401 U.S. 424 (1971) (high school diploma requirement); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements for prison guards); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1977) (employment tests and seniority systems); Connecticut v. Teal, 457 U.S. 440 (1982) (written examination); Watson v. Fort Worth Bank & Trust, No. 86-6139 (June 29, 1988) (subjective judgment of supervisor).

The Court's rule is also consistent with the general practice in the lower courts.

S. 2104 would also shift the burden of persuasion to the employer and require that he prove that its employment practices are "essential to effective job performance." In our view, the Court correctly held that the burden of persuasion remains with the plaintiff throughout a disparate impact case, just as it does in a case alleging intentional discrimination, see Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256-258 (1981), and just as it generally does when causation is an element of a violation. See Restatement (Second) of Torts 433B (1965). This is also the accepted rule in civil litigation generally. Fed. R. Evid. 301. We think it would be unjustifiable to impose a greater burden on an employer who is alleged to have violated Title VII by employing a practice that produced a statistical imbalance than on one who is alleged to have engaged in purposeful discrimination.

Even though the employer's burden is now established as one of production and not proof, it is by no means insubstantial. Under existing Supreme Court precedent (Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-255 (1981)), the employer's burden is "to rebut the presumption of discrimination" by "the introduction of admissible evidence" which is "legally sufficient to justify a judgment for the defendant." If the employer adduces evidence that an employment practice does pursue, in a significant way, legitimate employment goals, and if the plaintiff cannot then establish that such is not the case or that other reasonable alternatives are available, policy would not seem to dictate a result adverse to the employer.

Likewise, we think that the Court's formulation of the applicable substantive standard is fully justified as an appropriate balancing of the interests of employers and employees. Prior decisions had used varying terminology in describing the employer's burden after a showing of disparate impact. See, e.g., Connecticut v. Teal, 457 U.S. 440, 446 (1982) (citation omitted) ("'manifest relationship to the employment'"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) ("'job related'"); Griggs v. Duke Power Co., 401 U.S. 424, 431, 432 (1971) ("business necessity"; "manifest relationship to the employment"); New York Transit Authority v. Beazer, 440 U.S. 568, 587 n.31 (1979) ("legitimate employment goals of safety and efficiency * * * are significantly served"). The standard molded by the Court from those prior formulations, i.e., that a "challenged practice serves, in a significant way, the legitimate employment goals of the employer" (Wards Cove, 109 S. Ct. 2125-2126), has sufficient teeth to ensure that employers do not use practices of dubious business utility, while not pressuring employers to resort to hiring and promotion quotas, and respecting the needs of employers to preserve legitimate

management prerogatives. We find it unlikely that this formulation of the standard for a business justification will preclude the assertion of meritorious claims, particularly since the plaintiff may still prevail by showing that other reasonable business practices would satisfy the employer's need without producing a discriminatory effect.

By contrast, the requirement of S. 2104 that an employer whose workforce is not statistically balanced show that each of its employment practices is "essential" to the conduct of the business puts the employer in a nearly impossible position. It would be difficult for the employer not to adopt a silent practice of quota hiring and promotion in an effort to protect the business from the probability of litigation wherever a statistical imbalance exists. Many employers would resort to using hiring criteria that would insure that the numbers come out "right."

Those who say that Wards Cove represents a radical change in the law are simply wrong. Each of the Court's holdings was presaged by earlier Supreme Court and lower court decisions. These adjustments represent at most fine tuning to a method of proving discrimination that has been developed entirely by courts. We are convinced that the Court thoughtfully balanced the competing interests and produced a workable distillation of some eighteen years of precedents applying the disparate impact standard. Indeed, the Court in large part adopted the approach urged by a brief filed by the United States. This approach will enable employees to pursue successfully meritorious claims, and employers will not be unduly burdened in defending claims of discrimination. Nor will employers be encouraged to resort to quotas to ward off the threat of lawsuits based on statistical imbalances.

Section 5 of the bill would reverse the holding in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), in which the Court ruled in favor of a woman who alleged that she had been denied partnership by her accounting firm on account of her sex. The Court there faced a case in which plaintiff alleged that her sex had supplied part of the motivation for her rejection for partnership. The Court held that once she had established by direct evidence that sex played a substantial part in the decision, the burden shifted to the employer to show that it would have reached the same decision had sex not been considered. The result reached in Hopkins is as favorable or more favorable to plaintiffs as that adopted by the overwhelming (9-2) majority of courts of appeals. See id. at 1784 n.2. It is also consistent with the Supreme Court's own earlier decisions for mixed motive cases brought under the Constitution and the National Labor Relations Act. See Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977); NLRB v. Transportation Management Corp., 462 U.S. 393 (1983); see also

Hunter v. Underwood, 471 U.S. 222 (1985). We think that the Court's balancing of interests is reasonable and should be preserved.

Yet, S. 2104 would state that a violation of Title VII is established when the plaintiff demonstrates that race, color, religion, sex, or national origin was "a motivating factor" in an employment decision, regardless of whether the employer demonstrates that he would have made the same decision for legitimate reasons absent the discrimination. The latter proof would go only to the question whether the plaintiff was entitled to the position that he or she had been denied. The bill would reverse the general rule that in employment discrimination cases, as in any civil case, the plaintiff must show that the defendant's unlawful conduct caused the harm complained of by plaintiff. Allowing recovery based on an employer's state of mind is contrary not only to the spirit of Title VII, but to the spirit of our legal system as well. Of course, the inequities resulting from such an approach would be further magnified in the class action context. At the very least, reversal of Price Waterhouse is premature, since there was not a majority opinion for the Court and there is no evidence that the decision has worked inequitably. Moreover, the creation of this new category of Title VII violation would have an exacerbating effect if section 8 of the bill were enacted, authorizing compensatory and punitive damage awards for disparate treatment violations of Title VII. A plaintiff would be entitled to such awards and attorney fees even if the employer demonstrated that he would have made the same employment decision he did for legitimate reasons absent the discriminatory factor.

