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**FACT SHEET ON
ADMINISTRATION CIVIL RIGHTS BILL**

- o The Administration is committed to strengthening the strong employment discrimination laws that now exist. These improvements will operate to obliterate consideration of factors such as race, religion, sex, or national origin from employment decisions.
- o A major objective of the Administration is to ensure that Federal law provides strong new remedies for harassment based on race, sex, religion, or national origin. The Administration proposes to create a new monetary remedy, up to \$150,000, for these forms of discrimination.
- o In addition, the Administration proposes to extend 42 U.S.C. 1981 to outlaw racial discrimination in the performance of contracts, overruling Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).
- o The Administration also proposes legislation overturning the Supreme Court's decision in Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), which unfairly limits the time for challenging discriminatory seniority systems.
- o The administration also proposes to codify the "disparate impact" cause of action for employment practices that unintentionally exclude disproportionate numbers of certain groups from some jobs. This codifies Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Administration bill shifts the burden of proof to the employer to justify practices having a disparate impact under the rule of "business necessity." This overrules the contrary decision in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989).
- o In order to help curtail unnecessary litigation, the use of alternative dispute resolution mechanisms will be encouraged.
- o The time has come for Congress to bring itself under the same antidiscrimination requirements it prescribes for others. This will promote both fair treatment for congressional employees and a greater appreciation by Congress of the consequences of new legislative initiatives.
- o Other improvements, including changes in certain provisions affecting the statute of limitations and expert witness fees, will also enhance the administration of Title VII of the 1964 Civil Rights Act.

- o The Administration bill strengthens our civil rights laws without encouraging the use of quotas or unfair preferences, without departing from the fundamental principles of fairness that apply throughout our legal system, and without creating a litigation bonanza that brings more benefits to lawyers than to victims.
- o The Administration recognizes that equal opportunity can never be a reality unless there are decent schools, safe streets, and revitalized local economies. Therefore, in addition to this bill it seeks Congressional action to promote choice and opportunity on several fronts: educational choice and flexibility; home-ownership opportunity; enterprise zones and community opportunity areas; and heightened anti-crime efforts.

THE WHITE HOUSE
WASHINGTON

Date _____

TO: TONY SNOW

FROM: JACK HOWARD
Special Assistant to the President
for Legislative Affairs

Here's the info I promised you on
civil rights + strikebreakers. I assume
you've got enough stuff on crime to
talk about the 100 Day Agenda. If not, OK.

Any plugs you can put in on
these would be greatly appreciated +
very helpful. As I said, I've got several
House Republicans already making one-manics
+ special orders. An echo by the President
would have a real impact. Thanks very much -
Jack Howard

THE WHITE HOUSE
WASHINGTON

Date _____

TO:

FROM: JACK HOWARD
Special Assistant to the President
for Legislative Affairs

Civil Rights -

- ① Short fact sheet on our Bill.
- ② More detailed fact sheet - pretty technical but you may need it for something
- ③ Henry Hyde's opening statement. On H.R. 1, the Democrats' Bill. Brilliant - the only thing better is hearing him deliver it.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

The legislation may be cited as the "Civil Rights Act of 1991."

SECTION 2. FINDINGS AND PURPOSE

The Congress finds that this legislation is necessary to provide additional protections and remedies against unlawful discrimination in employment. The purpose of this Act is to strengthen existing protections and remedies in order to deter discrimination more effectively and provide meaningful relief for victims of discrimination.

SECTION 3. DEFINITIONS

Section 3 adds definitions to those already in Title VII.

The definition of "demonstrates" requires that a party bear the burden of production and persuasion when the statute requires that he or she "demonstrate" a fact.

The definition of the term "justified by business necessity" is meant to codify the meaning of business necessity as used in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), and subsequent cases including New York City Transit Authority v. Beazer, 440 U.S. 568, 587 n. 31 (1979). Such a definition was reaffirmed by the Court in Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115, 2125-2126 (1989). Even the dissent in Wards Cove acknowledged that "Griggs made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose." See 109 S. Ct., at 2129 (Stevens, J., dissenting) (emphasis added).

The terms "complaining party" and "respondent" are defined to include those persons and entities listed in the Act. The definition of the term "harass" is explained in the analysis of Section 8 below.

SECTION 4. DISPARATE IMPACT CLAIMS

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court ruled that Title VII of the Civil Rights Act of 1964 prohibits hiring and promotion practices that unintentionally but disproportionately exclude persons of a particular race, color, religion, sex, or national origin unless these practices are justified by "business necessity." Law suits challenging such practices are called "disparate impact" cases, in contrast to "disparate treatment" cases brought to challenge intentional discrimination.

In a series of cases decided in subsequent years, the Supreme Court refined and clarified the doctrine of disparate impact. In 1988, the Court greatly expanded the scope of the doctrine's coverage by applying it to subjective hiring and promotion practices (the Court had previously applied it only in cases involving objective criteria such as diploma requirements and height-and-weight requirements). Justice O'Connor took this occasion to explain with great care both the reasons for the expansion and the need to be clear about the evidentiary standards that would operate to prevent the expansion of disparate impact doctrine from leading to quotas. In the course of her discussion, she pointed out:

"[T]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. . . . [E]xtending 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." Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2787-2788 (1988) (plurality opinion).

The following year, in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989), the Court considered whether the plaintiff or the defendant had the burden of proof on the issue of business necessity. Resolving an ambiguity in the prior law, the Court placed the burden on the plaintiff.

Under this Act, a complaining party makes out a prima facie case of disparate impact when he or she identifies a particular employment practice and demonstrates that the practice has caused a disparate impact on the basis of race, color, religion, sex, or national origin. The burden of proof then shifts to the respondent to demonstrate that the practice is justified by

business necessity. It is then open to the complaining party to rebut that defense by demonstrating the availability of an alternative employment practice, comparable in cost and equally effective in measuring job performance or achieving the respondent's legitimate employment goals, that will reduce the disparate impact, and that the respondent refuses to adopt such alternative.

The burden-of-proof issue that Wards Cove resolved in favor of defendants is resolved by this Act in favor of plaintiffs. Wards Cove is thereby overruled. On all other issues, this Act leaves existing law undisturbed.

As Justice O'Connor emphasized in her Watson opinion, the use of disparate impact analysis creates a very real risk that Title VII will lead to the use of quotas. Indeed, there is evidence that the adoption of disparate impact analysis by the courts has led to the use of quotas, although the extent of this phenomenon is for obvious reasons not measurable. See, e.g., Hearings on H.R. 1, "Civil Rights Act of 1991," before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives, 102d Cong., 1st Sess., February 7, 1991 (testimony of Assistant Attorney General John R. Dunne); Hearings on S. 2104, "Civil Rights Act of 1990," before the Committee on Labor and Human Resources, U.S. Senate, 101st Cong., 2d Sess., February 23, 1990 (testimony of Professor Charles Fried); Joint Hearings on H.R. 4000, "Civil Rights Act of 1990," before the Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives, 101st Cong., 2d Sess., March 20, 1990, vol. 2, pp. 516, 625, 633 (testimony of Glen D. Nager, Esq.); Fortune, March 13, 1989, at 87-88 (reporting a poll of 202 CEOs of Fortune 500 and Service 500 companies, in which 18% of the CEOs admitted that their companies have "specific quotas for hiring and promoting"). The use of quotas, however, represents a perversion of Title VII and of disparate impact law. As the Court noted in Griggs, 401 U.S., at 431: "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

Because of the serious dangers inherent in the use of disparate impact analysis, any codification of a cause of action under the disparate impact theory must include evidentiary safeguards recognized in Justice O'Connor's Watson opinion and in Justice White's opinion for the Court in Wards Cove. The codification adopted in Sections 3 and 4 of this Act does so, and it is vital that courts and employers construe this Act in a manner that neither makes it possible to defend or justify the use of employment quotas nor encourages their use.

If an ability test, for example, has a disparate impact and the test is not justified by business necessity as defined in

Section 3 of this Act, the test should not be used. If business necessity can be shown, then the disparate impact need not be reduced or eliminated unless the complaining party demonstrates the availability of an alternative employment practice as required by Section 4 of this Act and the respondent refuses to adopt such alternative. In neither event is an employer required or permitted to adjust test scores, or to use different cut-offs for members of different groups, or otherwise to use the test scores in a discriminatory manner. Manipulating test results in such a fashion is not an alternative employment practice of the kind that an employer must adopt to avoid liability at the surrebuttal phase of a disparate impact case. On the contrary, such discrimination violates Title VII, whether practiced by an employer, an employment agency, or any other "respondent" as defined in Section 3 of this Act. Similarly, a discriminatory practice could not be defended under Title VII on the ground that the practice was necessary or useful in avoiding the possibility of liability under the disparate impact theory. Cf. Civil Rights Act of 1964, sec. 703(j), 42 U.S.C. 2000e-2(j).

It should be noted that in identifying the particular employment practice alleged to cause disparate impact, it is not intention of this Act to require the plaintiff to do the impossible in breaking down an employer's practices to the greatest conceivable degree. Courts will be permitted to hold, for example, that vesting complete hiring discretion in an individual guided only by unknown subjective standards constitutes a single particular employment practice susceptible to challenge.

This approach is consistent with Wards Cove, see 109 S. Ct., at 2125, and has been employed since Wards Cove in Sledge v. J.P. Stevens & Co., 52 EPD para. 39,537 (E.D.N.C. Nov. 30, 1989). The Sledge court alluded to the difficulty of "delving into the workings of an employment decisionmaker's mind" and noted that the defendant's personnel officers reported having no idea of the basis on which they made their employment decisions. The court held that "the identification by the plaintiffs of the uncontrolled, subjective discretion of defendant's employing officials as the source of the discrimination shown by plaintiff's statistics sufficed to satisfy the causation requirements of Wards Cove." This Act contemplates that the use of such uncontrolled and unexplained discretion is properly treated, as it was in the Sledge case, as one employment practice that need not be divided by the plaintiff into discrete sub-parts.

SECTION 5. FINALITY OF JUDGMENTS OR ORDERS

In Hansberry v. Lee, 311 U.S. 32, 40-41 (1940) (citations omitted), the Supreme Court held:

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in which he is not designated as a party or to which he has not been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statutes of the United States . . . prescribe, . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.

In Hansberry, Carl Hansberry and his family, who were black, were seeking to challenge a racial covenant prohibiting the sale of land to blacks. One of the owners who wanted the covenant enforced argued that the Hansberrys could not litigate the validity of the covenant because that question had previously been adjudicated, and the covenant sustained, in an earlier lawsuit, although the Hansberrys were not parties in that lawsuit. The Illinois court had ruled that the Hansberrys' challenge was barred, but the Supreme Court found that this ruling violated due process and allowed the challenge.

In Martin v. Wilks, 109 S. Ct. 2180 (1989), the Court confronted a similar argument. That case involved a claim by Robert Wilks and other white fire fighters that the City of Birmingham had discriminated against them by refusing to promote them because of their race. The City argued that their challenge was barred because the City's promotion process had been sanctioned in a consent decree entered in an earlier case between the City and a class of black plaintiffs, of which Wilks and the white fire fighters were aware, but in which they were not parties. The Court rejected this argument. Instead, it concluded that the Federal Rules of Civil Procedure required that persons seeking to bind outsiders to the results of litigation have a duty to join them as parties, see Fed. R. Civ. P. 19, unless the court certified a class of defendants adequately represented by a named defendant, see Fed. R. Civ. P. 23. The Court specifically rejected the defendants' argument that a different rule should obtain in civil rights litigation.

This Section codifies that holding. Had the rule advocated by the City of Birmingham in Wilks been adopted in Hansberry, one judicial decree in one case between one plaintiff and one defendant would have prevented an attack on the racial covenant by anyone who had ever heard of the original case. That is not how the Federal Rules of Civil Procedure operate. And there is no reason why a different rule should be devised to prevent civil rights plaintiffs, as opposed to persons bringing all other kinds of cases, from bringing suit.

SECTION 6. PROHIBITION AGAINST RACIAL
DISCRIMINATION IN THE MAKING AND
PERFORMANCE OF CONTRACTS

Under 42 U.S.C. 1981, persons of all races have the same right "to make and enforce contracts." In Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), the Supreme Court held: "The most obvious feature of the provision is the restriction of its scope to forbidding discrimination in the 'mak[ing] and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, [sec.] 1981 provides no relief."

As written, therefore, section 1981 provides insufficient protection against racial discrimination in the context of contracts. In particular, it provides no relief for discrimination in the performance of contracts (as contrasted with the making and enforcement of contracts). Section 1981, as amended by this Act, will provide a remedy for individuals who are subjected to discriminatory performance of their employment contracts (through racial harassment, for example) or are dismissed or denied promotions because of race. In addition, the discriminatory infringement of contractual rights that do not involve employment will be made actionable under section 1981. This will, for example, create a remedy for a black child who is admitted to a private school as required pursuant to section 1981, but is then subjected to discriminatory treatment in the performance of the contract once he or she is attending the school.

In addition to overruling the Patterson decision, this Section of the Act codifies the holding of Runyon v. McCrary, 427 U.S. 160 (1976), under which section 1981 prohibits private, as well as governmental, discrimination.

SECTION 7. EXPANSION OF RIGHT TO CHALLENGE
DISCRIMINATORY SENIORITY SYSTEMS

Section 7 overrules the holding in Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), 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 the plaintiffs, who claimed that the employer had adopted the seniority system with the intention of altering their contractual 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 rule adopted by the Court is contrary to the position that had been taken by the Department of Justice and the EEOC. It shields 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. At that time, the controversy between an employer and an employee can be focused more sharply.

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 either to challenge the system before they have suffered harm or to remain forever silent. Given such a choice, employees who are unlikely ever to suffer harm from the seniority system may nonetheless feel that they must file a charge as a precautionary measure -- an especially difficult choice since they may be understandably reluctant to initiate a lawsuit against an employer if they do not have to.

Finally, the Lorance 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 would be 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 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.

This change in the law, therefore, is warranted. Indeed, it is necessary to safeguard the same principles upheld by the Supreme Court in Martin v. Wilks, 109 S. Ct. 2180 (1989), which

guarantees civil rights complainants a fair opportunity to present their claims in court.

SECTION 8. PROVIDING FOR ADDITIONAL REMEDIES FOR HARASSMENT IN THE WORKPLACE BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

This provision is designed to redress an anomaly in current law. Title VII prohibits discrimination in employment, but provides inadequate remedies for harassment in the workplace, including sexual harassment, which the Supreme Court has recognized as actionable under Title VII. See, e.g., Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). Such harassment frequently will not be so intolerable that an employee subjected to it immediately leaves. In such circumstances, the only remedy the victim of harassment can obtain under Title VII's remedial scheme as currently drafted is declaratory and injunctive relief against continuation of the harassment.

Such a rule is plainly inequitable. It effectively tells employers that the only consequence of creating an environment so hostile to an employee that he or she is forced to sue to obtain relief is a directive to refrain in the future. This defect must be corrected.

At the same time, Title VII's existing framework, with its emphasis on conciliation and mediation, has served the country well for more than a quarter of a century as a tool for combatting discrimination. It would be most unwise to jettison or rewrite this basic statute in favor of a tort-style approach including compensatory and punitive damages at a time when our tort system is widely recognized to be in crisis. President Bush has made it clear that our civil rights laws "should not be turned into some lawyer's bonanza, encouraging litigation at the expense of conciliation, mediation, or settlement."

Section 8 is designed to meet both of these concerns. It creates a new remedy for on-the-job harassment, allowing courts to make a monetary award in addition to granting declaratory and injunctive relief. The new remedy is available on the same terms for all forms of on-the-job harassment, whether based on race, color, religion, sex, or national origin.

The new remedy created by this Section is capped at \$150,000. Courts are directed to make a monetary award when an additional equitable remedy is justified by the equities, is consistent with the purposes Title VII, and is in the public interest. In weighing the equities and determining the amount of any award, courts are instructed to consider the nature of compliance programs implemented by the employer; the nature of the employer's complaint procedures, if any, used to resolve

claims of harassment; whether the employer took prompt and effective remedial action upon learning of the harassment; the employer's size and the effect of the award on its economic viability (so that the maximum award would be available only against very large and financially secure employers); whether the harassment was willful or egregious; and the need, if any, to provide restitution for the complaining party.

This Section allows a court to make a monetary award "up to but not exceeding a total of \$150,000." This language is intended to make clear that where there are several related incidents that could arguably be subdivided into distinct unlawful employment practices, the award that can be obtained under this new provision for all of them combined is limited to \$150,000. Otherwise, plaintiffs and their lawyers will have incentives to spend resources on hair-splitting litigation over how many unlawful employment practices have occurred. \$150,000 is a large enough amount to be an adequate and effective remedy for the type of conduct sought to be prevented, and no good purpose would be served by encouraging lawyers to use their inventiveness to circumvent the limitation of \$150,000.