Section 6 of the bill would reverse the holding in Martin v. Wilks, 109 S. Ct. 2180 (1989). That case arose in the context of a civil rights action, but it turned on principles of fairness and access to court that apply in every area. The Court held that white firefighters, who had not been parties to a consent decree that mandated racial preferences, could have their day in court to contend that the decree violated their civil rights. The Court rejected the so-called collateral attack doctrine, pursuant to which some courts had held that, once a decree was entered, it could not be challenged, even by individuals who had not been parties to the original lawsuit.

The Court's decision turned on a straightforward application of the Federal Rules of Civil Procedure and underlying notions of due process. The Federal Rules establish procedures for joinder of all interested parties in a case. Quite simply, and quite fairly, anyone who is not joined in the lawsuit and given an opportunity to appear in court to protect his or her rights cannot be bound by the final judgment. The Court's decision is a reaffirmation of the fundamental notion that everyone is entitled

to his or her day in court. The Department of Justice advocated the position adopted by the Court.

S. 2104, however, would reverse this holding by prohibiting challenges to a Title VII decree by individuals who had notice of the proposed judgment and an opportunity to present objections to it or if the interests of the challenger were adequately represented by another individual who challenged the judgment. The bill would also forbid challenges if the court that entered the judgment determined that reasonable efforts were made to notify interested persons of the judgment.

We strongly oppose this provision. Rather, we think that the rule in Wilks has a salutary effect. By requiring early joinder of all those who may be adversely affected by a lawsuit, the rule enables courts to consider the full range of interests affected by a proposed decree. The decision may lead to fairer, more carefully considered, and unassailable remedies for discrimination. It will discourage attempts to bargain away third party rights, rather than making whole the actual victims of discrimination. In addition, the participation of all of the affected parties in formulation of a decree should aid in its implementation. Successful, voluntary compliance with Title VII may depend upon the cooperation of a broad range of individuals. Involving as many of those individuals as possible in formulating the decree will lead to smoother and more effective implementation of the remedy for discrimination. We view this decision working in conjunction with our proposed amendment to alter the statute of limitations in response to Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), to ensure that aggrieved individuals have an opportunity to litigate their claims. In practice, the only time a consent decree will be disturbed under Wilks is when a federal judge finds that its operation is violating the rights of the challenging party. It is hard to understand why anyone would try to prevent such an adjudication. The unfortunate effect of this provision would be to insulate illegal or unconstitutional quota decrees from judicial review.

Finally, by foreclosing appropriate review, the proposed Wilks legislation would raise serious constitutional concerns under the Due Process Clause of the Fifth Amendment. In particular, proposed section (m)(1)(B) of Section 6 of the bill would authorize the deprivation of an individual's legal claims without any attempt to notify the individual that his rights were in jeopardy. Rather, it would suffice that a court found that the individual's interests had been represented adequately by another party, regardless of whether the excluded individual stood in privity or in some similar relationship with the representative party. This provision of the bill is inconsistent with the Due Process Clause and "principle of general application in Anglo-American jurisprudence that one is not bound by a

judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." Martin v. Wilks, 109 S. Ct. 2184, quoting Hansberry v. Lee, 311 U.S. 32. 40 (1940) (black home buyers could not be bound by prior suit approving racially restrictive covenant, since they had not been parties nor in privity with parties to the earlier suit). It also cannot be squared with the Supreme Court's consistent holding that notice is an "elementary and fundamental requirement of due process." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Proposed section (m)(1)(C) also raises serious due process concerns. This section would cut off future challenges to discriminatory employment practices if the court entering the judgment determined that "reasonable efforts were made to provide notice to interested persons." As discussed in the preceding paragraph, a general, and fundamental, principle in our legal system is that individuals are not bound by litigation in which they are not a party -- that everyone is entitled to his or her day in court. This bill, moreover, differs considerably from other special statutory schemes approved by the Supreme Court where the need to resolve the ownership of specific property justifies foreclosing successive litigation by nonlitigants of preexisting claims. In contrast to the property interests affected by such statutory schemes, this bill precludes discrimination claims, including equal protection claims. Moreover, this bill purports to foreclose not only legal claims existing at the time of adjudication, but also claims that may arise in the future. Indeed, S. 2104 could foreclose claims which arose after judgment had been entered, based upon new acts of alleged discrimination occurring against, for example, individuals who had never previously applied for a job with the employer or, indeed, had not been born at the time of the original decree. Further, the procedure for determining the reasonableness of notice under section (m)(1)(C) is constitutionally defective. Such a proceeding would necessarily lack the adversarial character which normally gives us confidence in determinations reached by courts. Indeed, not only will the proceeding be nonadversarial, but defendants can be expected to support plaintiffs' claim to have provided reasonable notice. We do not believe an individual's due process rights are satisfied by a court determination entered with no one present to represent the individual's interests and where everyone who is present has interests contrary to those of the individual. Cf. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971).

Section 8 of the bill provides for compensatory damages for intentional violations of Title VII and punitive damages when violations are committed with malice, or reckless or callous indifference to the rights of others. The section also expli-

citly acknowledges that any party will have a right to request a jury trial in an action for damages. This section represents a major change in Title VII and is in no way related to any of last Term's Court decisions. It was part of the original compromise that led to passage of Title VII that the only monetary relief available would be in the form of back pay. The scheme of relief authorized in Title VII reflected a careful balancing of employees' rights and the need to preserve legitimate management prerogatives. Title VII has proved effective in fighting exclusion of minorities and women from the workplace.

The bill's proposal to authorize damages threatens to upset this careful balance. The bill's provisions for adding damages to the remedies already available will discourage conciliation and encourage litigation. Under the bill's regime, plaintiffs' lawyers will inevitably include claims for pain and suffering, emotional harm, and the like as a matter of course. Placing these issues before a jury, as well as the complex and emotional issues of liability that are often involved in Title VII cases, will turn Title VII litigation into a time-consuming, high risk venture for both plaintiffs and defendants. Thus, rather than adopt the bill's approach, we think it is better to preserve Title VII's current remedial scheme, with bench trials and prompt equitable relief including back-pay and rightful place seniority, which has worked well for over 25 years.

The Administration endorses the bill's intent to change results reached in two of last Term's decisions: Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), and Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). The Administration has, however, itself proposed legislation to accomplish these results, and, for the reasons stated below, we urge the approach taken in the Administration's bill rather than S. 2104.

Section 7 of S. 2104 would reverse the holding in Lorance v. AT&T Technologies, Inc., supra, in which female employees challenged a seniority system pursuant to Title VII, claiming that it was adopted with an intent to discriminate against women. Although the system was facially nondiscriminatory and treated all similarly situated employees alike, it produced demotions for plaintiffs, who claimed that the employer had adopted the seniority system intentionally to alter their contract rights. The Supreme Court held that the claim was barred by Title VII's requirement that a charge must be filed within 180 days (or 300 days if the matter can be referred to a state agency) after the alleged discrimination occurred.

The Court held that the time for plaintiffs to file their complaint began to run when the employer adopted the allegedly discriminatory seniority system, since it was the adoption of the system with a discriminatory purpose that allegedly violated their rights. According to the Court, that was the point at

which plaintiffs suffered the diminution in employment status about which they complained. The Court viewed this result as dictated by its prior cases holding that the statute of limitations begins to run when the act of discrimination occurs and not when its effects are felt.

The rule adopted by the Court was contrary to the position taken by the Government and the EEOC. It would shield large numbers of existing seniority systems from legitimate discrimination claims. The discriminatory reasons for adoption of a seniority system may become apparent only when the system is finally applied to affect the employment status of the employees that it covers. Moreover, such an application surely focuses the controversy between an employer and an employee more sharply and permits more precise litigation. In addition, a rule that limits challenges to the period immediately following adoption of a seniority system will promote unnecessary, as well as unfocused, litigation. Employees will be forced to challenge the system before it has produced any concrete impact or forever remain silent. Given such a choice, employees who might never suffer harm from the seniority system may be forced to choose to file a charge — an especially difficult choice since they may be understandably reluctant to initiate a lawsuit against an employer if they do not have to. And, finally, the Court's rule will prevent employees who are hired more than 180 (or 300) days after adoption of a seniority system from ever challenging the adverse consequences of that system, regardless of how severe they may be. Such a rule fails to protect sufficiently the important interest in eliminating employment discrimination that is embodied in Title VII.

Likewise, a rule that an employee may sue only within 180 (or 300) days after becoming subject to a seniority system is unfair to both employers and employees. The rule fails to protect seniority systems from delayed challenge, since so long as employees are being hired someone will be able to sue. And, while this rule would give every employee a theoretical opportunity to challenge a discriminatory seniority system, it would do so, in most instances, before the employee's status had been adversely affected by the seniority system and, therefore, before the challenge was sufficiently focused and before it was clear that a challenge was necessary. Finally, most employees would be reluctant to begin their jobs by suing their employers.

The Administration, therefore, supports an amendment to Title VII of the Civil Rights Act of 1964 that would start the period for filing a charge when a discriminatory system was adopted, when an employee becomes subject to the system, or when he is injured by it.

S. 2104 would address Lorance v. AT&T Technologies, Inc., supra, by adding the following sentence to Section 703(h) of Title VII of the Civil Rights Act of 1964:

> Where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agreement with the intent to discriminate on the basis of race, color, religion, sex, or national origin, the application of such system or practice during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice.

This provision contains two apparent and significant limitations. First it would apply only to seniority systems that are adopted as part of a collective bargaining agreement. Apparently, it would not apply to a non-union shop or where a seniority practice was not the result of a collective bargaining agreement or where a collective bargaining agreement had expired, but the seniority system remained in place.

Second, this provision does not make explicit that an unlawful employment practice also occurs when a discriminatory seniority system is adopted and when an employee first becomes subject to it, even though it has not been "applied" in any tangible sense to the employee to produce some employment consequence. Rather, this amendment states only that the unlawful employment practice occurs when the system is applied. Thus, an employee may be precluded from challenging a discriminatory seniority system any time before it is applied to him or her.

By contrast, the Administration proposal is broader. It states:

> For purposes of this section, an unlawful employment practice occurs when a seniority system is adopted, when an individual becomes subject to a seniority system, or when a person aggrieved is injured by the application of a seniority system, or provision thereof, that was adopted for an intentionally discriminatory purpose, in violation of this Title, whether or not that discriminatory purpose is apparent on the face of the seniority provision.

This proposal would reach all seniority systems, regardless of whether they were part of a collective bargaining agreement. It also makes explicit that an employee may challenge a

discriminatory system when it is adopted, when the employee first becomes subject to it, or when the employee suffers some injury by virtue of the application of the system. We, therefore, urge adoption of the Administration's language.

Section 12 of S. 2104 would overrule Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). In Patterson, an employee sued pursuant to 42 U.S.C. 1981, alleging that her employer had harassed her on the job, failed to promote her, and ultimately discharged her, all because of her race. The Court held that Section 1981 is limited by its terms to prohibiting discrimination in "mak[ing] and enforc[ing] contracts," and does not extend to "problems that may arise later from the conditions of continuing employment." Patterson, 109 S. Ct. at 2372. Thus, the Court held, the statute prohibits discrimination -- whether governmental or private -- in the formation of a contract and in the right of access to a legal process that will enforce established contract obligations without regard to race. While the plaintiff's allegation that she had been discriminatorily denied promotion might fall within the prohibition against discrimination in making contracts, her allegations of harassment on the job addressed only conditions of employment. And there was no allegation that she had been discriminatorily denied access to legal process to enforce her contract of employment.

We believe that the law as interpreted in Patterson leaves a significant gap in section 1981 coverage that should be filled. We, therefore, support corrective legislation to ensure that section 1981 will apply to the performance, breach, and termination of contracts to the same extent that it does to their making and enforcement. Furthermore, to remove any possible ambiguity for future cases, we believe that it is appropriate to codify the holding of Runyon v. McCrary, 427 U.S. 160 (1976), that section 1981 prohibits private, as well as governmental discrimination.