The substantive definition of harassment set out in Section 3 of this Act makes it an offense for an employer or its agents to harass any employee because of race, color, religion, sex, or national origin. The term "harass" encompasses "the subjection of an individual to conduct that creates a working environment that would be found intimidating, hostile or offensive by a reasonable person." The definition also explicitly defines sexual harassment to include certain conduct involving unwelcome sexual advances. The definition is intended to codify current law as stated by the Supreme Court. See Meritor Savings Bank, supra, 477 U.S., at 66 ("Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

The new provisions of Title VII established in this Section are designed to deter and provide restitution for harassment, and to encourage employers to adopt meaningful complaint procedures to redress harassment and to encourage employees to use them. The employer will not be found liable if the complaining party failed to avail himself or herself of an effective complaint procedure. In determining the appropriate remedy, moreover, courts will consider whether an employer took prompt and effective remedial action. The effect of these requirements will be to encourage preventive measures and prompt remedial action by employers and to minimize litigation, thus maximizing the speed and efficacy of relief.

This provision of the Act protects employers from liability only when they have established a procedure "for resolving

complaints of harassment in an effective fashion within a period not exceeding 90 days." Procedures under which victims of harassment are required to seek relief from the same supervisor who has engaged in the harassing conduct, or under which victims would otherwise reasonably expect their complaints to result in retaliation against them rather than in a fair investigation and effective resolution of their complaint, will not insulate the employer from liability. The new provisions of Title VII allow an employee, moreover, to petition a court for emergency relief, and they provide that the continued suffering of harassment shall be assumed to be sufficient irreparable harm to warrant judicial relief, whether or not the employee has fully exhausted a complaint procedure, so long as the employee has initiated a complaint.

This Section includes a provision reaffirming that Congress intends all issues to be decided by judges, as has always been the case under Title VII. Such a provision is important in avoiding the creation of an inefficient tort-style litigation system that is foreign to the purposes of employment law. Because the courts have relatively limited experience with harassment cases, because particular cases will undoubtedly raise issues requiring clarification, and because employers therefore require the information contained in written judicial opinions to assist them in conforming their conduct with the law, it is particularly important to avoid a profusion of unexplained and inconsistent jury verdicts if possible.

Because the monetary relief authorized in these amendments to Title VII is characterized as equitable, the courts should find that bench trials are consistent with the Seventh Amendment. Because the question of constitutionality is not free from doubt, however, this Section also provides that should a court hold that a jury trial with respect to issues of liability is constitutionally required, it may empanel a jury to hear those issues and no others. This ensures that the additional relief this scheme makes available will not become a dead letter should the courts conclude that the Seventh Amendment requires a jury trial on liability. See Tull v. United States, 107 S. Ct. 1831 (1987).

SECTION 9. ALLOWING THE AWARD OF EXPERT FEES

Section 9 authorizes the recovery of expert witness fees (up to but not exceeding \$300 per day) by prevailing parties according to the same standards that govern awards of attorney fees under Title VII. Cf. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). The provision is intended to allow recovery for work done in preparation for trial as well as after trial has begun, with the cap applying to each witness.

**SECTION 10. PROVIDING FOR INTEREST AND EXTENDING THE
STATUTE OF LIMITATIONS, IN ACTIONS AGAINST
THE FEDERAL GOVERNMENT**

Section 10 extends the period for filing a complaint against the Federal government pursuant to Title VII from 30 days to 90 days. It also authorizes the payment of interest to compensate for delay in the payment of a judgment according to the same rules that govern such payments in actions against private parties.

**SECTION 11. PROVIDING CIVIL RIGHTS PROTECTIONS TO
CONGRESSIONAL EMPLOYEES**

Section 11 extends the protections of Title VII to congressional employees on the same basis that they extend to Executive branch employees. The Executive branch, like private employers and state and local governments, is forbidden by law to discriminate on the basis of race, color, religion, sex, or national origin. The Congress, however, has exempted itself from the law. President Bush has stated that Congress "should live by the same requirements it prescribes for others" and that Congress "should join the Executive branch in setting an example for these private employers."

In addition to setting a helpful example, and providing congressional employees with the same rights enjoyed by other Americans, coverage under Title VII will provide the Congress with the valuable experience of living under the same rules that it imposes on other employers. This experience should prove useful in encouraging the Congress to give prompt and serious consideration to proposals for improving the law and in enabling the Congress to resist ill-considered proposals -- like the bill that President Bush vetoed on October 22, 1990 -- that would undermine the cause of civil rights and impose completely unjustified burdens on the employers of this nation.

It should be emphasized that this Section allows the Congress to create its own internal mechanisms for enforcing Title VII in the legislative branch. Like Executive branch employees, congressional employees would retain the right to judicial relief, but the Executive branch would have absolutely no role in enforcing Title VII against the Congress. For that reason, any objection to this Section on separation-of-powers grounds would not be well-founded.

SECTION 12. ALTERNATIVE MEANS OF DISPUTE RESOLUTION

This provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods.

In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums.

SECTION 13. SEVERABILITY

Section 13 states that if a provision of this Act is found invalid, that finding will not affect the remainder of the Act.

SECTION 14. EFFECTIVE DATE

Section 14 specifies that the Act and the amendments made by the Act take effect upon enactment, and will not apply to cases arising before the effective date of the Act.

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STENOGRAPHIC MINUTES
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Committee on the Judiciary
U.S. House of Representatives

Markup Session
H.R. 1 - The Civil Rights Act of 1991

Tuesday, March 19, 1991

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1745 Jefferson Davis Highway, Suite 611
Arlington, VA 22202

1 or worse. They know it and you know it. It gets good press; it
2 gets people's hackles up; but, it doesn't honestly state the
3 issue.

4 The real issue is that corporations fear that
5 discriminatory practices will result in lawsuits, which they
6 might lose. Losing will cost dollars and cents, hurt the bottom
7 line, hurt their stock dividends, maybe their bonuses, maybe
8 their golden parachutes. Well, I happen to believe that it is
9 our duty to fashion a legal system in which discriminatory
10 practices hurt the perpetrator, not the victim. That's called
11 deterrence, and it's something that should cause absolutely no
12 concern to businesses, corporations that operate in compliance
13 with our anti-discrimination laws. If businesses don't
14 discriminate--and that includes avoiding the use of quotas--they
15 have nothing to fear from this legislation or the laws already
16 on the books.

17 This legislation is about decency, fairness, and equality
18 in America. At a time when a substantial majority of households
19 have both spouses working, I think discrimination in the
20 workplace is an evil that most Americans want to see eradicated.
21 H.R. 1 is a good bill, a timely bill. It deserves your support,
22 and I ask you to do so.

23 I yield to the distinguished ranking member of the
24 subcommittee, Mr. Hyde.

25 Mr. Hyde. Thank you, Mr. Chairman.

1 The issues we debate today are of transcendent importance
2 because they involve the heart and soul of our Constitution--
3 equal protection of the law. Before we discuss substance, I'd
4 like to comment about the interesting effort to structure the
5 vocabulary of debate about H.R. 1. The first politically correct
6 notion is to avoid the cue word ``quotas.'' We who believe this
7 is a quota bill, not a civil rights bill, have been warned that
8 we will be held accountable for using what one Member has called
9 the new snarl word. Today I was interested to note that it's
10 reduced to a buzzword, ``quotas.''

11 There exists a whole menu of epithets, such as racist,
12 sexist, eurocentrist, which can be used as a substitute for
13 debate on the merits. But, at the risk of being called all of
14 the above and more, I propose in the few minutes I have to
15 candidly analyze H.R. 1.

16 I might say that the chairman of the subcommittee used
17 words, ``They want to make this into a race issue to exploit
18 that part of our society.'' I don't want to make this into a
19 race issue to exploit anything. I sincerely analyzed this bill,
20 and my opinion is based on the merits, not trying to exploit
21 anything or anybody.

22 In the early and middle years of the civil rights movement,
23 it sounded a battle cry that all fair-minded citizens, the
24 overwhelming number of Americans, could respond to--the
25 essentially moral argument that race must not be a source of

1 advantage or disadvantage to anyone. This claim sought to
2 shatter what Shelby Steel has called "the corrupt union of race
3 and power with principles of fairness and equality." Back then,
4 color preference was known as white supremacy, and we thought we
5 had "delegitimated" color preference in 1964. Americans
6 supported, and still support, the Civil Rights Act of 1964
7 because we recognized racial power is the enemy and used moral
8 power as the weapon.

9 The Civil Rights Act was about unifying people, but I fear
10 H.R. 1, in its consequences if not its intention, is about
11 dividing people, balkanizing our society. In the end, when its
12 complexities are understood at the employment offices of
13 countless businesses and factories, it will not have the support
14 of the American people. It will have their resentment and their
15 indignation.

16 Under H.R. 1, civil rights is no longer about equal
17 opportunity; it has become a contest of statistics. The notion
18 of equality has been subsumed into the concept of
19 proportionality. I would advise all employers to abandon the
20 outdated claim "an equal opportunity employer" for the more
21 honest claim, "a statistically proportional employer." I would
22 recommend all help wanted signs review the old "Irish need not
23 apply" sign, as in 19th century Boston, and perhaps
24 advertisements can specify: "Help wanted--four women, two
25 African American males, and one hispanic needed."

1 My reading of the Constitution is that the 14th Amendment's
2 promise is equal protection, not proportional protection of the
3 law. I oppose H.R. 1 because, while it enriches contingency fee
4 lawyers, it impoverishes the principle of the equality of all
5 Americans. The practical and predictable consequences of this
6 bill, notwithstanding its contrary assertions, is to
7 institutionalize color, ethnic, and gender preferences under the
8 false flag of civil rights. By stacking the deck against
9 employers, they have made this a quota bill, and not Eliza
10 Doolittle, but as Lady MacBeth once complained, "All the
11 perfumes of Arabia will not sweeten it." This bill will
12 accomplish precisely what the 1964 civil rights bill stood four
13 square against--a color-conscious society.

14 Now proponents can point to the alleged exculpatory
15 language on quotas as their argument that quotas are not
16 required nor encouraged, and they can point to a too clever by
17 half paragraph that says statistical imbalances in an employer's
18 workforce are not alone sufficient to show disparate impact.
19 Notice that it's silent about any disparity between the
20 available labor pool and this workforce. But, the reality of
21 this legislation is that it creates a presumption of guilt based
22 only on crude race or gender statistical imbalances in the
23 workplace as compared with the available labor force, and forces
24 the employer to rebutt that presumption under a standard of
25 proof that rules out excellence as a defense and is almost

1 impossible to meet.

2 This bill rewrites 20 years of civil rights law in its
3 definition of "business necessity," distorting it from the
4 definition in the Grieggs case, from having a manifest business
5 relationship to the job in question--that is Grieggs; that is
6 the holding in Grieggs. Now they've defined it as having a
7 significant relationship to the successful performance of the
8 job. That is not Grieggs.

9 Incidentally, I strongly suggest to my colleagues on this
10 committee you review the ethnic ratio, religious, and gender
11 makeup of your office and committee staffs. Should you be hiring
12 or promoting, consult the raw statistics. Don't bother measuring
13 skills, experience, training, quality of education, motivation,
14 or anything else. Forego the search for excellence or you will
15 be personally sued. That's what we're imposing on the rest of
16 the country, and that's what we're imposing on ourselves. By the
17 way, what labor force do you measure against? The District of
18 Columbia? Your home district? A mix of both? We don't know. Some
19 court will tell us, I assure you.

20 The bill's presumption of guilt and its high hurdle of
21 proof will force employers to hire by the numbers, promote by
22 the numbers, and the imposition of the tort system--you know how
23 well the tort system and juries work for medical malpractice,
24 for product liability, don't you? The possibility of jury
25 damages of unlimited amount, both compensatory and punitive,

1 will drive any sane employer to quotas or bankruptcy. But,
2 either way, the country and the cause of civil rights is set
3 back 30 years.

4 I am almost through, Mr. Chairman.

5 Dr. Martin Luther King expressed his dream as "living in
6 a society where people would be judged not by the color of their
7 skin, but by the content of their character." This bill is a
8 quantum leap back from that dream, and that's a real pity.

9 Thank you, Mr. Chairman.

10 The Chairman. Thank you, Mr. Hyde.

11 I now recognize the gentleman from Michigan, the chairman
12 of the Government Operations Committee and a long-time member of
13 this committee, Mr. Conyers.

14 Mr. Conyers. Thank you very much, Mr. Chairman.

15 My first comments must be addressed to the chairman of the
16 Judiciary Committee, the chairman of the Constitution and Civil
17 Liberties Committee, and the ranking member of the Republicans
18 on the Judiciary Committee, Mr. Fish of New York, because you
19 three, who already made again your opening comments, have set
20 the tone for the bipartisan debate around a rather modest
21 question that was attempted to be concluded in a measure last
22 year that saw the House and the Senate pass the bill, two major
23 committees in the Congress, both the Education and Labor
24 Committee and the Judiciary Committee joined, 65 percent of the
25 Members supporting the bill, a bill which had modest goals and



(c) 1991 Daily Report for Executives, May 28, 1991

The Bush Administration has decided temporarily to stop administering a job placement aptitude testing system that has become controversial due to a scoring procedure that rates job seekers within their racial group, administration sources said May 24.

The "'within-group scoring'" technique used to compute a job applicant's score on the General Aptitude Test Battery was intended to combat the adverse impact of lower scores earned by minority job seekers. Also known as the validity generalization process and "'race norming,'" the scoring technique essentially allows blacks, Hispanics, and whites to be scored separately.

The procedure is used by U.S. Employment Service offices in 30 states. Its use has been discontinued in recent years by Virginia, Texas, Missouri, Vermont, Kansas, and Delaware. Of the 18 million individuals who register with employment service offices annually, approximately 600,000 who take the GATB for job referral purposes are scored within their racial or ethnic groups, according to a Labor Department spokeswoman. Altogether, employment service offices annually place about 3 million individuals into jobs nationwide.

The administration's decision to suspend use of the GATB was made during a May



LEVEL 1 - 5 OF 62 STORIES

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HEADLINE: Scoring of job tests under fire
Critics say grouping by race 'new breed of discrimination'

BYLINE: By Ethan Bronner, Boston Globe

DATELINE: WASHINGTON

BODY:

" Race-norming, " the technique used to give some minorities an advantage in employment tests, has been widely used for nearly a decade, attracting little attention until this week when it emerged as an obstacle to passage of the 1991 Civil Rights Act.

(c) 1991 Chicago Tribune, May 25, 1991

Through race-norming, tests offered by many federal and state agencies and large corporations are graded differently for different ethnic groups. Although it is difficult to determine how many states use the practice, 33 states are known to use the kind of job testing in which race-norming is common.

Because blacks and Hispanics generally perform at levels below whites and Asians on standardized tests designed to measure intellectual ability, their scores are not measured against the general population but only against others in their racial group.

Without such a system, the testers say, not enough blacks and Hispanics would pass the tests to qualify for employment.

To opponents, including Sen. Alan Simpson, it amounts to a new breed of discrimination.

" Race-norming denies equal opportunity very blatantly," Simpson, a Wyoming Republican, has complained. "It says some people are more equal than others."

Simpson and Rep. Henry Hyde, an Illinois Republican, say they hope to ban race-norming through the Civil Rights Act of 1991, as does the Bush administration. A new Democratic version of the bill in the House seems to aim



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is known as 'unintentional' discrimination. This means you do not have to prove that a potential employer deliberately discriminated in refusing a job or a promotion. You can win damages merely by showing that your minority is under-represented in his workforce.

The trouble for the Democrats is that their bill raises the spectre of racial quotas, the word likely to be wielded as the most redoubtable weapon in next year's elections. Employers, it is said, would protect themselves by ensuring that their staff reflected the racial mixture of the local population. With resentment growing among working-class whites at further favours to blacks and Hispanics, the Democrats are desperate not to be tarred with the 'Q-word'. They have now injected a clause forbidding employers to apply quotas, so that if President Bush vetoes the bill, they can be cast as more opposed to quotas than the Republicans.

The anger surrounding quotas reflects a deep split in views between the races. A majority of whites, particularly poorer ones, believe that blacks have been helped enough with two decades of affirmative action. Disclosures about the way government agencies have been skewing the results of aptitude tests ('race-norming') to benefit blacks and Hispanic workers have reinforced this view. Past injustice has been rectified, it is said, and the time has come for blacks to stop playing victim and tackle their own faults.