Again, however, we urge adoption of the language offered by the Administration. S. 2104 would overturn Patterson by adding the following sentence to 42 U.S.C. 1981:

> For purposes of this section, the right to "make and enforce contracts" shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

The Administration bill would add the following new language:

> The rights protected by this section are protected against impairment by nongovernmental discrimination as well as against impairment under color of state law. This section affords the same protection against discrimination in the performance, breach, or termination of a contract, or in the setting of the terms or conditions thereof, as it does in the making or enforcement of that contract.

The proposals are comparable in extending the protection of section 1981 to every aspect of contract performance and termination. The Administration proposal, however, goes beyond S. 2104 in codifying the holding of Runyon v. McCrary, 427 U.S. 160 (1976), that section 1981 reaches private, as well as governmental conduct. While the Supreme Court declined to overrule Runyon in Patterson, this provision ensures that Runyon will remain the law of the land.

S. 2104 contains several changes to current civil rights law of less significance and varying degrees of merit, none of which appear necessary at present.

Section 7(a)(2) of S. 2104 would overturn much of the Supreme Court's jurisprudence regarding the time for challenging an unlawful employment practice. Under current law, an employee must challenge such a practice within 180 days after it "occurred." Section 7(a)(2) would also permit such a challenge within 180 days after the unlawful practice had "been applied to affect adversely the person aggrieved." The selection of a starting point for the running of a statute of limitations initially involves a weighing of two important interests: (1) ensuring that as many meritorious claims as possible can be pursued, while (2) not unfairly burdening employers with the obligation to defend stale suits. The Court has generally designated the point at which the employee receives notice of an employment action as the relevant moment. See Delaware State College v. Ricks, 449 U.S. 250 (1980); Chardon v. Fernandez, 454 U.S. 6 (1981). S. 2104 would go too far in upsetting the present balance. By focusing on the subsequent applications of an employment practice, rather than the occurrence of the practice, S. 2104 would allow charges to be filed long after --in many instances years after -- the challenged practices occurred. Increasing the time between the challenged act and the filing of a charge will increase the likelihood that memories will fade, witnesses will disappear, and documents will be lost, making it more difficult for both plaintiffs and defendants to meet their respective burdens.

Similarly, section 7(a)(1) would extend the statute of limitations for filing a charge of discrimination pursuant to Title VII from 180 days (or 300 days in a state that is certified as having a comparable procedure) to 2 years. We are aware of no body of proof that suggests a need for such prolongation of the existing filing rules. Instead, this additional time between the occurrence of the challenged practice and the charge will simply increase the likelihood that employers will have to defend against stale claims. It may also disadvantage some plaintiffs by lulling them into delaying assertion of their claims until their claims are stale and more difficult to prove.

Likewise, Section 10(1) of S. 2104 would extend the time for filing a charge against the federal government from 30 to 90 days. We are not convinced of the need for this change. The short filing deadline provides an opportunity for structured resolution of a grievance before positions become hardened.

Section 9 of the bill addresses attorney and expert witness fees in Title VII actions. Section 9(2) would authorize awards of the full amount of expert witness fees to prevailing parties. The fees presumably would be awarded according to the same standard that governs awards of attorney fees; that is, prevailing plaintiffs generally recover fees, while prevailing defendants recover if the plaintiff acted frivolously or unreasonably. The current state of the law regarding awards of expert fees is unsettled, and is likely to be resolved soon. The Supreme Court recently granted certiorari in West Virginia Hospital v. Casey, No. 89-994, to resolve whether the fees of expert witnesses may be included in an award of attorney fees pursuant to 42 U.S.C. 1988. Because the statutory language of section 1988 and Title VII is similar, that case should shed light on the question whether such fees may be recovered pursuant to Title VII. Legislation may prove to be premature, and the Court's thinking on the subject may provide instruction.

Section 9(3) of the bill would strike the language of section 706(k) of Title VII that states that attorney fees shall be awarded "as part of the costs." This section would overturn Marek v. Chesny, 473 U.S. 1 (1985), in which the Court held that attorney fees awarded pursuant to 42 U.S.C. 1988 as part of the costs were subject to Rule 68 of the Federal Rules of Civil Procedure. Rule 68 states that when a timely pretrial offer of settlement is made and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Thus, Marek held that if a plaintiff rejects a pretrial offer and fails to recover more at trial, he may not recover from the defendant attorney fees incurred after the offer.

The Government supported this result as amicus curiae, and we are not convinced that the current rule fails to make sense as a matter of judicial administration. Rule 68 is designed to encourage settlement and avoid litigation. The inclusion of attorney fees as an expense that cannot be recovered serves those goals. Title VII is otherwise designed to encourage resolution of complaints prior to litigation and Rule 68 constructively reinforces that structure. The Administration is not aware that Marek has imposed substantial hardship.

Section 9(4) of the bill would prohibit a court from entering a consent decree unless the parties and their counsel attested that a waiver of attorney fees had not been compelled as a condition of the settlement. This provision would overturn Evans v. Jeff D., 475 U.S. 717 (1986), in which the Court held that a district court has discretion to approve a settlement that is conditioned on a waiver of statutory attorney fees. Again, the Government urged this result as amicus curiae.

This provision is designed to eliminate a potential bind for attorneys. Where a defendant offers a favorable settlement, but conditions it on the attorney's waiver of any claim for attorney fees, the plaintiff's attorney will often disserve his client by rejecting the offer, but may forego compensation if he accepts. This provision, however, would eliminate a way in which defendants can limit their liability and be certain of the bottom line. In addition, a district court has discretion to reject a settlement that contains a compelled fee waiver. It may also instruct the parties to negotiate fees separately. In view of these safeguards, the Administration is not convinced that this provision is necessary.

Section 9(4) of S. 2104 would also authorize a party who prevailed in a Title VII action to recover from the party against whom relief was granted attorney fees incurred in defending that relief from subsequent collateral attack. This provision addresses indirectly the rule announced in Independent Federation of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989), in which the Court held that individuals bringing a collateral attack would be treated as Title VII plaintiffs, not defendants, for attorney fee purposes -- i.e., the original plaintiffs would recover from them only if the collateral attack had been frivolous. The Government, as amicus curiae, once again supported this result. Pursuant to this provision of S. 2104, the cost of another party's unsuccessful -- and perhaps frivolous or ill-advised -- litigation would be imposed on a defendant who had no control over it. The Administration is not convinced that the solution offered by this provision is wise.

Section 10 of the bill, in addition to lengthening the statute of limitations for filing a charge against the federal government, would also authorize payment of interest on Title VII awards against the United States.

Section 11 of S. 2104 would require that all civil rights statutes be broadly construed to effectuate their purposes. To the extent that this provision suggests that courts should eschew traditional rules of statutory construction in favor of unfettered judicial policymaking, we oppose it. Civil rights statutes, like all others, should be construed in a manner that is consistent with legislative intent as expressed in the language of the statutes.

Section 11 of the bill further provides that no federal civil rights law shall be construed to "limit the rights, procedures, or remedies available under any other Federal law protecting such civil rights." Again, civil rights statutes should be construed and reconciled according to their language as enacted. To the extent that this provision suggests that courts do otherwise, we oppose it.

Section 13 of the bill states that it shall not be construed to affect "court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law." The purpose of this section is unclear. It should be clarified so that it may be debated.

Section 14 of the bill contains a severability provision.

Section 15 of the bill creates transition rules. It states, in effect, that each provision that overrules a Supreme Court case shall apply retroactively to the date of the decision. It also provides for vacating orders entered in the interim and tolls until enactment of the bill the running of the statute of limitations on actions that were not filed because of one of the overturned decisions. By upsetting final judgments, this section may unconstitutionally interfere with vested legal rights.

In conclusion, the Administration supports overruling Patterson and Lorance, but urges the Committee to adopt the language of the Administration's proposal. The Department vigorously opposes those parts of S. 2104 that would overturn Wards Cove Packing Co. v. Atonio, Martin v. Wilks, and Price Waterhouse v. Hopkins, as well as the bill's damage remedy for Title VII violations. Based upon this opposition, if S.R. 2104 were presented to the President in its current form, I and other senior advisors would recommend that it be vetoed.

The Office of Management and Budget has advised us that there is no objection to the submission of this report and that enactment of S. 2104 would not be in accord with the program of the President.

Sincerely,

Dick Thornburgh
Attorney General

cc: Honorable Orrin G. Hatch

CIVIL RIGHTS ACT OF 1990

by

William J. Kilberg*

The Civil Rights Act of 1990, currently before Congress, purports to seek a series of narrowly defined, undeniably laudable goals: to "restore" rights, "correct" statutes of limitation, "reform" rules of construction, and reassert the principle that "job bias is always illegal." In fact, the bill would overturn years of Supreme Court precedent reflecting the difficult balancing of societal dilemmas embedded in hard-fought civil rights legislation. Indeed, while eschewing any intent to mandate quotes, this bill would eliminate all defenses to employment practices that fail to assure proportionate hiring and promotion for minorities and women.

Proponents of this legislation apparently view Supreme Court interpretations of the 1964 Civil Rights Act as a coherent challenge to the ability of the American workforce to

---

*Mr. Kilberg served as Solicitor for the United States Department of Labor, 1973-77; he is a labor lawyer and partner in the Washington, D.C. office of Gibson, Dunn & Crutcher.

become integrated racially and sexually. In fact, the tentative and factious Court has done no such thing. Rather, it has backed itself into a series of compromises that allow employers a degree of flexibility to adopt and implement affirmative action programs while denying plaintiffs the right to ride statistical disparities in the workforce to the point at which quotas become inexorable.

One of the decisions criticized by the proposed legislation, Wards Cove Packing Co. v. Atonio, sets forth two complementary principles: (1) plaintiffs are responsible for isolating and identifying with specificity the employment practices that are allegedly responsible for any observed statistical disparities; and (2) employers must show that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer." These holdings strike a carefully calculated balance between a plaintiff's difficulty in proving intent from an employer's subjective decisional process and an employer's difficulty in proving that subjective criteria are justified by business necessity. The Civil Rights Act of 1990 would reverse both portions of this compromise. Under this legislation, plaintiffs could rely on a generalized "group of employment practices" as the basis for a lawsuit. To prove business necessity, the employer would then

have to establish that the criterion applied was "essential to effective job performance."

Thus, under the Civil Rights Act of 1990, plaintiffs would have to do nothing more than establish a statistical disparity; employers then would be liable unless they could identify specific reasons for the disparity and prove that each of the causes was essential for effective job performance. How do you prove that any particular subjective criterion, such as loyalty, integrity, or interpersonal skills, is "essential"? It is virtually impossible to do so. Thus, employers governed by such a standard would be left with little choice: either impose statistical quotas or risk large compensatory and punitive damage awards from the juries that now would decide such actions under the revised procedures contained in other portions of the bill.

Similarly, the proposed legislation would radicalize the Supreme Court's 1989 decision in Price Waterhouse v. Hopkins, which sets forth standards under which plaintiffs may recover in so-called "mixed motive" cases. In Hopkins, the Court had to reconcile the difficult questions raised when evidence of both discriminatory and non-discriminatory motives for employment decisions is presented. The Court resolved these questions by holding that, once a plaintiff evidences some impermissible race-based or gender-based stereotypes, the

employer must assume the burden of proving that the same decision would have been made in the absence of these factors. Because requiring "clear and convincing" evidence concerning the latter issue would make proof virtually impossible, the Supreme Court held that the employer's burden would be governed by the "preponderance of the evidence" standard usually associated with civil actions in our legal system.

Not satisfied with the plaintiff's victory in Hopkins, or even with a "clear and convincing" standard that would make the employer's burden nearly impossible, proponents of the Civil Rights Act are seeking to assure that the employers' burden in such cases is, in fact, impossible. Under the proposal, an unlawful employment practice would be found whenever "the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though such practice was also motivated by other factors." The employer would thus be given no opportunity to prove that the adverse action would have resulted even in the absence of any discriminatory motive. Deputy Attorney General Donald B. Ayer put it succinctly in his testimony on the bill in the House of Representatives: "I believe that this would be the first instance ever in American law where damages could be recovered solely for thinking bad thoughts."