THE WHITE HOUSE
WASHINGTON

Date: 3-19-91

TO: The Domestic Policy Reform
Breakfast Group

FROM: RICHARD W. PORTER
Special Assistant to the President
and Executive Secretary to the
Domestic Policy Council

The attached articles are for your
information.

GOP Can Capture the Civil-Rights Issue

By CLINT BOLICK

Usually when legislation just barely fails to make it into law, its proponents in the next session will pick up where they left off, attempting to gain the few extra votes necessary for approval.

Not so with the 1991 version of last year's civil-rights bill. Though the legislation is the same, the politics have changed dramatically since President Bush's veto was upheld in the closing days of the last Congress. So much so, in fact, that Republicans may wind up turning to their gain an issue the Democrats have dominated for a quarter century.

On the surface, the dynamics appear much the same. Ted Kennedy (D., Mass.) is still the major force behind the bill in the Senate; in the House, Rep. Jack Brooks (D., Texas) is the primary sponsor, replacing Rep. Augustus Hawkins, who retired. The effort to override Mr. Bush's veto of Kennedy-Hawkins failed by only one vote in the Senate and was within striking distance in the House, meaning that Kennedy-Brooks needs, in theory, to gain only a few votes.

But the actions of the major players betray a very different reality. Where a year ago Democrats monolithically supported the bill, this year Mr. Kennedy has had trouble finding people to sign on and will almost certainly lose some of the handful of Republicans (especially Sen. John Danforth of Missouri, who co-sponsored the bill last year). As a result, the bill is still not introduced in the Senate, three months into the new year.

Across the Aisle

Meanwhile, lobbyists led by Ralph Neas of the Leadership Conference on Civil Rights are now trying to portray the bill as a women's bill, even though most of its provisions relate more closely to racial discrimination. At the same time, the civil-rights lobby is negotiating with representatives of the Business Roundtable to find a

compromise—but that group's biggest objection is to the very provisions that are of greatest importance to the women's lobby. Compromise thus appears unlikely.

Activities on the other side of the aisle are markedly different as well. Last year, not a single Republican wanted to take the lead in opposing Kennedy-Hawkins. This year, GOP legislators are falling over themselves to sponsor their own civil-rights bills or to take on the issue in a visible manner.

Likewise, in 1990 the administration was sharply divided between those who opposed and supported Kennedy-Hawkins. It spent the better part of half a year in intense negotiations trying to find a way to

less employers can prove that the challenged practices are significantly related to the job in question. In reality, this standard is nearly impossible to satisfy, and only at tremendous expense through litigation—which employers can avoid if they adopt informal quota systems.

The quota issue was the breakthrough for the Bush administration, for it completely reversed the usual dynamics of civil-rights bills, in which proponents are highly motivated but opposition is diffused. This time, the quota issue galvanized opponents: non-minorities who feel victimized by reverse discrimination.

But perhaps even more important, the bill failed to resonate among mainstream

Though the legislation is the same, the politics have changed dramatically since President Bush's veto was upheld in the closing days of the last Congress.

appease Mr. Neas and company, in the end embracing legislative language that would have given the civil-rights lobby almost everything it wanted.

This year, conversely, Mr. Bush appears to have drawn a line in the sand around his own more moderate proposal, which he's clothing in a broader "civil rights and individual opportunities" package designed to refocus the debate. What's more, after a year of infighting, no prominent naysayers have emerged in the White House to oppose this new approach.

What happened to send Democrats into a tailspin and to embolden the GOP? Both sides apparently have discovered that civil rights has become, for the moment at least, a no-lose issue for Republicans.

Why this is so has a great deal to do with the specifics of the Kennedy bill, one of the most complex civil-rights bills ever. Though it contains a number of fairly non-controversial components that could have been enacted last year had Mr. Kennedy been willing to compromise, its core provisions deal with the standards applicable to statistics-based discrimination claims.

Under the bill, lawsuits challenging employment criteria (tests, education requirements, etc.) and based solely on differences in numerical outcomes among races, religions and genders will be successful un-

blacks. Unlike past civil-rights bills that promised tangible gains, such as housing or voting rights, this one was mired in complex abstractions, such as burdens of proof and statistical disparities.

The lack of grass-roots support for the civil-rights bill dogged its supporters from the beginning. When the NAACP's executive director called for a mass protest against the Supreme Court's 1989 civil-rights rulings, so few people showed up that he was forced to recast the event as a "silent vigil." This reflects a broader trend in which the NAACP has lost more than 100,000 members in the past decade, particularly among younger blacks who increasingly view the organization as irrelevant to their needs.

These new dynamics showed up in the election results last November. The quota issue figured prominently in helping Jesse Helms (R., N.C.) keep his Senate seat and helping Pete Wilson exchange his for the California governorship. Now Democrats, especially the several Southern senators whose seats are up in 1992, are looking nervously over their right shoulders, while Republicans like Sen. Phil Gramm (R., Texas) move to exploit the quota issue for all it's worth.

New support for the GOP strategy arrived from an unexpected source: Ralph



Ralph Neas

Neas himself, whose group sponsored a major poll and series of focus groups on what mainstream Americans think about the civil-rights movement today. The results were so devastating that Mr. Neas tried to suppress the findings, to no avail.

The results are unsurprising, except to people inside the Beltway: Most Americans support equal opportunity and efforts to expand opportunities to the disadvantaged, but they no longer view the civil-rights movement as advancing those goals. Instead, they view it as merely another special-interest group, pursuing its own interests at the expense of others.

Even more ominously for supporters of the 1991 bill: Mainstream voters believe that reverse discrimination is pervasive in American life. And they're not happy about it.

But the GOP isn't making quotas the only facet of its civil-rights strategy. Instead, it's embracing the concept of "empowerment"—eliminating arbitrary barriers that prevent low-income people from controlling their own destinies—as the next logical step for civil rights.

As a result, the administration is packaging its civil-rights bill with empowerment initiatives, such as funding to encourage inner-city school districts to allow parents to choose the best schools for their children, public or private; enterprise zones to ease tax and regulatory burdens on inner-city enterprise; tenant ownership of public housing; and anti-crime measures.

The ideas aren't new (though the administration only recently endorsed private-school choice), but the linkage of empowerment with civil rights is. Whether the administration will work aggressively to establish that linkage is yet unclear. Except for a single speech by Mr. Bush that was eclipsed by war coverage, the administration has yet to present the package as a coherent strategy.

A civil-rights and empowerment strategy could be politically potent, however. It offers the prospect of bipartisan compromise: The nation's first private-school choice law, allowing 1,000 low-income Milwaukee youngsters to opt out of inadequate public schools, was championed by the duo of liberal black state legislator Polly Williams and conservative Gov. Tommy Thompson.

It also offers the GOP a chance to make inroads among black voters without jeopardizing its base among whites. Ask Gov. Thompson, who last year won re-election as the first Republican gubernatorial candidate to carry Milwaukee County since 1946.

Indeed, if the GOP embraces empowerment in a big way, it could completely reverse the ordinary political equation. For once it will be Republicans who can go into the inner city offering tangibles—school choice, homeownership, jobs—while the Democrats argue about abstract intangibles. If Republicans can parlay empowerment issues into a 5% to 10% overall increase in black support, it could deliver them the Senate in 1992.

Black Voters' Choice

What can moderate Democrats do to retain their base? They can take columnist William Raspberry's advice to quietly forget about the Kennedy bill, which is racially divisive and not very helpful to the real needs of the most disadvantaged black Americans, and instead move on to more important issues.

Or they can hope that the Bush administration drops the ball and capitulates on the civil-rights bill. If he fails to assert boldly a clear alternative, Mr. Bush will find, as did Richard Nixon and Gerald Ford before him, that given a choice between the Democrats and a Republican trying to out-Democrat them, black voters will choose the real thing every time.

But for once, the ball is in the Republicans' court on civil-rights issues. The Democrats may have the bill most people are talking about—but it's also one that many would dearly love to abandon. The Republicans have the ideas and the momentum to shift the terms of the debate—both to their advantage, and to the advantage of Americans generally.

The question is whether they have the courage of their convictions. If so, maybe Saddam Hussein taught George Bush a lesson after all.

transforming some CHA development

By Terry Wilson

The lobby of the building at 1230 N. Burling St. isn't fancy, but it also isn't litter-strewn and graffiti-covered like those in the buildings nearby.

With a two-member security team stationed in the lobby to monitor who passes through the building in the Chicago Housing Authority's Cabrini-Green development, the lobby is safe, well-lit and clean.

Since 1984, when tenants united and began working to keep the building from falling further into disrepair, residents have transformed the lobby and other parts of the building from places they feared into ones they show with pride.

Now the committed group of residents, eager to see more improvements, is preparing to undergo an intensive training program that will result in a management partnership with CHA officials.

Like tenants in some other developments here and across the country, the tenants at 1230 N. Burling have found tenant management and other partnerships with public housing officials to be a sound way for residents to improve their homes.

"It's a movement that for the first time gets residents involved in crafting solutions to public housing problems," said CHA spokeswoman Katie Kelly. "It offers residents hope that they can change the way their development is."

Tenants in six CHA developments are at various stages of obtaining tenant management for their complexes or for individual buildings. LeClaire Courts on the Southwest Side has had full tenant management for nearly two years and has enjoyed such success that its board members sometimes meet with boards from other developments to help them iron out problems.

Organized tenants of 1230 N. Burling on the North Side and the Dearborn Homes development on the South Side are preparing to undergo training that will help them co-manage the sites with the CHA, a step that precedes tenant management.

And organized tenants of the North Side's Lathrop Homes devel-

opment and the South Side's Wells, Wentworth Gardens and Washington Park developments also are working toward the same goal.

Beginning with the election of a tenants' board of directors, called a resident management corporation, tenants learn to work together to better conditions in their developments.

They screen prospective applicants who will be their neighbors, evict unruly or destructive residents and oversee modernization projects. They apply for funding in accordance with guidelines of the Department of Housing and Urban Development and the CHA and eventually put out bids and hire their own contractors for work that is paid with funds from their own budgets supplied by CHA and HUD.

They also try to devise economic councils to provide job training and business opportunities within the developments.

"It makes a big difference for the residents," said Dolores Wilson, president of the resident management corporation at 1230 N. Burling, the only building in Cabrini-Green that is pursuing tenant management.

"We were able to turn a whole building around, and now other residents want to move into our building," she said. "It wasn't something that housing just gave us. We were a part of making this a success."

The most formidable obstacle has been enlisting widespread tenant help to ensure that a few do not end up doing all of the work.

"It isn't easy," said Ann Swan, president of the Washington Park resident management corporation, which has encountered difficulty in getting enough tenants to chip in to help. "Most people want things, but some do not want to do what it takes to get them."

Patricia Perry, corporation president at the Wells development, said the commitment to managing is intensive and time-consuming. She said tenants who undergo training attend retreats where the seminars sometimes stretch from 8 a.m. to 8 p.m.

At LeClaire Courts, residents sought tenant management when the buildings began to fall into disrepair. The low-rise development at 4832 W. 44th St., where 4,000 people live, was not a high priority of CHA officials because so many larger developments faced more critical problems, said Irene Johnson, resident management corporation president.

Upon organizing and getting a nod and a sizable list of advisers from HUD, the residents underwent months of training seminars and transformed from a grassroots group of residents with high intentions into a group of people who can get things done.

"It's really learning how to relate to other folks on their level," Johnson said, referring to lawyers, contractors and officials from various funding sources.

Since the development underwent tenant management, work orders for repairs have been addressed faster and the management corporation has obtained rehabilitation funds to begin structural repairs, Johnson said.

The residents at 1230 N. Burling and at the Dearborn Homes development are following LeClaire Courts' lead.

"We cannot depend on management to fix all of our problems," Wilson said. "Management did not write on the walls, and management did not throw things out of the windows. We did that."

The transformation also means some residents will receive jobs, working as janitors, security guards and clerks and monitoring work.

At Dearborn Homes, 2930 S. Dearborn St., several tenants are planning to undergo the training to co-manage the 16-building development with CHA help.

"We'd like to see the development back to the way it used to be," said Naomi McMiller, board vice president for the resident management corporation.

"We had a different type of people here. There was not as much anti-social behavior, and there was no gang activity. The elevators worked, and it was a safe place to live."

Two Hill Leaders Stress Need to Address Poor Children's Plight

By Paul Taylor
Washington Post Staff Writer

Two influential members of Congress yesterday urged President Bush to make America's poor children his top domestic priority and offered some ideas about how to raise funds and restructure programs.

"If I were president, I'd focus on children. They've been in the dark cellar of policy debate for too long," House Ways and Means Committee Chairman Dan Rostenkowski (D-Ill.) said in a speech to the National Association of Children's Hospitals and Related Institutions. "Their problems are stark. They cannot plead their own case. . . . And kids are a good investment. If we help

them today, they'll strengthen our economy tomorrow."

Rostenkowski said that he is "not afraid" to consider new taxes earmarked especially for children's programs, but added that no revenue measure could move through Congress without the president's blessing.

Sen. John D. Rockefeller IV (D-W.Va.), addressing the same group, said it was "fundamentally amoral" that children have become the poorest group in society and that one child in five is now growing up in poverty.

Rockefeller is chairman of the National Commission on Children, a bipartisan panel appointed two years ago by the president and Congress that is due to issue a report

later this spring. One of its likely recommendations, he said, is a proposal to replace the current system of welfare payments to impoverished single parents with a strengthened child support enforcement system, backed up by guaranteed federal allowances for children whose parents do not have the means to support them.

The new system would be designed to collect the "\$25 to \$30 billion sitting out there in child support but not being paid" by non-custodial parents, Rockefeller said, while at the same time providing the backup of a guaranteed federal benefit that would not be stigmatized with the label of welfare.

Even though the commission's members span the ideological spec-

trum from left to right, Rockefeller predicted the panel would issue a consensus report, and he challenged the Bush administration to "pounce on it."

Rostenkowski spent much of his speech spelling out the cost of doing nothing for children.

"There's a depressingly logical momentum here," he said, "Kids who start off on the wrong foot spend a lifetime trying to catch up. And they often don't."

"Kids who don't have enough to eat tend to get sick. Kids who lack adequate medical care tend to miss a lot of school. Kids who aren't in class don't learn how to read. Teenagers who are illiterate tend to drop out of high school. High school dropouts can't get good jobs. Often they can't

get jobs at all. Those who become dependent on the government for a divert resources that could be used better in other areas."

The Ways and Means Committee chairman noted that the restrictions on new spending built into last year's budget deal have all but scripted Congress into a "do-nothing session" this year. But he said he has instructed his subcommittee chairmen to conduct oversight hearings on the plight of children, the hope that children's issues will eventually break out of the budgetary and political gridlock.

"There is no question that there is a sentiment 'on the Hill' to do something more for children because, quite frankly, there is embarrassment at the record," he said.

Sullivan's Sermon: Responsibility

HHS Chief Stresses Individual Behavior in Countering Social Problems

By Spencer Rich
Washington Post Staff Writer

Secretary of Health and Human Services Louis W. Sullivan disagrees with those who believe that the problems of the underclass can be alleviated only by greater investment in social programs.

Sullivan says social spending is but a part of the solution and in recent years has become the apostle of what he calls a "culture of character."

Sullivan has made dozens of speeches, to audiences of all races, warning that more than government spending on social programs is needed to eliminate AIDS, poor health, crime and the economic deprivation that afflict a substantial number of Americans and a disproportionate number of blacks.

He repeatedly emphasizes devotion to one's family. He admonishes listeners to: assume personal responsibility; finish school; work hard at a legitimate job; avoid alcohol, tobacco, drugs and unwed pregnancy; and improve their diets and personal health habits.

These changes in lifestyle and adherence to high standards of conduct, he says, will do as much and probably more to enhance health and improve the lives of the poor as any large government spending program.

At Hampton University last Wednesday, he emphasized he was speaking not only as HHS secretary, but as "a black man and a father of three." He focused on problems that affect many low-income black neighborhoods. "Yes, the government has a role in solving the problems of violence, and drugs and teenage pregnancy and AIDS. But it is far more important what we are doing to help ourselves, what we are doing to help each other."

Other HHS secretaries or surgeons general have taken up some of these causes. Joseph A. Califano crusaded against smoking. C. Everett Koop opposed smoking and favored education about safer sex to avert AIDS. Otis R. Bowen campaigned against smoking and alcohol. Richard S. Schweiker focused on disease prevention. But none has preached the doctrine of good behavior, responsibility and moral

conduct to the extent Sullivan has:

■ On March 10 before the National League of Cities: "Beyond the question of resources, there's the matter of the values that families and communities teach, that government cannot teach, that are critical for human survival."