The Civil Rights Act of 1990 would thus appear to have as its primary effect, if not purpose, to stimulate lawsuits against employers. If enacted, it would surely succeed in that. It would not, however, create a single job, except perhaps for labor lawyers. Nor would the bill provide job skills for a single person. It ignores the two key changes coming to our workforce in the 1990's -- the increasing demand for skilled labor and the dramatic increase in the percentage of new entrants into the workforce who are minorities and women. Instead of dealing with the real issues resulting from changing demography, this bill would favor a race and gender-coded workforce hired and promoted by the numbers. The Civil Rights Act of 1990 is not an extension of prior congressional efforts to create a better society, but an effort that can only pervert the principles upon which that prior, historic legislative effort was founded.

Treasury would have to borrow from the public, or the government would have to cut spending or raise taxes elsewhere in the budget" to argue that only reduction of the current-account deficit will produce a meaningful economic benefit.

said in an interview. Myers is concerned that an over-generous Congress could enact more generous current account

TALKING POINTS

Bush Meets With NAACP Chief, Cites 'Outrage' at Bombings

President Bush yesterday met with NAACP Chairman Benjamin Hooks to assure him that the administration will "not let up" in investigating the recent wave of bombings aimed at civil rights figures.

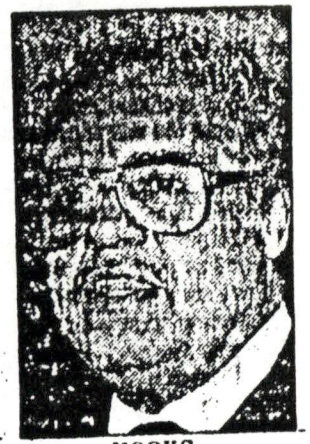
In a statement issued by the White House, Bush said he met with Hooks to "personally express to him my outrage" at the recent bombings, obscene phone calls and hate mail aimed at NAACP headquarters and branch chapters. "I have asked Reverend Hooks to let his membership know that this administration will not let up in the fight against racism and that we will work to bring the perpetrators of these hideous crimes to justice," Bush said.

Hooks said after the meeting that he is "fairly satisfied" with the efforts of federal authorities to investigate the wave of bombings and threats. A federal judge and a lawyer involved in civil rights cases were killed last month by mail bombs. Other mail bombs, sent to the courthouse in Atlanta and to an NAACP office in Florida, were intercepted by authorities.

Earlier, Bush signed a proclamation for next Monday's Martin Luther King holiday observance before a group including Hooks. Bush, saying he wanted to offer "some words from the heart," said King's life was "central to the story of America" and the holiday is an event "that celebrates the greatness of a man whose life and legacy helped set America free."



BUSH



HOOKS

Privately Financed 'Points of Light'

■ President Bush was presented last week with recommendations for establishing a privately financed national volunteerism program—his own "thousand points of light" program.

"We're recommending setting up a private-public foundation," said New Jersey Gov. Thomas H. Kean (R), chairman of the five-member President's Advisory Committee on the Points of Light Initiative.

Although Bush has discussed a $50 million annual budget to get the initiative moving—$25 million from the private sector and another $25 million in public money—Kean said the foundation should begin immediately without tax dollars. "Let's get it up first as a private foundation so we can get it going right away," he said.

The Points of Light Initiative Foundation, which would be composed of 19 to 25 board members, would seek to instill a desire for community service in the 50 percent of all Americans who never have volunteered, Kean said.

"I don't think there's a problem out there that can't be helped by volunteers," Kean said. "That's not to replace what government should be doing. No matter what government does, it can never be enough."

States' Big Tab for Education, Welfare

■ State governments spent half their $485 billion outlays in fiscal 1988 on education and welfare, according to a recent Census Bureau report.

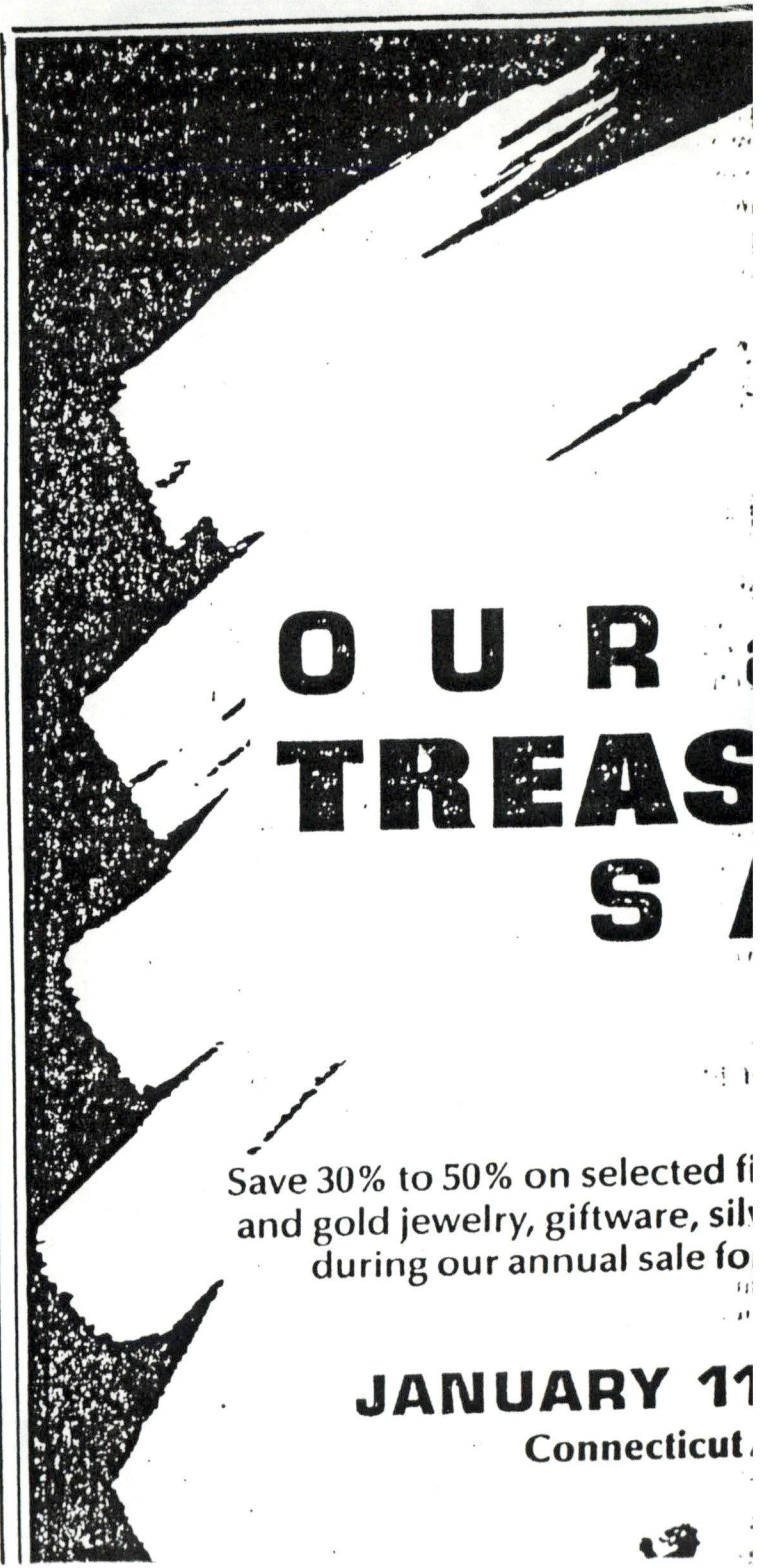
The bureau said $160 billion went for education and $84 billion for welfare. Highways, health and hospitals, employee retirement, unemployment and other insurance trusts plus a variety of smaller programs accounted for the remaining expenditures.

The report said the two biggest sources of state revenue were state taxes, which produced $264 billion, and federal government payments, $100 billion.

Senator Hits Gains Tax 'Name-Calling'

■ Sen. Howard M. Metzenbaum (D-Ohio) yesterday

$150 Hourly Fees at Ethics Committee



A philosopher writing 800 years ago said
"Anticipate charity by preventing poverty."

Maimonides, 1190

Guide to the Perplexed

THE WALL STREET JOURNAL FRIDAY, MAY 4, 1990

The 1990 Civil Rights Bill Is Wrong

By Abigail Thernstrom

Opposing a bill that has been named "The Civil Rights Act of 1990" is not politically easy; the deck has already been rhetorically stacked. But the proposed legislation is deeply flawed. The title of the bill and the voices of Coretta Scott King and others in support of it all suggest continuity with the great civil rights statutes of the 1960s. In fact, the issues the 1990 bill raises have none of the moral simplicity of those earlier days.

It is the attempt to overturn last term's Supreme Court decision in *Wards Cove Packing Co. v. Atonio* that is most troubling. Employment patterns in an Alaskan salmon cannery were the issue in *Wards Cove*. The "non-cannery" jobs were generally held by whites, while Filipinos, Eskimos and Aleuts filled most of the unskilled "cannery" positions. The plaintiffs charged discrimination. But how telling was the disproportionate concentration of minority employees in the lower paying-jobs? Not as telling as the plaintiffs claim, the Supreme Court said.

Harder for Plaintiffs

Civil rights groups depict the decision as a betrayal; the court reneged on an earlier commitment, they say. And indeed, *Wards Cove* has made it harder for minority plaintiffs to prevail. A 1971 decision (*Griggs v. Duke Power Co.*) forced employers to defend their hiring practices as a "business necessity" if plaintiffs could point to a "racially disparate impact"—fewer blacks than whites passing, say, an aptitude test.

The problem with *Griggs* was the assumption that numbers—the number of blacks in one job category and the number of whites in another—tell much of what you want to know in an employment discrimination case. And the strength of *Wards Cove* was that it refined—in an elementary, common-sense manner—the statistical rule. Minorities may be disproportionately concentrated in unskilled positions or may disproportionately fail an aptitude or other test, the court said, but the relevant question is the size of the pool of minority candidates qualified to fill the jobs in question. And if the numbers alone tell less than the *Griggs* court assumed they would, then a showing of disparate impact should not place the burden of proof on employers to demonstrate the "business necessity" of their hiring procedures. Plaintiffs who charge discrimination should have to prove their case.

Within limits, numbers are telling in discrimination cases. No one would argue otherwise. But only in exceptional circumstances should they be regarded as conclusive, or nearly so. The 1965 Voting Rights Act is instructive in this regard. It was precisely the point of the act to substitute a statistical rule of thumb for the extended and complex judicial process by which Fifteenth Amendment questions were traditionally decided. The act identified a violation wherever voter registration or turnout in the presidential election of 1964 fell below 50% and a literacy test was used to screen potential registrants. All states and counties fitting those criteria were "covered" and thus subject to a set of stringent remedies.

At the time, critics complained that justice could not be measured by percentages and that fair enforcement of the Fifteenth Amendment required the precise identification of offenders, which the statistical formula did not provide. But in fact the act did not rely excessively on numerical indicators. Framed with meticulous care, informed by years of litigation experience, the 1965 statute swiftly accomplished what no previous law had achieved: the enfranchisement of Southern blacks.

The statistical test allowed the finding of vote denial by a simple formula, eliminating the need to ferret out constitutional violations in states with abominable records with respect to black voting rights. By 1965 the excessive cost and limited effectiveness of the traditional judicial route had become abundantly clear. And what the framers of the act wrote into law was only what the litigators had learned in the field. The statistical test simply acknowledged the proven link—proven in countless suits—between fraudulently administered Southern literacy tests and low levels of voter participation. Aware that literacy tests were the chief means of disfranchising Southern blacks, the framers of the 1965 act used voter registration and turnout figures to devise a statistical means to identify the discriminatory use of literacy tests.

Within limits, numbers are telling in discrimination cases. No one would argue otherwise. But only in exceptional circumstances should they be regarded as conclusive, or nearly so.