■ On March 12 at the National Health Forum here: "Our children will not thrive until we reverse the cultural trends that are undermining the family in America. . . . When we examine the data, many of the root causes of the disintegration of child health and welfare are directly traceable to the unprecedented and precipitate rise in single-parenting due to the lack of family formation and rise of divorce. . . . In 1988, 18 percent of white births were to unmarried women and a staggering 63 percent of black births were to unmarried women."

■ Also in his Hampton University speech: "Spiritual wellness is another quality found in strong families which typically manifests itself by attending a church, a mosque or a synagogue."

Since a September 1989 speech at Tuskegee Institute, Sullivan has been preaching the unequivocal message that individuals have a responsibility to behave in certain ways, that they must be held to standards of conduct and that society expects them to make a contribution to the solution of their own problems.

Listeners sometimes snicker at Sullivan and say discussions of good lifestyles or personal conduct will not solve the problems. What is needed, they say, are financial commitments to address some of these problems.

But Sullivan's supporters say statistics seem to back him up.

Unmarried women who have children are far more likely to be on welfare and in poverty than other women—43 percent of single-parent families headed by a woman are in poverty, compared to 7 percent of married-couple families with children. Having a child often prevents a woman from finishing school or working. With no father present, that often means there is no paycheck.

Those who use illicit drugs, practice unsafe sex, or abuse alcohol

and tobacco can expect massively greater health problems. AIDS killed 21,360 Americans in 1989; respiratory cancer killed 141,590; half of all traffic fatalities are alcohol-related. Poor food habits are a major factor in heart disease.

"I couldn't be more supportive of the secretary" in emphasizing personal conduct and responsibility, said Eddie Williams, president of the Joint Center for Political and Economic Studies, a think tank on social issues affecting blacks. "I hope he keeps it up." Williams said Sullivan's message of responsibility "is consistent with the views of black leaders and black scholars."

"But in the same breath we also emphasize governmental responsibility. Government must play a role, and that role inevitably involves expenditure of dollars."

Isabel Sawhill, an economist at the Urban Institute, said Sullivan's message "is constructive as long as it doesn't ignore some of the reasons" why poor people, for example in the inner city, "have adopted certain lifestyles."

She said an individual who faces "a lifetime of poor economic prospects" has his or her "values and attitudes and lifestyles" affected and that feeds back "on your ability to get ahead and be economically mobile."

"People who argue that you can change the world through mere exhortation and particularly preaching at the poor about shaping up their lives are not realistic about the objective circumstances," she said. "But liberals who say all you need to do is give the poor money and it will solve all their problems are missing a piece of the story."

Douglas Besharov, resident scholar at the American Enterprise Institute and a specialist in children's problems and social indicators, called Sullivan "an important voice. He speaks with great authority and evident sincerity."

Besharov said it is important for someone to be saying these things.

"More people have to say what he's saying. We've had a discussion of only one side of the problem of the poor: 'social victimology.' The other side is some degree of personal responsibility. Both sides must be heard."

Can We Talk?

It looks like it's time for the American people to sit down and have a long talk about racial quotas. Without a good-faith discussion of this subject, the United States may be on its way to taking a turn into some very dangerous political terrain.

Let us just describe some of the large forces that seem to be converging on this sensitive subject:

- The Bush administration and congressional Democrats have proposed different versions of a civil-rights bill directed at discrimination by employers. The central disagreement between the two sides is whether the Democrats' bill would cause employers to embed minority quotas in their hiring practices. The Democrats say nothing in their bill mandates quotas; its opponents say the bill implicitly creates incentives for employers to use quotas.

- A week ago, the Washington Post published one of those rare news stories that transforms the politics around an issue such as this. The Post's reporter discovered that the Leadership Conference on Civil Rights, the main proponents of the Democratic bill, had commissioned a study whose results suggest strongly that blue-collar white voters, ticket-splitters and less affluent younger voters now believe that "civil rights" has become a movement dedicated to obtaining preferential benefits based on race or gender, rather than its original goal of equal opportunity. Ce-linda Lake, a pollster and an author of the study, said, "Voters believe that business will implement this bill as quotas." The study also found that these same people are committed to egalitarianism in hiring.

- Several days later, columnist William Raspberry published an important column titled "Why Civil Rights Isn't Selling." Though a supporter of the Democratic bill, he wrote: "Are the rules governing 'disparate impact' suits and minority set-asides of such overriding importance that they should constitute the No. 1 priority of our leaders? I don't think so. The problems most critically affecting black Americans are the joblessness and despair of our young people, the academic indifference of our

children, the dissolution of our families, the destruction (by crime and drug trafficking) of our neighborhoods, the economic marginality of our people. And the Civil Rights Act of '91 won't do a blessed thing about these problems. Worse, it threatens to divide America along racial lines."

- The day before Mr. Raspberry's column appeared, the House Labor Committee's Democrats voted to rename the bill, "The Civil Rights and Women's Equity in Employment Act of 1991." It also voted to require the EEOC to supply equal-employment data submitted by employers, broken down by industry and occupation. It passed a Glass Ceiling Commission to study underrepresentation of women and minorities in upper-level jobs and a Labor Department program to offer employers technical assistance in correcting wage-setting practices. That same day, Majority Leader Richard Gephardt said, "The polls would indicate that people do not perceive correctly yet what the bill can do and why it is important."

We may already be beyond whatever Mr. Gephardt is trying to say. It does seem to be the case that increasing numbers of white Americans, who certainly have not read the text of the Democrats' bill, believe that the civil-rights effort has somehow gone off on the wrong track. You can call that track quotas or preferences or set-asides or disparities or any of the other buzzwords our politics creates around these issues. But a lot of Americans now think some fundamental principles of fairness are being violated.

They may be partly wrong about that, but surely their concerns deserve to be discussed. However, the attitude of the Leadership Conference and House Democrats seems to be, by golly, we're going to cram this bill down these people's throats whether they like it or not, because it's right and good and just.

That is a formula for making David Duke one of the most famous men in America.

Mr. Duke, the Louisiana racial demagogue who likes to run for high office, is a phenomenon created by the quotas issue. Without it, he ceases to exist politically. Liberals said that Jesse Helms's quotas commercial in his last senatorial campaign was also racist. What we now know about voter attitudes suggests that Mr. Helms did us all a favor by raising the issue in such dramatic fashion. The fact is that the quotas issue also helped Pete Wilson defeat Dianne Feinstein for Governor in California.

It's not enough to cry racism against all these voters. Something else is going on here. Most likely, some social compromise needs to be struck around this subject. It threatens to drive us apart—and already is—in ways that should frighten serious people.

If our politics has become so estranged from the voters that it is not possible or desirable to talk honestly about all that is bound up inside the issue called quotas, then the country is in for unending trouble.

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Wall Street Journal
March 19, 1991

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Killing HOPE

The next time you see another Democratic Member of Congress complaining that the Bush administration "doesn't have an answer" for the problems at home, keep in mind what the majority party did to Jack Kemp's HOPE proposal.

Last November, President Bush signed into law a landmark Affordable Housing Act, which starts to shift the federal government away from warehousing public-housing tenants. As an alternative, HUD Secretary Jack Kemp created the HOPE program to promote tenant management and ownership. Congress agreed to fund HOPE with \$287 million taken from other housing programs (failed housing programs, in our opinion). The price for this modest reform was Mr. Kemp's support for an extra \$2 billion for new public housing.

But the lobbies representing developers and public-housing managers were horrified at the mere idea that HUD would experiment with privatizing public housing. The real beneficiaries of federal housing programs, after all, aren't the poor who end up still living in squalid, crime-infested neighborhoods, but the people HUD pays large sums to build and run the housing. If HOPE worked, they'd be cut out of the action.

And so no less than 46 pro-public-housing groups formed a coalition to block the transfer of money to HOPE and another \$500 million program to give states block grants to rehabilitate low-income rental housing. Their effort paid off: The House Appropriations Committee voted down all funding for HOPE. Rep. Charles Schumer of New York intoned that HOPE is "not a substitute for the lack of affordable housing."

This was too much even for Mr. Kemp, who is fairly tenderhearted toward his former colleagues in Con-

gress. He accused the Appropriations Committee of being "more concerned about failed new construction programs of the past, which create dependency and despair." An attempt to restore funding for HOPE will be made on the Senate floor today; the vote will probably be close. Secretary Kemp is only the latest reformer to discover that cutting a deal with Congress is easy; getting Members to honor it is another matter.

Mr. Kemp noted that if there is a shortage of public housing, it is in large part because conditions in existing units are so bad that 7% of them, or some 100,000 apartments, are currently vacant. The reasons why so many poor people recoil from moving into public housing are clear: There are few incentives to keep up the buildings, it is almost impossible to evict drug dealers and other criminals, and tenants have no say in the management of the projects. Encouraging tenant control and ownership can turn neighborhoods around, as pilot programs in Washington, D.C., St. Louis and Boston have shown.

Last year, the House's own Government Operations Committee issued a report on the scandals at HUD. It concluded that both Congress and Sam Pierce's HUD deserved blame for allowing politics to run housing policy. And of course the Members yawned and went on with business as usual.

The killing of HOPE is a good example of why politics in Washington, especially on domestic matters, so often seems incapable of making forward progress. Like the fable of the dog in the manger, congressional Democrats haven't the slightest intention of giving an idea such as Mr. Kemp's HOPE program a chance to prove itself. Heavens, it might work. Then where would they be?

kin. The Soviets (and many government officials) tend not to realize that buying a house entails investment risk. Given the way government construction is delayed, a flood of housing could come on the market just as immigration-fed demand tapers off. That could create a situation where Soviets owe large amounts on homes that are worth less than what they paid for them.

Third, the government brags that the loans are interest free. But the payments are indexed to inflation. Many will be shocked to discover their payments rising 17% a year.

• *Phase 4: The sting.* Normally, the \$37,000 loan would cover much of the cost of a modest home. But government policies artificially inflate housing costs. Average homes in central Israel cost between \$100,000 and \$150,000. Soviets generally choose the cheapest homes, at about \$60,000, and scrape together other debt to cover the difference between the government loan and the cost of the house. Rest assured that they have more incentive to pay off this debt than the government loan.

To get the government loan, the immigrants have to find three guarantors to co-sign. When you are sitting in a roomful of home-owning emigres and you ask them who are their guarantors, they all point to each other.

In other words, the loans create a giant house of cards. A few defaults bring down the whole group. It's easy to see what would happen if thousands of immigrants were suddenly faced with defaults on their loans. The government would bail out the whole mess, and the Soviets would get to keep their homes.

There are other obstacles. The high minimum-wage laws and benefit mandates reduce the number of low-end jobs. The government permit process is so exhausting that only those Israelis with extensive personal connections can expedite them. And then there's government protection of industry: Israeli West Bankers speak about a Palestinian man who wanted to start a concrete company to compete with the monopoly. The civil administration refused to let him proceed—not because he was Palestinian, but because he threatened a coddled industry.

There is some movement toward economic liberalization, led by think tanks such as The Israeli Center for Social and Economic Progress. Thanks to those efforts, you can't throw a stone in the Israeli Parliament without hitting four politicians professing their faith in the free market. But this is a faith rarely sullied by deeds—the entrenched interests are too strong.

Former Prime Minister Shimon Peres says: "I'm for the market, but the market does not absorb immigrants. The market is indifferent. Absorption has to be done by the people. When you fight a war, the market doesn't fight, the people do."

The people will end up doing OK. The immigrants will find ways to subvert the maze of socialist regulation and integrate into the economy after a few years. Israel, despite itself, will be immeasurably stronger.

Mr. Brooks is deputy editorial page editor of The Wall Street Journal Europe.

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Background *The Heritage Foundation*

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April 30, 1991

TIME FOR AN OMNIBUS CIVIL RIGHTS BILL

INTRODUCTION

American civil rights policy is at a crossroads. For the first time in many years, there is a clear choice between two starkly different visions of civil rights: one would extend and strengthen the same race-based policies that have failed to help the most disadvantaged Americans; the other would seek to give these disadvantaged Americans a greater degree of control over their own destinies.

These two visions are reflected in proposals currently before Congress. The race-based approach is contained in a House bill (H.R. 1) introduced by Representative Jack Brooks, the Texas Democrat; a Senate version has not yet been introduced. The Brooks bill is a slightly modified version of the civil rights bill sponsored in the last session of Congress by Senator Edward Kennedy of Massachusetts, and then Representative Augustus Hawkins of California, both Democrats. The Kennedy-Hawkins bill passed both houses of Congress, and was vetoed by George Bush. The Senate sustained Bush's veto by one vote, and no effort to override the veto was made in the House of Representatives.

The White House alternately opposed and sought to accommodate the Kennedy approach last year, finally vetoing the legislation. By contrast, the Administration this year has taken the initiative, introducing a "civil rights and individual opportunities" legislative package which combines greater civil rights protections with empowerment measures designed to expand economic opportunities for lower income Americans and to give them greater control over their own lives.

The Administration's proposals are a first step in shifting the terms of the debate over civil rights issues, away from divisive and counterproductive social engineering schemes and toward efforts to eliminate barriers to opportunity. They reflect the first attempt by a Republican administration to do something more in the civil rights area than merely to oppose or imitate liberal civil rights proposals. By linking with the concept of civil rights, moreover, such empowerment approaches as allowing parents to choose the public schools their children will attend, or permitting public housing tenants to manage their own projects, the Bush Administration is making an important contribution to the debate over how best to enable disadvantaged Americans to improve their situation.

More Commitment. The trouble is that while the White House links empowerment to civil rights, it has done so only rhetorically — and sparingly at that. For such a civil rights strategy to succeed, it will require far greater leadership and commitment than the Administration has given it to date. One problem is that the Administration so far has not pursued the empowerment strategy aggressively in key congressional votes. Another problem is that the Administration has balked at consolidating its entire package into one omnibus bill, to prevent congressional committees sidelining the empowerment proposals, and forcing the White House to debate civil rights entirely within the context of the revamped Kennedy bill. Still a third problem is that the Administration is hesitant to strengthen the empowerment provisions of its package and to make these provisions the centerpiece of its initiative.

The changing political dynamics on civil rights issues appear to favor a bold new approach. By pursuing an aggressive strategy linking civil rights and individual empowerment, the Bush Administration could turn the flank of those lawmakers who evidently wish to see *de facto* quotas in America, and, more important, who apparently do not care that recent civil rights measures have failed to improve the lives of many minorities and other disadvantaged Americans. George Bush now has the chance to prove that he can do far more for disadvantaged Americans than those who long have claimed to be their advocates.

THE CHANGED DYNAMICS OF THE CIVIL RIGHTS DEBATE

Much has changed since Kennedy early last year introduced a bill to overturn a series of 1989 Supreme Court civil rights rulings.¹ First, the Kennedy bill failed to attract veto-proof support in Congress: though the bill passed, it received fewer votes in each house than nearly any other major civil rights bill in the past decade.

¹ The impact of these rulings is summarized in Clint Bolick, "The Supreme Court and Civil Rights: A Challenge for George Bush," Heritage Foundation *Background* No. 728, September 28, 1989.

Second, the specific provisions of the Kennedy bill turned out to be its undoing. Though some of these provisions were unremarkable (such as expanding the time within which individuals may challenge discriminatory seniority systems), other provisions clearly would have promoted racial quotas. The bill's most controversial provision would have made it virtually impossible for companies to defend their personnel practices against discrimination claims based solely on different statistical hiring rates for different groups.² This provision would have created a strong incentive for employers to avoid costly litigation by adopting *de facto*, though not official, quota systems.

Quota Approach. By creating a legal presumption that all differences in group outcomes are attributable to discrimination, the Kennedy bill thereby ignored other major problems that are experienced disproportionately by low-income minorities, such as inferior educational opportunities, welfare dependency, and crime. The bill's quota approach, in fact, flew in the face of findings by both liberal and conservative scholars in recent years that quotas and other forms of racial preferences primarily benefit relatively advantaged members of minority groups and do little to aid the disadvantaged.³ These flaws led a number of liberal writers and publications, including *The New Republic* and *The Christian Science Monitor*, to oppose a civil rights bill for the first time ever.