But those circumstances were unique. In 1965 low voter registration rates were an almost infallible guide to the intentionally discriminatory use of literacy tests. Equally important, citizens over 18, with few exceptions, have a right to vote; that's what democracies are all about. Employment is very different. Statistical information is not a comparably reliable sign of intentional discrimination—of a desire to exclude blacks from certain jobs. And no one is entitled to a particular category of job in a particular place of employment.

Thus, when it comes to jobs, numbers can serve to alert employers, employees and courts to the possibility of discrimination. But numbers should only set off an inquiry. Other questions must then take over. Again, the history of the Voting Rights Act is instructive. In the enforcement of the statute, the initially legitimate use of numerical indicators has expanded to one that is highly questionable. Courts and the Justice Department have arrived at a new statistical rule of thumb: Where minority officeholding is disproportionately low in relation to the minority population, electoral exclusion can almost be assumed. Only blacks can represent blacks, it is apparently believed, and black candidates lose elections for only one reason: race.

Those assumptions last week informed the Justice Department decision to throw out Georgia's system of electing judges. True, the number of superior court judges in the state is disproportionately low in relation to the black population. Even in majority-black Atlanta, only three out of 11 judges are black. But how large is the pool of qualified attorneys eager for judgeships? How many black voters bother to cast ballots in judicial elections—contests that are often ignored by almost everyone? And how often does any candidate—white or black—win against an incumbent? Again, the numbers raise questions. But, as the court in *Wards Cove* understood, they don't provide the answers.

In voting rights cases, electoral defeat is not conclusive evidence of inadequate electoral opportunity, and opportunity should be the question. Likewise, the failure to pass an employer's test is not strong evidence of a system closed to minority aspirations. The point of antidiscrimination laws is not to protect black candidates from white competition—whether the job in question is in politics or industry. Their point is to provide access, and, again, only in the most extraordinary circumstances can access be gauged from statistical evidence. Access normally raises a question about process, not results. Is the electoral—or hiring—process distorted by racism? Has opportunity been blocked by racist assumptions?

Emphasis on Opportunity

An emphasis on opportunity, or fair process, squares with our traditional and continuing understanding of what Americans are entitled to. To focus on numerical results is to invite quotas. And quotas amount to reserved seats for scheduled castes, as in India where the horizons of trust do not extent beyond ethnic boundaries. That, too, is a lesson contained in the history of the Voting Rights Act. We can take the path of pessimism—of assuming that members of minority groups cannot get a "fair shake" and must be given their "fair share."

Or we can structure our legal system—our electoral and employment processes, among others—to deliver a message that minority groups amount to separate nations and separate nations require distinct treatment. That message runs through much civil rights discussion these days. But it should not inform our law.

Mrs. Thernstrom is the author of "Whose Votes Count? Affirmative action and Minority Voting Rights," (Harvard University Press, 1987).

Whitney Young
Roy Innis
against quotas.

WARNER BROS. INC.
FEATURE LEGAL
4000 WARNER BOULEVARD
BURBANK, CA 91522
TELEPHONE: 818-954-2023
FAX NO. (818) 954-3490

FACSIMILE COVER PAGE

TO: CAROLYN CAWLEY

FROM: JEREMY WILLIAMS

COPIES TO:

TOTAL NUMBER OF PAGES (INCLUDING COVER PAGE): 3

DATE: MAY 8, 1990

NOTE: IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL (818) 954-2023 AND ADVISE US OF MISSING PAGES OR TELEX NUMBER: 4720389, 0677129 AND LEAVE MESSAGE ADVISING US OF THE PAGES MISSING YOU NEED.

THANK YOU.

BUDGET NO.: 415107

FAX NO.: 202-456-6218

Bill Bennett
Terry Eastland

"__ by #'s"

Ben Hooks
John Jacobs
"on quotas
Bush"

Jeremy N. Williams
Vice President and General Counsel - Theatrical

WARNER BROS.
Warner Bros. Inc.
4000 Warner Boulevard
Burbank, California 91522
818 954-2023
Cable Address: Warbros

May 8, 1990

VIA FAX (#202-456-6218)

Carolyn Cawley
THE WHITE HOUSE
Washington

Re: "DRIVING MISS DAISY" - King Quote

Dear Ms. Cawley:

Replying to your fax, I attach the page of the script in which the King voice overs appear.

Best of luck with it.

Sincerely,

Jeremy N. Williams

JNW/wa
Attachment

139 EXT. BILTMORE SIDE DOOR - SAME TIME 139

Daisy emerges from her car, slowly but head held high. Hoke stands where he is, on his side of the car, not helping, his head also held high. This is an enormous breach of etiquette. Daisy proceeds into the hotel. Hoke climbs back into the car, his face troubled. He drives it slowly away from the arrival area.

ON HOKE'S immobile face.

140 INT. BILTMORE HOTEL BALLROOM - NIGHT 140

The room is crowded with elegantly laid round tables, each seating eight. The camera concentrates on DAISY so we see only one end of the room. Nor do we see the speaker DR. KING, but only hear his voice, as the camera moves in slowly toward DAISY and the empty chair beside her.

DR. KING (v.o.)
...Segregation has placed the whole south socially, educationally and economically behind the rest of the nation. Yet there are in the white south millions of people of goodwill whose voices are yet unheard, whose course is yet unclear, and whose courageous acts are yet unseen...

141 INT. DAISY'S CAR - NIGHT 141

HOKE sits listening to the same speech on the car radio.

DR. KING (v.o.)
These persons are often silent today because of fear - fear of social, political and economic reprisals. In the name of human dignity, and for the cause of democracy these millions are called upon to gird their courage, to speak out, to offer leadership that is needed.

141A INT. BILTMORE HOTEL BALLROOM - NIGHT 141A*

CU Daisy.

DR. KING (v.o.)
If the people of goodwill of the white south fail to act now, history will have to record that the greatest tragedy of this period of social transition was not the vitriolic words and the violent actions of the bad people, but the appalling silence and the indifference of the good people.

Diane Weak
MLK Library 526-8989 524-1956 Archives

Dingler Plaza Hotel after Nobel Prize '65 Atlanta

"A Testament of Hope
The Writings of MLK
Harper & Row

Sell Out by Rufus King
The Writings of MLK, Jr.
Grove
New Yorker Press