Third, supporters of the Kennedy bill misjudged the strong opposition among Americans to racial quotas. When Bush announced the principles behind his stance on civil rights at a Rose Garden ceremony last summer, he said he would sign a civil rights bill only if it met three standards: it must neither require nor encourage quotas; it must not violate the fundamental due process principle that the accused is presumed innocent until proven guilty; and it must not be so complex as to create a bonanza for lawyers. The Kennedy bill flunked all three standards. Still, the White House, apparently wanting to sign a civil rights bill at almost any cost, signalled its willingness to overlook Kennedy's failure to satisfy two of the standards. Only when Kennedy

² This provision of the bill would have overturned the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989), which allows plaintiffs to challenge employment practices on the basis of statistics, but requires plaintiffs to prove that such practices are truly discriminatory in that they do not serve a legitimate business justification. In such cases, plaintiffs do not have to demonstrate an intent by employers to discriminate, but merely that the practice challenged (such as tests or a high school diploma requirement) produces different hiring rates for different groups. The Kennedy bill would have placed the burden on the employer to prove himself innocent of discrimination, and, moreover, to show that his practices were not merely desirable or non-discriminatory, but actually necessary to the performance of the job — an almost impossible standard to meet. The Kennedy bill also would have overturned *Martin v. Wilks*, 109 S.Ct. 2180 (1989), which would have the effect of closing the courthouse doors to many victims of discrimination by limiting challenges to "consent decrees" that contain quotas. Although the bill states that its provisions are not intended to encourage quotas, its proponents consistently have rejected language prohibiting quotas.

³ See, for example, William Julius Wilson, *The Truly Disadvantaged* (Chicago: University of Chicago Press, 1987).

held out for language that could lead only to quotas did the frenzied negotiations between the White House and Kennedy collapse. Then last fall Bush vetoed the bill and the veto was sustained; the bill's supporters threatened retaliation at the polls in November.

The election results demonstrated, however, the shallowness of the bill's appeal and the extent of public opposition to quotas. Republicans who supported Bush's veto and made quotas an issue — such as Senator Pete Wilson, in his successful race for Governor of California, and Senator Jesse Helms in his successful re-election bid in North Carolina — used the issue to significant advantage.

At the same time, a post-election survey and series of focus groups sponsored by the Leadership Conference on Civil Rights, an umbrella group of approximately 200 organizations, revealed that while mainstream Americans favor efforts to expand opportunities for the less fortunate, they strongly oppose racial preferences. Americans also believe that quotas pervade American society.⁴

And fourth, there has been a marked increase in grass roots support for empowerment initiatives, such as parental choice in education and tenant ownership of public housing, as a means to improve the lives of minorities; these initiatives provide an alternative to the means enshrined in the Kennedy-Hawkins bill. One Republican who has benefited from his enthusiastic support for empowerment is Governor Tommy Thompson of Wisconsin, who won re-election last November as the first GOP candidate since 1946 to carry urban Milwaukee County. Thompson did so because of his support for such empowerment legislation in Wisconsin as the Milwaukee school voucher program for low income families.

Changing Liberals. These developments have helped create a political climate receptive to new thinking on civil rights. Both conservatives and liberals appear to be re-casting their traditional approaches to civil rights.⁵ The change on the liberal side is seen in the columns of William Raspberry, who is black. Raspberry supported the Kennedy bill, but last month urged Democrats to forget about the bill and move on to more important concerns. Argues Raspberry:

The problems most critically affecting black America are the joblessness and despair of our young people, the academic indifference of our children, the dissolution of our families, the destruction (by crime and drug trafficking) of our neighborhoods, the economic marginality of our

⁴ Thomas B. Edsall, "Rights Drive Said to Lose Underpinnings," *Washington Post*, March 9, 1991, p. A6.

⁵ See Jim Sleeper, "Moving Beyond Race to a Common Agenda," *Washington Post*, March 19, 1991, p. A19.

people. And the Civil Rights Act of '91 won't do a blessed thing about these problems.

Even worse, Raspberry warns, H.R. 1 "threatens to divide America along racial lines," just when "white America stands ready to support racial programs and policies it believes to be fair." Raspberry calls for "end[ing] production of the old model" of civil rights legislation exemplified by the Kennedy bill, and replacing it with "a new model whose chief marketing points would be its orientation toward solutions (as opposed to blame-assignment) and its unambiguous fairness."⁶

CIVIL RIGHTS AND EMPOWERMENT: THE CASE FOR LINKAGE

Empowerment is not a new idea. Neighborhood activists such as Robert Woodson, president of the National Center for Neighborhood Enterprise, and political leaders such as Housing and Urban Development Secretary Jack Kemp, for years have pioneered efforts to reduce barriers that separate low-income individuals from the opportunities available to other Americans.

The new dimension in the discussion is the linkage between empowerment and civil rights.⁷ Critics of an empowerment-based civil rights strategy predictably contend that civil rights and empowerment are separate concepts. These critics argue that Congress should pass civil rights legislation (that is, the new version of the Kennedy bill) first, and later consider empowerment proposals.⁸

Two-Century Struggle. But empowerment is not a logical "next step" after quotas and other forms of social engineering; empowerment is an alternative to such ill-conceived schemes. Viewed in historical context, empowerment is a logical third and final stage in America's two-century struggle for civil rights: the first stage was the abolition of slavery; the second was the legal guarantee of equal opportunity; and the third now is the elimination of barriers that prevent some Americans from controlling their own destinies.

In contrast to quotas, which focus on collective rights and attempt to compel equality of outcomes, empowerment emphasizes individual rights and equal opportunities. An empowerment-based civil rights strategy assumes that discrimination is not the only serious obstacle to opportunity afflicting

⁶ William Raspberry, "Why Civil Rights Isn't Selling," *Washington Post*, March 13, 1991.

⁷ A legislative strategy combining civil rights and individual empowerment was proposed by Clint Bolick and Mark Liedl in "Fulfilling America's Promise: A Civil Rights Strategy for the 1990s," Heritage Foundation Backgrounder No. 773, June 7, 1990.

⁸ This suggestion rings hollow considering the opposition of many within the civil rights lobby to such empowerment proposals as parental choice in education, repeal of the Davis-Bacon Act, funding for the Homeownership and Opportunity for People Everywhere (HOPE) proposal, enterprise zones, and anti-crime proposals.

disadvantaged members of minority groups today. Empowerment thus consists of strategies designed to eliminate these obstacles. Conversely, H.R. 1 ignores or glosses over these problems and presumes they will be solved by racial quotas.

A civil rights strategy based on empowerment thus offers a comprehensive solution to the problems of disadvantaged Americans. It would strengthen civil rights protections without embracing quotas. At the same time, however, it would increase access to quality education, provide economic incentives and other opportunities to escape poverty, and provide greater protection from crime. To do anything less, or to substitute quotas for the elimination of barriers to opportunity, is to compromise the promise of civil rights for all Americans.

THE BUSH ADMINISTRATION AND EMPOWERMENT

The Bush Administration has championed or endorsed a number of empowerment initiatives, such as tenant management and ownership of public housing, enterprise zones, and anti-crime legislation. Bush linked civil rights and empowerment for the first time in his Rose Garden civil rights speech last summer, declaring that empowerment, rather than quotas, should form the cornerstone of future civil rights policies. The Administration, however, then spent the remainder of the year either negotiating over or opposing the Kennedy bill, and did not present a comprehensive alternative approach.

Positive Alternative. When the veto of the Kennedy bill was sustained by one vote in the Senate, the Administration decided it needed to craft a positive alternative to it. News reports and off-the-record comments by Administration officials suggested that a civil rights and empowerment strategy would play a prominent role in the President's domestic policy agenda in 1991.

Bush unveiled his "civil rights and individual opportunities" package on February 27. The package includes expanded civil rights protections and empowerment measures in the areas of education, economic opportunities, home ownership, welfare reform, and crime. However, the overall package was not presented as an omnibus bill; instead, each of its components is, or will be, introduced as a separate bill. The President emphasized that the common theme of these proposals is to "expand opportunity and choice for all."⁹ Bush's announcement marked a potential turning point in civil rights policy by breaking from policies that have focused for decades on redistribution rather than the expansion of opportunities.

⁹ Remarks of the President in "Announcement of Opportunity Action Plan to Civic and Charitable Organizations," Washington, D.C., February 27, 1991.

The trouble with the Bush announcement is that his welcome and creative package has remained just rhetoric. The White House has offered little in the way of leadership or commitment since Bush's announcement. By not offering the package as an omnibus bill, the President runs the risk that the empowerment elements in his proposal will languish in committee while the legislative battle is fought in terms of H.R.1.

Worse still, empowerment advocates who worked closely with the Administration are puzzled and disappointed by the lack of action to promote its bold new strategy. With the exception of an aggressive education reform agenda championed by new Education Secretary Lamar Alexander — an agenda that includes empowerment of low-income parents through choice of public or private schools — the Administration has done little to take the offensive.

The White House in fact acts in a manner to suggest that it will place no political muscle behind and spend no political capital on the empowerment agenda. Indeed, White House actions suggest a lack of commitment.

Example: The term "empowerment" itself mysteriously has been stricken from the approved White House lexicon for speeches by the President.

Example: No linkage with civil rights was made when the President introduced his anti-crime bill.

Example: Jack Kemp, the most experienced and effective empowerment proponent in the Administration, has not been assigned a significant role in promoting the legislative package.

Example: The Administration has made no effort to sell its empowerment strategy where it can do the most good and where it can win new support — in the inner cities.

Example: When Kemp urged Congress to earmark funds in the fiscal 1991 budget to launch his HOPE program, he received no political support from the White House. And when Congress rejected the Kemp request, Bush remained silent.¹⁰

Example: When Congress blocked the Labor Department's efforts to issue new rules under the Davis-Bacon Act, to permit more "helpers" in government-funded construction projects — which would have opened up many job opportunities for young inner-city minorities — the White House could have rigorously condemned empowerment opponents in Congress, but did not do so.

Thus, once again, the Bush Administration is in danger of allowing the opposition to dictate the terms of the debate on a vital domestic policy issue. While the Administration spins its wheels, the forces behind the new Ken-

¹⁰ Carl F. Horowitz. "Why Kemp's HOPE Program Should Be Funded," *Issue Bulletin* No. 162, March 12, 1991.

nedy bill are gaining ground. If the Administration fails to take the offensive on civil rights and empowerment, it may wind up fumbling away the chance to offer real hope and tangible opportunities to disadvantaged Americans.

WHAT THE ADMINISTRATION SHOULD DO

The President's civil rights and individual opportunities package covers a range of issues under the general headings of civil rights protection and empowerment. In each area the Administration has made a credible start, identifying and reducing barriers that separate disadvantaged individuals from opportunities. But in addition to demonstrating strong political support for the package, it should strengthen the empowerment provisions in the package. Even more important than the substance of any particular provision, however, is the imperative that the President establish vocally and aggressively the clear link between civil rights and empowerment. He should state unequivocally and frequently that protection from crime is a civil right; that freedom to pursue entrepreneurial or professional opportunities free from excessive government interference is a civil right; and that the opportunity of parents to choose where their children shall be educated is a civil right. The White House also should combine such empowerment initiatives with strengthened provisions to reduce actual discrimination by employers in a single omnibus bill.

Tangible Opportunities. Bush can take steps to make this civil rights vision a reality. The President should go to America's inner cities and present his vision directly to the people. He should challenge leaders of both parties to join in giving low-income people tangible opportunities. He should challenge mainstream Americans to extend to more disadvantaged individuals the opportunities that are essential to upward mobility. If he does these things, he can revitalize a noble quest for civil rights that for a generation has been drifting off course.

In addition, he should modify his package in several key areas. Among them:

1) Civil rights protections.

The White House has proposed several changes to strengthen existing civil rights laws, specifically in a bill sponsored on behalf of the Administration by minority leaders Robert Dole of Kansas, in the Senate (S.611) and Robert Michel, of Illinois, in the House (H.1375).

One troublesome aspect of this bill, however, is its provision to modify the Supreme Court's *Wards Cove* decision. Yet no modification is necessary, since *Wards Cove* created a level playing field in which plaintiffs can still win

valid discrimination challenges, but employers can successfully defend practices that are not discriminatory.¹¹ The Administration bill thus makes matters worse by tilting the playing field. The Bush bill would do this by placing on the employer the burden of proving its practices are justified by "business necessity." Although the Administration bill defines this term in a less onerous fashion than does H.R.1, this provision would make it difficult for the bill to satisfy the President's own Rose Garden standard that the legislation must not lead in practice to quotas. The Administration should defend vigorously the *Wards Cove* decision, not undermine it the way the Dole-Michel bill does.

Other aspects of the Administration bill are very reasonable. For instance, the bill would allow reasonable monetary damages to victims of on-the-job racial or sexual harassment, for whom existing remedies often are inadequate. The Administration also would allow arbitration as an alternative to litigation in employment discrimination cases, thereby reducing the costs to both parties and providing speedier justice to victims of discrimination. It also would extend protection of the Civil Rights Act of 1964 to congressional employees, ending the current double standard under which Congress exempts itself from laws to which it subjects the rest of the country.

How the Administration should strengthen its package. The administration should propose to re-define "affirmative action" as the term is used in federal regulations, contracts, consent decrees, and other official documents. Most Americans now assume affirmative action means racial preference. Indeed, it often has come to mean this in practice. Originally, however, affirmative action was a legitimate strategy to give disadvantaged individuals the tools necessary to compete on an equal basis. This original meaning should be restored. It would lead to such actions as basic skills training, literacy training, transportation of inner-city workers to suburban jobs, apprenticeships, and expanded recruitment — in short, a range of steps designed to increase the pool of employable disadvantaged individuals.¹² The original advocates of affirmative action did not conceive it as a racial preference scheme, and such preferences do nothing to help individuals overcome real disadvantages.

The Administration similarly should propose a streamlining of all federal civil rights laws and regulations. Laws passed at different times covering overlapping subjects, and regulations imposed by the many agencies charged with enforcing civil rights laws have created confusion among those seeking to abide by the law and those who seek to assert their rights under the laws. A comprehensive effort to harmonize federal civil rights laws and to make their enforcement more efficient and effective is long overdue.

11 See Bolick, *op. cit.*

12 See Clint Bolick and Susan Nestleroth, *Opportunity 2000: Creative Affirmative Action Strategies for a Changing Workforce* (Washington: U.S. Department of Labor, 1987).

2) Empowerment: parental choice in education.

The most devastating barrier to opportunity in the inner city is the public school system. Because it has a virtual monopoly on schooling of low-income youngsters who cannot afford to go elsewhere, public schooling often consigns such youngsters to inferior education in crime-ridden environments.

Education choice programs in Milwaukee, New York City's East Harlem, and other areas for the first time give parents the opportunity to select high quality educational opportunities for their children.¹³ Parental choice also forces public schools to compete for low-income youngsters and the funds they bring with them, creating a strong incentive for improvement. Probably more than any other single initiative, parental choice in education could help disadvantaged Americans gain the tools necessary to escape poverty.

To give low-income parents a chance to send their children to better schools, the White House plans to introduce an "Educational Excellence Act," which will offer funds to school districts to develop and introduce choice programs. This proposal would expand the benefits of choice that today are available only in a few cities.

How the Administration should strengthen its package. Rather than the carrot of increased funding, which is the inducement for introducing choice favored by the White House, the Administration should instead wield the stick of withholding funding. It should propose that any school district failing to offer quality educational opportunities to disadvantaged youngsters must as a condition of receiving federal education funds introduce choice programs for such youngsters. The Administration also should propose that parental choice rather than forced busing should be the preferred remedy in school desegregation cases.

3) Empowerment: economic opportunities.

In recent years, the movement of jobs to the suburbs, government regulations, rising taxation, and other factors have reduced the number of traditional entry-level jobs in the inner city, thus effectively cutting off the bottom rungs of the economic ladder. To stimulate job creation in the inner city, the Bush Administration has supported the "Enterprise Zone Jobs Creation Act of 1991." This bill (H.R. 23), introduced by Representative Charles Rangel, the New York Democrat, would direct the Secretary of Housing and Urban Development to designate fifty economically depressed areas as enterprise zones. This designation would spur investment and jobs in the zones by eliminating capital gains taxes on new business investments, providing other tax incentives for business development, and reducing taxes on low-income workers. By removing such burdens, jobs would return to places where

¹³ See Clint Bolick, "A Primer on Choice in Education: Part I - How Choice Works," Heritage Foundation Backgrounder No. 760, March 21, 1990.

people need them the most. Giving young and unskilled inner-city residents steady jobs, regular paychecks, and inculcating good work habits would help solve serious problems ignored by the old-line approach to civil rights.

How the Administration should strengthen the package. Economic regulations imposed at every level of government — particularly by states and cities — prevent low-income individuals from starting businesses or entering occupations for which they are qualified.¹⁴ Laws regulating entry into professions from hairstyling to plumbing, limits on the number of taxicabs and garbage collectors, union wage requirements placed on government contracts by the federal Davis-Bacon Act, and similar state laws set arbitrary restrictions on entrepreneurial and employment opportunities. Such restrictions burden especially those currently outside the economic mainstream. These Americans are disproportionately minorities and the poor.

Bush should restore the civil rights guarantee of economic liberty — one of the most basic rights secured by post-Civil War legislation but left unprotected by the courts. He could do this by proposing an Economic Liberty Act. This bill would require governments to justify the limits they place on economic opportunities by demonstrating that such limits are reasonably necessary to protect a valid public health, safety, or welfare objective. The Administration also should support efforts to repeal the Davis-Bacon Act. This legislation was passed explicitly to reduce competition for government-funded construction jobs from black and Hispanic workers, and it continues to have that impact today.¹⁵

4) Empowerment: emancipation from dependency.

The current welfare system contains perverse incentives that lead to broken families and long-term dependency. The result is that those trapped in the cycle of poverty have few avenues of escape. One reason for this is that only a fraction of the funds intended to help the poor actually reach the poor, with the welfare bureaucracy taking the rest to provide "help" that actually encourages dependency.¹⁶ Worse still, the incentives of the system discourage work and contribute to the collapse of families by granting more assistance to households headed by single mothers than to poor but intact families.

14 See Clint Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century* (San Francisco: Pacific Research Institute, 1990), pp. 47-91.

15 See Scott Hodge, "Congress vs. Minorities: The New Davis-Bacon Rules," *Heritage Foundation Executive Memorandum* No. 299, April 9, 1991. See also, Scott Hodge, "Davis-Bacon: Racist Then, Racist Now," *The Wall Street Journal*, June 25, 1990.

16 See Stuart M. Butler, "Welfare," in Charles Heatherly and Burton Yale Pines, eds., *Mandate for Leadership III* (Washington: The Heritage Foundation, 1989), pp. 265-267.

The empowerment approach would reform the welfare system in several key ways. It would, whenever possible, replace welfare bureaucracies with service organizations composed of the poor themselves, so that their interests would be better served. It would give the poor greater control over their own lives, through such things as parental choice in education. And it would foster the economic independence of the poor by eliminating the incentives in the welfare system that discourage work.

The Bush Administration, building on the foundation of the Reagan Administration, has proposed such an empowerment approach to welfare reform. For example, the Administration has emphasized resident management and ownership of public housing as an essential solution in helping poor people escape poverty by strengthening community institutions and fostering self-improvement. Pilot "urban homesteading" programs in Washington, D.C., St. Louis, and elsewhere have demonstrated the benefits of giving low-income people greater control over their housing. Where they exercise this control, crime drops, property values climb, and welfare dependency decreases.¹⁷

Resident Management. The Bush Administration last year won congressional approval for its HOPE (Homeownership and Opportunity for People Everywhere) program, which gives funds to resident management corporations and other entities to allow public housing tenants to gain ownership of their homes. The Administration this year proposed an acceleration of funding for HOPE, but that was rejected by Congress.¹⁸

The Administration also is proposing the "Community Opportunity Act of 1991." This would give local communities greater flexibility to tailor federal welfare benefits to the needs of the beneficiaries, by making it easier to obtain exemptions from government rules that currently thwart welfare reforms proposed by states. Freedom from bureaucratic regulations can result in a much more innovative and effective welfare system.

How the Administration should strengthen its package. Bureaucrats have a vested interest in preserving their powers by resisting the empowerment of the poor. The Administration thus should propose a statutory right to resident management and ownership of public housing, setting forth the precise conditions for management and ownership and sharply limiting the ability of public housing officials to frustrate these objectives. Unnecessary regulations hampering resident management and ownership, such as restrictions on evictions of tenants who persistently violate rules and Davis-Bacon wage requirements for resident employees, should be eliminated.

17 See John Scanlon, "People Power in the Projects: How Tenant Management Can Save Public Housing," Heritage Foundation *Background* No. 758, March 8, 1990.

18 Carl F. Horowitz, "Why Kemp's HOPE Program Should Be Funded," *Issue Bulletin* No. 162, March 12, 1991. See also Jack Kemp, "Democrats' Double Talk on Affordable Housing," *Washington Post*, April 11, 1991, p. A21.

The Administration also should press for far more sweeping reforms in the welfare system. It should propose legislation to tighten work requirements for those receiving welfare, and legislation to reduce taxes on very low-income working families. These measures would reduce the powerful disincentive to leave welfare and join the workforce. The Administration too should propose far more generous exemptions from federal rules for major state-sponsored welfare reform proposals.

5) Empowerment: freedom from crime.

The most basic civil right is personal security, and the most important duty of a government is to protect its citizens from crime. Yet freedom from crime is the least-protected civil right, particularly for those who live in poor, inner-city neighborhoods. Crime destroys schools, job opportunities, property, and lives.¹⁹

The President's anti-crime bill (S. 635), introduced by Senator Strom Thurmond, the South Carolina Republican, would strengthen law enforcement in several ways. It would extend the federal death penalty to several additional crimes. It would reform *habeas corpus* procedures, which today lead to seemingly endless death penalty appeals that clog the criminal justice system. It also would modify the "exclusionary rule," under which crime evidence is suppressed because police erred in obtaining it. This rule as currently applied often allows confessed criminals to go free. In sum, the White House proposals would increase the odds of bringing criminals to justice.

How the Administration should strengthen its package. Recognizing the devastating effect of crime in the inner city, the Administration should sponsor legislation to protect victims' rights in federal cases, and to encourage states to adopt uniform standards for victims' rights. Prosecutors should be required to take the victims' interests into account in the criminal justice process, in such areas as sentencing, parole, and plea bargaining, and to secure restitution for loss of life or property. The right of Americans to be free from crime should be accorded the same importance as society's interests and the rights of criminal defendants in the criminal justice process.

CONCLUSION

The obsession of the established civil rights lobby with enactment of a bill that will lead inevitably to racial quotas, threatens to turn civil rights into a zero-sum game in which one American's gain is necessarily another American's loss. This is not necessary. It is possible to pursue a civil rights strategy in which everyone wins. Such a civil rights strategy is based on em-

¹⁹ See Carl F. Horowitz, "An Empowerment Strategy for Eliminating Neighborhood Crime," Heritage Foundation *Background* No. 814, March 5, 1991.

powerment and provides a welcome alternative to the racially divisive features of H.R.1. As such, the Bush Administration's civil rights and individual opportunities package is the first step of a promising new strategy designed not only to better ensure equality of opportunity, but to assist those who are excluded from such opportunities.

Now Bush must go beyond the first step. He must mount an aggressive campaign to explain to Americans that empowerment and civil rights are linked closely together. He must give legislative form to that link by combining his empowerment proposals with his antidiscrimination proposals in an omnibus civil rights bill. He must give strong White House support to his Cabinet secretaries when they seek legislation on Capitol Hill to empower Americans. And he must continue to declare his adamant opposition to any measure that will in practice lead to racial quotas in employment. Strong public opinion and sound public policy have converged to create an unprecedented opportunity. This Administration has the chance to enter history as the administration that finally made good on America's promise of opportunity for all Americans. The Administration's decision can determine in large part whether the most disadvantaged members of society are allowed to participate fully and equally in the American Dream, or if America will become a land of competing racial groups vying for legal advantage.

Prepared for The Heritage Foundation
by Clint Bolick

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*"That was extremely empowering, Terry—I believe
I'll have another."*

Welfare Reform With the Family as the Focus

By WAYNE R. BRYANT

For most Americans, the family has endured as an institution of great strength and comfort. For a growing number of families, however, the fabric that holds them together is being weakened and torn by insidious social ills such as illiteracy, drug and alcohol abuse and poverty.

If the family crumbles, there is little hope for citizens enveloped by poverty to emerge from their hopelessness and frustration and lead happy and fulfilling lives. That is why I have introduced a legislative program in New Jersey that places the family at the center of efforts promoting new opportunities for self-sufficiency.

Government's response thus far to poverty plaguing one generation after another has been welfare. But welfare is not a system that encourages self-sufficiency. It is not a system designed to give recipients access to the economic, social and political power they need to break the chains of poverty. It is a system that discourages family unity by forcing fathers and father figures out of welfare communities.

The welfare system has created a sub-society of "invisible men" who fear that if they make their presence known, they will put the welfare mother at risk of losing her benefits. Cutting off benefits when a mother marries is a glaring flaw in public-assistance policy.

One bill in my package would permit a mother to marry a man without facing a total loss of Aid to Families with Depen-

dent Children benefits—provided the couple's total income is less than 150% of the federal poverty levels. (For a family of four, the income standard would be \$20,100 a year.) By creating an incentive to bring men back into the home, we as a society can begin to renew the strength, warmth and love that are characteristic of the American family.

But abolishing the financial disincentive for marriage is not enough. Government must continue to use law-making tools at its disposal to reform public assistance with a holistic approach to the family. Another bill, the cornerstone of my package, would establish the Family Development Program Act. This program, which would be offered in counties with the largest AFDC caseloads, is designed to bring recipients and their families under an umbrella of self-sufficiency.

As an African-American who has worked in the church, the community and in government on behalf of the minority community, I know that self-sufficiency begins with education. Education must be the hallmark of any plan to help individuals escape the clutches of poverty.

The program I have proposed has a goal of ensuring that every member of a recipient's family obtains a high school diploma or its equivalent in either the traditional academic or vocational course of study. And, with that education and skill, parents, sons and daughters will be prepped and primed for good jobs at good

wages. The contrast between what welfare offers and what I am proposing can be captured in one simple Chinese proverb: "Give a man a fish and you will feed him for a day. Teach a man to fish and you will feed him for a lifetime."

My bill carries a provision that would require the state to craft and monitor an assistance program tailored to an individual family's status. As part of this plan, recipients and their families would be required to meet the terms of a contract for assistance. And if a recipient or family member breached that contract by failing to attend school or vocational training, he or she would risk a 20% cut in benefits.

Another major component of my package has already fueled discussion among many diverse groups and individuals: Once a woman was under contract, she would no longer be paid added benefits when she had more children. This legislation actually has a dual focus. The second part of the legislation would allow welfare women to work and to earn income equivalent to 25% of their welfare grants.

This proposal has been characterized as "sound logic," "mandatory planned parenthood," and many things in between. In actuality, all I suggest is that unexpected pregnancies be handled in AFDC families much like they're handled in other homes. In a middle-class family, the family readjusts the household budget or someone goes out to get a part-time job to support the new arrival.

A final major component of this package would create a new council that would take a close look at the communities and neighborhoods in which many recipients live. It would recommend to state government leaders how to target resources to improve, redevelop and rehabilitate urban neighborhoods. As someone whose district includes Camden, one of the poorest cities in the country, I know how much help is needed. While we must forge greater unity in the family, it is equally important to improve the physical environment surrounding the family.

This program is hardly the first attempt to reform the welfare system. In New Jersey, a 1980s creation called Reach (Realizing Economic Achievement) was sold to welfare recipients as the Yellow Brick Road to a private-sector job. It put government in the job-training business, an occupation best suited for the private sector. By ignoring the importance of a family focus to break the cycle of poverty, Reach was doomed in the design stage.

In contrast, my program rededicates the state to its more traditional function of educating the public. This emphasis on education, I feel, would be welcomed by the private sector, as businesses spend billions of dollars each year on basic skills training for employees.

Education represents the doorway to freedom from poverty. The key to that door is in the hands of the family.

Mr. Bryant, a Democrat, is majority leader of the New Jersey Assembly.

Hispanics

D. Although there have been only relatively small changes in income ratio . . .

1. Ratio of Hispanic to U.S. Total Personal Income

Year	Family Income Ratio	Per Capita Income Ratio
1973	.72	.59
1977	.71	.61
1981	.73	.63
1984	.71	.62
1987	.66	.62
1988	.68	.61

(Cont.) . . . many economic analysts believe that real Hispanic income gains have been masked by the recent arrival of substantial numbers of new Hispanic immigrants.

2. U.S. Hispanic Population

Year	Percent of Mexicans that are:	Percent of Hispanics that are:	
	Emigrés	Mexican	Emigrés
1970	18%	50%	20%
1980	26%	59%	29%
1985	33%	62%	34%

See notes on page 391.

that 36 percent of them are immigrants to the United States and half of those arrived within the last 10 years. Historically, new immigrants usually have difficulty starting out. Accordingly, the statistical status of their entire group is artificially depressed. But when the data for Hispanics are adjusted to reflect the difference in nativity and duration of residence, a different portrait emerges.

For example, Census Bureau data show that Hispanic immigrants in the United States for more than five years have a poverty rate half that of more recent immigrants. And while 1987 Hispanic family income was only 63 percent that of whites, young Hispanics—who are much more likely to be American-born—had almost the same earnings as young whites. Also, American-born Hispanics are twice as likely to hold white-collar jobs as are recent Hispanic immigrants.

A recent examination of the 1985 National Assessment of Educational Progress, by Professor Francisco Rivera-Batiz of Rutgers University, found further evidence that the longer Hispanics have been in the United States, the more money they make. (See chart, page 60.)

Not surprisingly, the data can be interpreted in different ways in the public policy debate. Rafael Valdivieso of the Hispanic Policy Development Project stresses that, notwithstanding individual progress, Hispanics as a group still lag far behind whites; they are far more likely to drop out of high school and to live in female-headed households. He concludes that Hispanics need massive government and private help.

Linda Chavez, former staff director of the U.S. Commission on Civil Rights and a former official in the Reagan White House, believes the current data is essentially heartening. Chavez, who is writing a book on Hispanics entitled "Tipping the Melting Pot," suggests that stressing bad news is the worst thing for Latinos because it "inculcates the idea that they are permanently and structurally disadvantaged, which corrodes self-esteem, and can be self-fulfilling." Indeed, it might be wise to stop thinking of Latinos as Americans who are down and out, and look instead to models of earlier upwardly mobile immigrant groups, who struggled and made it.

September 25, 1989

Turning the Kerner on Racism

Has the Kerner Commission report of 1968 been repudiated?

It's an important question. Ideas have consequences. The Kerner study, which came after black riots, shaped the thinking of a generation. If Kerner was flawed, the thinking that grew from it may be flawed.

Kerner's central statement was that America "is moving forward two societies, one black, one white—separate and unequal." Why? The answer

was clear said Kerner: "white racism." The results of racism were also clear to Kerner: Conditions for blacks were dreadful, apparently deteriorating, and would worsen unless the federal government acted massively.

Comes now a new study, by the National Research Council: "A Common Destiny: Blacks and American Society."

The NRC report does not seek to discredit Kerner, or even deal with it directly. Yet, consider the summary of NRC by the director of the study, Professor Gerald Jaynes of Yale: "Although better by a wide margin than it was in 1940, by nearly all objective measures, the status of blacks relative to whites has stagnated or regressed since the early 1970s."

So: NRC says there was great progress in the good old days of the civil rights movement—until the early 1970s. But Kerner, which came out in those good old days, said things were terrible, and likely to get worse.

Which is right? NRC's statement of no relative progress for blacks since the early 1970s is arguable; I think black progress has continued. But NRC's conclusion that progress was made in the '60s is correct. It is supported by mountains of data.

Kerner was not only off-base factually. It sent out harmful messages to blacks and Americans generally. By concentrating on racism and government, Kerner shortchanged the argument now called "the culture of poverty," which stresses internal problems of the black community.

Some NRC scholars (by no means all) understand that Kerner was misguided. Professor Glen Loury of Harvard, an NRC panelist, states: "By saying that implacable white racism brought about poor conditions, Kerner posed the situation as a white problem, not a black problem. That is a harmful notion for blacks."

Loury, who is black, is right. Efforts to root out racial discrimination must continue. But the doors of opportunity are open. Loury believes blacks are better served by focusing on open doors rather than blaming their situation on racism.

Professor Nathan Glazer of Harvard, another NRC panel member, says: "The Kerner Commission taught us to concentrate on the undoable or the unimportant."

Glazer believes Kerner's stress on racism led to stressing civil rights enforcement as the major tool of black advancement. That led to disruptive fights about school busing, reverse discrimination and quotas. Glazer believes that was a wrong turn because major legislative battles had already been won. Education should have been emphasized: The payoff is surer and less polarizing.

Another sad Kerner legacy is a paradox: that the tool of big government doesn't work—and that only the tool of big government can possibly work. Wrong twice.

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that the tool of big government government can possibly work.

In the 1960s America mounted a major governmental effort to help minorities. Social and welfare spending went up by 89 percent in real dollars. Black poverty was cut almost in half. Along came Kerner and said things don't get better even when the government spends. Conservatives whooped. When early-vintage Reaganites said, "we're throwing money down a rathole," the unstated subtext was "and Kerner proves it."

But Kerner also said only vast amounts of government dollars could solve the problem. As with the racism idea, that de-emphasized individual effort.

Dr. Bernard Gifford, NRC member and vice president of Apple Computer, says that dwelling on either of the grand arguments, racism or government, "can cripple those who are trying to make change one day at a time." Gifford, a black, says Kerner was not scholarship, but "a political period piece that delayed serious intellectual thought about the real pathologies in the black community."

Correct: Kerner was politics, not sociology.

August 23, 1989

Atten-chun! Blacks in the Military

There is a fascinating article—mixing sociology, race and politics—in May's edition of the *Atlantic* magazine. The piece is "Success Story: Blacks in the Army," by Dr. Charles C. Moskos, a Northwestern University sociologist who specializes in race relations in the U.S. military.

To begin, Moskos believes this: The U.S. military is the most successfully integrated institution in America.

Consider: There are 400,000 blacks in the U.S. armed forces. That's almost 20 percent of the entire force, while blacks make up only about 12 percent of the total population. In the Army, which Moskos has studied with particular care, 30 percent of the personnel are black.

Blacks, says Moskos, do pretty well in the Army. About 30 percent of the Army's non-commissioned officers are now black. That's almost 100,000 black sergeants!

It doesn't stop with NCOs: Fully 10 percent of the Army's officers are black, and the rate is rising. One in five of the Army's new ROTC graduate officers are black. The proportion of blacks in the incoming West Point class has gone up tenfold in one generation. Of the active generals in the Army today, 7 percent are black. More are on the way.

Moskos is not foolish enough to say everything is all racially wonderful. He notes reflections in the military of an American society where blacks are poorer and less educated than whites. He sees the reflections, too, of a society that has still not fully conquered discrimination. But he says

this: "Today one is more likely to hear racial jokes in a faculty club than in an officers' club. And in an officers' club, one will surely see more blacks."

Moskos points to another heartening fact: Each year about 5,000 black officers and NCOs reach the young military retirement age and return to civilian work. This number will be growing as the decades roll on. These are productive, disciplined people. They have been bossed by whites. And they have bossed whites. In the years to come, one may expect that these veterans will play a large role in making integration more successful in the rest of America.

Moskos also has a political point. He notes that black elected leaders are out of touch with this large group of upwardly mobile blacks—and the feeling is mutual.

The elected blacks (says Moskos) are almost invariably very liberal; not so the military blacks among whom, for example, some substantial Reagan support exists, as well as support for moderate to conservative Democrats. Most elected blacks favor preferential treatment for blacks; blacks in the military are often dubious and draw pride from having made it on their own. And there is foreign and defense policy. Recall that Jesse Jackson has called for a 25 percent cut in defense spending and that the Congressional Black Caucus always leads the parade for less defense spending.

Here's what Moskos says about the black elected liberal leadership: "Most of them are uninterested in, even alienated from, the long-term goals of American foreign policy. . . . When foreign-policy issues are raised by black leaders, the discussion generally involves racist features of U.S. behavior overseas, especially in Africa and the Caribbean."

When the Congressional Black Caucus issued a formal condemnation of the U.S. invasion of Grenada, Moskos reports the reaction of one black general was, "Why can't they support us just this once?"

Very interesting. Now, I have a question. There are 400,000 blacks now in service. Many more are going into the military each year, and many are coming out with military retirement pay. Add to that all the spouses and growing families. Question: Isn't it possible that there may be a growing and potent pro-defense, pro-moderate, black political constituency out there? Is it possible that politicians—black and white, of both parties—are ignoring something big that has already happened?

May 15, 1986

In August 1989, President Bush appointed General Colin Powell, who is black, to be as chairman of the Joint Chiefs of Staff, the highest rank in the military.

People

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act: Each year about 5,000 black military retirement age and return to the service as the decades roll on. These men have been bossed by whites. And now, one may expect that these men will make integration more successful in the future.

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most invariably very liberal; not to mention, some substantial Reagan administration to conservative Democrats. The administration for blacks; blacks in the administration from having made it on their own policy. Recall that Jesse Jackson was running and that the Congressional leadership was defense spending.

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on. There are 400,000 blacks in the military each year, and they get a decent pay. Add to that all the money that it costs to maintain a moderate, black political constituency—black and white, of both sexes—already happened?

d General Colin Powell, Joint Chiefs of Staff, the

Don't Lebanonize America

President Bush is being urged to be a good fellow and go along with the proposed Civil Rights Act of 1990. It is said that it is good for America, good for blacks, and good for Republicans.

It's bad for America. It's probably bad for most blacks. It is political quicksand for Republicans.

Proponents say the bill does not mandate hiring quotas. OK. So stipulated. But will it encourage actions that lead to the effect of quotas?

Yes. That's why the Supreme Court acted last year to define what procedures are appropriate to outlaw discrimination without yielding reverse discrimination.

The American business community may often be praised for many saintly characteristics. Courage is not one of them. The proposed law says that if hiring doesn't yield what quotas would yield, the burden of proof is on the corporation to show why not.

That foreordains that most corporations will respond anatomically. Short on spine, institutionally gutless, always covering their asses, they will pre-fold their hands. Rather than face a lawsuit, punitive damages and bad publicity, they will supinely hire to ensure proportionality, a polite word for quotas.

This harms America. Affirmative action makes sense, in law and in life. But some specific legal aspects of affirmative-action-via-goals-and-time-tables tend to push behavior based on group proportionality rather than individual merit.

If there was ever a justification for such pressure, it is gone. When the Civil Rights Act of 1964 was originally passed, about 15 percent of Americans were of non-white, non-European origin. More than two-thirds of these were blacks. Today, due to healthy immigration, almost 25 percent of the population is non-white, non-European. The percentage is slowly rising. Only about half are blacks.

Won't the new law push proportionality for Hispanics? Asians? Moslems? Caribbean blacks? The newly free from Eastern Europe? Do we want a society where the goodies are divided on group identity rather than on merit and content of character? There is a model for such a proportionalized country: Lebanon.

Proportionality, quotas, preference—call it what you will—is harming blacks. Writing in the New York Times Magazine, Professor Shelby Steele argues that preferential treatment "nurtures a victim-focused identity in blacks and sends us [Steele is black] the message that there is more power in our past suffering than in our present achievement."

The power to "exploit" suffering, says Steele, is insubstantial and diverts energy from the power that comes when blacks take "responsibility for their own . . . development." He says racial preferences reinforce America's oldest myth, "that whites are superior . . . that blacks are inferior . . . they have the effect of stigmatizing the already stigmatized."

That is why the politics of proportionality yields no good to Republicans. It fosters racial antagonism. Republican moderates look at the black vote, 90 percent Democratic, and muse, "If we wink at quotas, we'd get some of that vote, and we'd be elected to everything forever."

Wrong. The polls show that almost half the blacks—just those that might vote Republican—disapprove of preferential treatment. And 90 percent of whites disapprove. Anyone who thinks those voters "have no place to go" didn't follow politics in the 1960s and the rise of then-racist George Wallace.

The principal race issue then was about discrimination. Those favoring it were wrong and in a minority. Today the principal race issue is about unfair proportionality. Those upset by it are right and in a majority.

America's political strength is nothing if not flexible. If, in the negotiations with Congress to come, Bush does not represent those anti-quota views vigorously, those views will find other outlets, perhaps unpleasant ones.

That's happening in Louisiana today. David Duke, a swinish ex-Klansman, a registered Republican, is running for the U.S. Senate using quotas as his lance, splitting the Republican party, setting race against race.

Re-creating the politics of racial conflict is no good for Republicans. Or for America. Or for blacks.

May 23, 1990

The quota issue, if not wisely settled, could be the most serious social problem we have in the 1990s. By setting group against group, it could turn the idea of a universal nation into a bitter charade. I don't believe it will happen. Americans are too smart to accept a theory, however well-meaning, that could destroy the village in order to save it.

The fight will occur on the post-Brennan Court. In Justice Brennan's last big victory (a July 1990 Federal Communications Commission case) the court broke astonishing new ground. Congress can now blithely pass laws that discriminate racially, if a mere "important governmental objective" is served. (Could a nasty Congress legislate re-segregation?)

Also in July of 1990 every Democratic Senator, 100% of them, collapsing under pressure from the civil rights lobby, voted to pass the Civil Rights Act of 1990, described above.

So: The court said the Congress may legislate racial preferences. The Senate said it was afraid not to.

Quotas are passionate stuff. Many blacks, egged on by activist leaders, say the anti-quota position is racist. Many other Americans, blacks and whites, believe that merit is a powerful ingredient in the glue that holds America together.

My sense is that the new Supreme Court will do away with quotas. It will be a bitter pill for some blacks. When Brennan retired, I speedily wrote a column urging President Bush to nominate Judge Clarence Thomas, who is former Chairman of the Equal Employment Opportunity Commission, a vigorous opponent of quotas, and black. When the anti-quota decisions come, I reasoned, domestic tranquility will be served if blacks see that those decisions are based on reason, not race.

(Appointing Thomas would not be quota hiring. Because he might de-fuse racial animosity, he would be best qualified.)

Alas for President Bush, he moved even more speedily to nominate Judge David Souter, and consequently ended up acting with neither my advice nor consent. Worse, I had to kill the column.

Does Less Prejudice Equal More Prejudice?

You will be pleased to know—probably—that 98 percent of white Americans would have no problem if blacks moved in next door, that 88 percent would have no problem if their 6-year-old child brought home a black friend, that 95 percent would have no problem having a black boss, that 89 percent would have no problem going to a black doctor.

Golly, it's nice to live in such an open-minded country! And it must be so, because it's in a poll from *U.S.A. Today*, and polls never lie.

On the other hand, you will—probably—be discomfited to know that the same survey shows that 60 percent of blacks believe that they encounter racial prejudice either "daily" (9 percent), "frequently" (13 percent) or "sometimes" (38 percent).

A further break-out of the poll shows that well-to-do blacks are much more likely to feel discriminated against than are poorer blacks. Thus, 66 percent of blacks earning over \$50,000 feel they have been viewed as a criminal just because they are black; 79 percent report they receive prejudiced treatment while shopping.

It's a mystery. All those unprejudiced whites, and all those blacks being discriminated against. Who's doing it? The other person. Of the white respondents, 60 percent say they are less prejudiced than "the average person," and only 3 percent say they are more prejudiced.

To add to the confusion, the poll shows solid majorities of whites and solid pluralities of blacks believing that opportunities for blacks have improved in the past 10 years and will continue to improve in the next 10.

What's happening? There is progress. If the poll were taken a couple of decades ago it would not have dealt with upper-income blacks. There weren't many. But the *U.S.A. Today* story on the poll quotes a black female engineer saying that store clerks "often ignore you. . . . So one day I put on my mink coat, my Gucci bag and my diamond ring and walked into the store"—and then service improved. Exaggerated? Sure, but that's not your standard exaggerated anecdote from yesteryear.

And there is even evidence of a form of almost perverse progress revealed by the fact that upper-income blacks feel discriminated against. That is likely coming about because as blacks move up the income ladder, there is more integration and contact with whites.

There is also a form of attitudinal progress shown when white respondents are fearful to suggest, even to a pollster pledging confidentiality, that he or she may act in a prejudiced way.

Further, there may well be acts that appear racist to blacks, but not to whites. On a recent "Nightline" program following ABC's special "Black in White America," a black ABC reporter noted bitterly that even when a black had achieved status, it was hard to successfully hail a cab. The cab drivers just whizzed on by.

But is it racist when a black cab driver passes by a potential black fare? (They do.) It is surely a prejudiced act. But we can assume that a black cab driver is not acting out of race hatred. Something else is at work.

Cab drivers, blacks and whites, know that the violent crime rate among blacks is proportionally five times greater than among whites. The cab drivers, of both races, are often nervous about picking up blacks because they are fearful of becoming a crime statistic. Is that racism?

And so, complexity and paradox. Blacks are making headway—and finding discrimination. Whites are becoming less prejudiced as time goes on—but reacting understandably to real fears.

September 20, 1989

Black Families: Actuality and Anomaly

An important debate is beginning. Bill Moyers' fine program on CBS has crystallized concern about the very high rate of female-headed black families in America. The concern is proper: It is the No. 1 problem for blacks.

Unfortunately, as the dialogue unfolds, a caricature of the problem may be emerging: It is said that morality in the inner city breaks down, welfare offers incentives to have babies, teenage black girls get pregnant, black

teenage boys drop out of school and can't get jobs, ever-more babies are born into poverty and with no male role model, teenage fathers remain dead-ended, the cycle of welfare, sexual irresponsibility and crime is continued, and blacks destroy themselves.

There is some tragic truth to all that, but there are complicating facts and questions that are not often considered. It is important to try first to unscramble the curious pattern of black birthrates.

Item: Contrary to perception, the black birthrate in America has come down dramatically in recent years for all income groups. Remarkably, even the illegitimate birthrate for blacks has come down somewhat. Question: If welfare creates a bonus for poor blacks to have babies—why have these birthrates gone down?

Item: Because marital birthrates have fallen so sharply, the proportion of black babies born out of wedlock has soared—to a devastating 56 percent. Questions: How can this happen when there is more sex education about birth control in the schools? Is it simply sexual irresponsibility? But then why is the overall black birthrate, legitimate and illegitimate, falling?

On the topic of irresponsibility, other anomalies emerge.

Item: The black rate of abortion is twice as high as the white rate. Questions: Does this indicate sexual irresponsibility regarding conception, or sexual responsibility regarding termination of pregnancy, or the lack of the right kind of sex education which would encourage abstinence and discourage abortion—or all of the above?

Item: Most black teenage mothers with out-of-wedlock children end up getting married. An Urban Institute study showed that about three-quarters of such mothers are married by age 24. Question: Is it really a never-ending cycle of matriarchy if most of these children end up in married households, at least for part of their lives?

Item: More black children are living in female-headed households because their parents have been divorced or separated than because their parents were never married. Questions: Are we ignoring a big part of the problem by concentrating only on the out-of-wedlock syndrome? But is it "irresponsible" for blacks to get divorced? How about for whites?

What about education and employment?

Item: The black high school dropout rate has gone way down. Five out of six young blacks graduate from high school. A million young blacks are now in college. Questions: Isn't it likely that these young blacks will make out all right? Or, conversely, why hasn't more schooling taught more responsibility?

Item: Black teenage unemployment rates are very high, but they are somewhat misleading. The rates don't even deal with the majority of black teenagers—who are in school. Moreover, the rates don't predict the future.

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Black unemployment rates shrink dramatically as individuals get older—
down below 10 percent by age 35. Question: Are jobs the real long-term
problem?

What does it add up to? It is a convoluted situation, perhaps not as
bad as popularly described, but bad enough.

January 30, 1986

Tomorrow: Black Progress

Recent data about the condition of blacks suggest that while they are making
progress, including some catching up with whites, as a group they are far
behind and are plagued with social problems.

With progress in medicine and health-care coverage, black health has
improved. Life expectancy at birth climbed for blacks by 5.6 years to 69.7
from 1970 to 1987. Infant mortality improved from 1970 to 1986, falling
from 32.6 deaths per thousand to 18.

Education reform may be paying off. The dropout rate is at a historic
low. From 1980 to 1988, the rate of young blacks completing high school
rose from 75 percent to 80 percent. The white rate stayed at 87 percent.
The number of blacks who completed college climbed from 1.1 million
in 1980, 4.5 percent of all graduates, to an estimated 2.1 million in 1990,
6.3 percent of the total. However, the rate of increase of black male high-
school graduates entering college has now stalled. Still, blacks are moving
into better jobs. About half are now in the higher-salaried categories (white-
collar and precision crafts), compared with 70 percent of whites. And the
number of black elected officials climbed from 1,469 in 1970 to 7,226 in
1989.

Growing influence, better health, education, and jobs should pay off
in income. That hasn't happened. Both black and white income has gone
up since the early-1980s recession, but black income is still mired at about
57 percent to 59 percent of whites' income. The reasons seem to be social.
Since 1980, the rate of black children living "with mother only" has climbed
from 45 percent to 52 percent. (It was 22 percent in 1960.) The white
rate is 16 percent. Female-headed households (FHH) have lower household
incomes, particularly among blacks. Black married couples have 77 percent
of the income of comparable whites, black FHH's 57 percent. There are
other massive social problems. More than 300,000 blacks are in prison—
47 percent of total inmates, although blacks are 12 percent of the population.
And blacks are much more likely than whites to be on hard drugs. As
long as so many blacks stay outside the social mainstream, their aggregate
income can't improve much relative to whites' income.

There is controversy about the causes of black disadvantage. Is it the

fault of discrimination and changing economic patterns (external causes) or the "culture of poverty" (internal causes)? Laws and programs can be wisely directed at things like the elimination of job discrimination or the provision of health and education benefits. Yet it is doubtful that laws can change individual behavior such as criminality, drug abuse and out-of-wedlock pregnancy. Moreover, there are scant available resources or public support for programs aimed at massive social transformation. If the statistics are to move upward, behavior will have to change.

There may be evidence that change is beginning. Out-of-wedlock birth rates have plateaued for blacks. Black violent-crime rates were falling before the crack epidemic hit. Now, although too high, drug abuse is falling for both races. And today there is a model of a successful black middle class that can motivate and assist the personal upward mobility of blacks.

January 22, 1990

Adam Smith said that each nation should capitalize on its "comparative advantage." Immigration is the comparative advantage of the first universal nation.

The best arguments for immigration are names. Add these: Toscanini, Kissinger, Javits, I. M. Pei, Robin McNeil, Navratilova, John Kenneth Galbraith, Edward Teller, Oppenheimer, Paul Orrefice (chairman of Dow Chemical), Roberto Goizuta (chairman of Coca-Cola), Adolfo (Cuban), de la Renta (Dominican).

If you believe that America will have problems concerning "competitiveness" in the years to come, if you believe that we are ill-educated and undermotivated, if you believe there will be a labor shortage or a customer shortage in the nineties, if you believe we are short of engineers, physicists, nurses, tile setters, maids, nannies, and busboys—consider the immigration fix.

If you believe we face a problem in funding Social Security liabilities because we are an aging society—consider the immigration fix.

If you believe, as most Americans do somewhat inchoately, that America has some sort of mission (beyond prosperity) in this world, if you believe that global influence has some relationship to population size (Belgium won't be a superpower, no matter what), if you believe that American influence will diminish if it is a slow-growth player in a high-growth world—consider the immigration fix.

Some facts: only immigration provides a society with "instant adults" to deal with labor shortages; increased fertility doesn't provide worker bees until several decades go by. Immigrants are likely to be young workers; they not only relieve a labor shortage, but put a quick dent

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

The legislation may be cited as the "Civil Rights Act of 1991."

SECTION 2. FINDINGS AND PURPOSE

The Congress finds that this legislation is necessary to provide additional protections and remedies against unlawful discrimination in employment. The purpose of this Act is to strengthen existing protections and remedies in order to deter discrimination more effectively and provide meaningful relief for victims of discrimination.

SECTION 3. DEFINITIONS

Section 3 adds definitions to those already in Title VII.

The definition of "demonstrates" requires that a party bear the burden of production and persuasion when the statute requires that he or she "demonstrate" a fact.

The definition of the term "justified by business necessity" is meant to codify the meaning of business necessity as used in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), and subsequent cases including New York City Transit Authority v. Beazer, 440 U.S. 568, 587 n. 31 (1979). Such a definition was reaffirmed by the Court in Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115, 2125-2126 (1989). Even the dissent in Wards Cove acknowledged that "Griggs made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose." See 109 S. Ct., at 2129 (Stevens, J., dissenting) (emphasis added).

The terms "complaining party" and "respondent" are defined to include those persons and entities listed in the Act. The definition of the term "harass" is explained in the analysis of Section 8 below.

SECTION 4. DISPARATE IMPACT CLAIMS

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court ruled that Title VII of the Civil Rights Act of 1964 prohibits hiring and promotion practices that unintentionally but disproportionately exclude persons of a particular race, color, religion, sex, or national origin unless these practices are justified by "business necessity." Law suits challenging such practices are called "disparate impact" cases, in contrast to "disparate treatment" cases brought to challenge intentional discrimination.

In a series of cases decided in subsequent years, the Supreme Court refined and clarified the doctrine of disparate impact. In 1988, the Court greatly expanded the scope of the doctrine's coverage by applying it to subjective hiring and promotion practices (the Court had previously applied it only in cases involving objective criteria such as diploma requirements and height-and-weight requirements). Justice O'Connor took this occasion to explain with great care both the reasons for the expansion and the need to be clear about the evidentiary standards that would operate to prevent the expansion of disparate impact doctrine from leading to quotas. In the course of her discussion, she pointed out:

"[T]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. . . . [E]xtending 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." Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2787-2788 (1988) (plurality opinion).

The following year, in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989), the Court considered whether the plaintiff or the defendant had the burden of proof on the issue of business necessity. Resolving an ambiguity in the prior law, the Court placed the burden on the plaintiff.

Under this Act, a complaining party makes out a prima facie case of disparate impact when he or she identifies a particular employment practice and demonstrates that the practice has caused a disparate impact on the basis of race, color, religion, sex, or national origin. The burden of proof then shifts to the respondent to demonstrate that the practice is justified by

business necessity. It is then open to the complaining party to rebut that defense by demonstrating the availability of an alternative employment practice, comparable in cost and equally effective in measuring job performance or achieving the respondent's legitimate employment goals, that will reduce the disparate impact, and that the respondent refuses to adopt such alternative.

The burden-of-proof issue that Wards Cove resolved in favor of defendants is resolved by this Act in favor of plaintiffs. Wards Cove is thereby overruled. On all other issues, this Act leaves existing law undisturbed.

As Justice O'Connor emphasized in her Watson opinion, the use of disparate impact analysis creates a very real risk that Title VII will lead to the use of quotas. Indeed, there is evidence that the adoption of disparate impact analysis by the courts has led to the use of quotas, although the extent of this phenomenon is for obvious reasons not measurable. See, *e.g.*, Hearings on H.R. 1, "Civil Rights Act of 1991," before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives, 102d Cong., 1st Sess., February 7, 1991 (testimony of Assistant Attorney General John R. Dunne); Hearings on S. 2104, "Civil Rights Act of 1990," before the Committee on Labor and Human Resources, U.S. Senate, 101st Cong., 2d Sess., February 23, 1990 (testimony of Professor Charles Fried); Joint Hearings on H.R. 4000, "Civil Rights Act of 1990," before the Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives, 101st Cong., 2d Sess., March 20, 1990, vol. 2, pp. 516, 625, 633 (testimony of Glen D. Nager, Esq.); Fortune, March 13, 1989, at 87-88 (reporting a poll of 202 CEOs of Fortune 500 and Service 500 companies, in which 18% of the CEOs admitted that their companies have "specific quotas for hiring and promoting"). The use of quotas, however, represents a perversion of Title VII and of disparate impact law. As the Court noted in Griggs, 401 U.S., at 431: "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

Because of the serious dangers inherent in the use of disparate impact analysis, any codification of a cause of action under the disparate impact theory must include evidentiary safeguards recognized in Justice O'Connor's Watson opinion and in Justice White's opinion for the Court in Wards Cove. The codification adopted in Sections 3 and 4 of this Act does so, and it is vital that courts and employers construe this Act in a manner that neither makes it possible to defend or justify the use of employment quotas nor encourages their use.

If an ability test, for example, has a disparate impact and the test is not justified by business necessity as defined in

Section 3 of this Act, the test should not be used. If business necessity can be shown, then the disparate impact need not be reduced or eliminated unless the complaining party demonstrates the availability of an alternative employment practice as required by Section 4 of this Act and the respondent refuses to adopt such alternative. In neither event is an employer required or permitted to adjust test scores, or to use different cut-offs for members of different groups, or otherwise to use the test scores in a discriminatory manner. Manipulating test results in such a fashion is not an alternative employment practice of the kind that an employer must adopt to avoid liability at the surrebuttal phase of a disparate impact case. On the contrary, such discrimination violates Title VII, whether practiced by an employer, an employment agency, or any other "respondent" as defined in Section 3 of this Act. Similarly, a discriminatory practice could not be defended under Title VII on the ground that the practice was necessary or useful in avoiding the possibility of liability under the disparate impact theory. Cf. Civil Rights Act of 1964, sec. 703(j), 42 U.S.C. 2000e-2(j).

It should be noted that in identifying the particular employment practice alleged to cause disparate impact, it is not intention of this Act to require the plaintiff to do the impossible in breaking down an employer's practices to the greatest conceivable degree. Courts will be permitted to hold, for example, that vesting complete hiring discretion in an individual guided only by unknown subjective standards constitutes a single particular employment practice susceptible to challenge.

This approach is consistent with Wards Cove, see 109 S. Ct., at 2125, and has been employed since Wards Cove in Sledge v. J.P. Stevens & Co., 52 EPD para. 39,537 (E.D.N.C. Nov. 30, 1989). The Sledge court alluded to the difficulty of "delving into the workings of an employment decisionmaker's mind" and noted that the defendant's personnel officers reported having no idea of the basis on which they made their employment decisions. The court held that "the identification by the plaintiffs of the uncontrolled, subjective discretion of defendant's employing officials as the source of the discrimination shown by plaintiff's statistics sufficed to satisfy the causation requirements of Wards Cove." This Act contemplates that the use of such uncontrolled and unexplained discretion is properly treated, as it was in the Sledge case, as one employment practice that need not be divided by the plaintiff into discrete sub-parts.

SECTION 5. FINALITY OF JUDGMENTS OR ORDERS

In Hansberry v. Lee, 311 U.S. 32, 40-41 (1940) (citations omitted), the Supreme Court held:

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in which he is not designated as a party or to which he has not been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statutes of the United States . . . prescribe, . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.

In Hansberry, Carl Hansberry and his family, who were black, were seeking to challenge a racial covenant prohibiting the sale of land to blacks. One of the owners who wanted the covenant enforced argued that the Hansberrys could not litigate the validity of the covenant because that question had previously been adjudicated, and the covenant sustained, in an earlier lawsuit, although the Hansberrys were not parties in that lawsuit. The Illinois court had ruled that the Hansberrys' challenge was barred, but the Supreme Court found that this ruling violated due process and allowed the challenge.

In Martin v. Wilks, 109 S. Ct. 2180 (1989), the Court confronted a similar argument. That case involved a claim by Robert Wilks and other white fire fighters that the City of Birmingham had discriminated against them by refusing to promote them because of their race. The City argued that their challenge was barred because the City's promotion process had been sanctioned in a consent decree entered in an earlier case between the City and a class of black plaintiffs, of which Wilks and the white fire fighters were aware, but in which they were not parties. The Court rejected this argument. Instead, it concluded that the Federal Rules of Civil Procedure required that persons seeking to bind outsiders to the results of litigation have a duty to join them as parties, see Fed. R. Civ. P. 19, unless the court certified a class of defendants adequately represented by a named defendant, see Fed. R. Civ. P. 23. The Court specifically rejected the defendants' argument that a different rule should obtain in civil rights litigation.

This Section codifies that holding. Had the rule advocated by the City of Birmingham in Wilks been adopted in Hansberry, one judicial decree in one case between one plaintiff and one defendant would have prevented an attack on the racial covenant by anyone who had ever heard of the original case. That is not how the Federal Rules of Civil Procedure operate. And there is no reason why a different rule should be devised to prevent civil rights plaintiffs, as opposed to persons bringing all other kinds of cases, from bringing suit.

SECTION 6. PROHIBITION AGAINST RACIAL DISCRIMINATION IN THE MAKING AND PERFORMANCE OF CONTRACTS

Under 42 U.S.C. 1981, persons of all races have the same right "to make and enforce contracts." In Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), the Supreme Court held: "The most obvious feature of the provision is the restriction of its scope to forbidding discrimination in the 'mak[ing] and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, [sec.] 1981 provides no relief."

As written, therefore, section 1981 provides insufficient protection against racial discrimination in the context of contracts. In particular, it provides no relief for discrimination in the performance of contracts (as contrasted with the making and enforcement of contracts). Section 1981, as amended by this Act, will provide a remedy for individuals who are subjected to discriminatory performance of their employment contracts (through racial harassment, for example) or are dismissed or denied promotions because of race. In addition, the discriminatory infringement of contractual rights that do not involve employment will be made actionable under section 1981. This will, for example, create a remedy for a black child who is admitted to a private school as required pursuant to section 1981, but is then subjected to discriminatory treatment in the performance of the contract once he or she is attending the school.

In addition to overruling the Patterson decision, this Section of the Act codifies the holding of Runyon v. McCrary, 427 U.S. 160 (1976), under which section 1981 prohibits private, as well as governmental, discrimination.

SECTION 7. EXPANSION OF RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS

Section 7 overrules the holding in Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), 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 the plaintiffs, who claimed that the employer had adopted the seniority system with the intention of altering their contractual 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 rule adopted by the Court is contrary to the position that had been taken by the Department of Justice and the EEOC. It shields 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. At that time, the controversy between an employer and an employee can be focused more sharply.

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 either to challenge the system before they have suffered harm or to remain forever silent. Given such a choice, employees who are unlikely ever to suffer harm from the seniority system may nonetheless feel that they must file a charge as a precautionary measure -- an especially difficult choice since they may be understandably reluctant to initiate a lawsuit against an employer if they do not have to.

Finally, the Lorance 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 would be 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 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.

This change in the law, therefore, is warranted. Indeed, it is necessary to safeguard the same principles upheld by the Supreme Court in Martin v. Wilks, 109 S. Ct. 2180 (1989), which

guarantees civil rights complainants a fair opportunity to present their claims in court.

SECTION 8. PROVIDING FOR ADDITIONAL REMEDIES FOR HARASSMENT IN THE WORKPLACE BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

This provision is designed to redress an anomaly in current law. Title VII prohibits discrimination in employment, but provides inadequate remedies for harassment in the workplace, including sexual harassment, which the Supreme Court has recognized as actionable under Title VII. See, e.g., Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). Such harassment frequently will not be so intolerable that an employee subjected to it immediately leaves. In such circumstances, the only remedy the victim of harassment can obtain under Title VII's remedial scheme as currently drafted is declaratory and injunctive relief against continuation of the harassment.

Such a rule is plainly inequitable. It effectively tells employers that the only consequence of creating an environment so hostile to an employee that he or she is forced to sue to obtain relief is a directive to refrain in the future. This defect must be corrected.

At the same time, Title VII's existing framework, with its emphasis on conciliation and mediation, has served the country well for more than a quarter of a century as a tool for combatting discrimination. It would be most unwise to jettison or rewrite this basic statute in favor of a tort-style approach including compensatory and punitive damages at a time when our tort system is widely recognized to be in crisis. President Bush has made it clear that our civil rights laws "should not be turned into some lawyer's bonanza, encouraging litigation at the expense of conciliation, mediation, or settlement."

Section 8 is designed to meet both of these concerns. It creates a new remedy for on-the-job harassment, allowing courts to make a monetary award in addition to granting declaratory and injunctive relief. The new remedy is available on the same terms for all forms of on-the-job harassment, whether based on race, color, religion, sex, or national origin.

The new remedy created by this Section is capped at \$150,000. Courts are directed to make a monetary award when an additional equitable remedy is justified by the equities, is consistent with the purposes Title VII, and is in the public interest. In weighing the equities and determining the amount of any award, courts are instructed to consider the nature of compliance programs implemented by the employer; the nature of the employer's complaint procedures, if any, used to resolve

claims of harassment; whether the employer took prompt and effective remedial action upon learning of the harassment; the employer's size and the effect of the award on its economic viability (so that the maximum award would be available only against very large and financially secure employers); whether the harassment was willful or egregious; and the need, if any, to provide restitution for the complaining party.

This Section allows a court to make a monetary award "up to but not exceeding a total of \$150,000." This language is intended to make clear that where there are several related incidents that could arguably be subdivided into distinct unlawful employment practices, the award that can be obtained under this new provision for all of them combined is limited to \$150,000. Otherwise, plaintiffs and their lawyers will have incentives to spend resources on hair-splitting litigation over how many unlawful employment practices have occurred. \$150,000 is a large enough amount to be an adequate and effective remedy for the type of conduct sought to be prevented, and no good purpose would be served by encouraging lawyers to use their inventiveness to circumvent the limitation of \$150,000.

The substantive definition of harassment set out in Section 3 of this Act makes it an offense for an employer or its agents to harass any employee because of race, color, religion, sex, or national origin. The term "harass" encompasses "the subjection of an individual to conduct that creates a working environment that would be found intimidating, hostile or offensive by a reasonable person." The definition also explicitly defines sexual harassment to include certain conduct involving unwelcome sexual advances. The definition is intended to codify current law as stated by the Supreme Court. See Meritor Savings Bank, supra, 477 U.S., at 66 ("Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

The new provisions of Title VII established in this Section are designed to deter and provide restitution for harassment, and to encourage employers to adopt meaningful complaint procedures to redress harassment and to encourage employees to use them. The employer will not be found liable if the complaining party failed to avail himself or herself of an effective complaint procedure. In determining the appropriate remedy, moreover, courts will consider whether an employer took prompt and effective remedial action. The effect of these requirements will be to encourage preventive measures and prompt remedial action by employers and to minimize litigation, thus maximizing the speed and efficacy of relief.

This provision of the Act protects employers from liability only when they have established a procedure "for resolving

complaints of harassment in an effective fashion within a period not exceeding 90 days." Procedures under which victims of harassment are required to seek relief from the same supervisor who has engaged in the harassing conduct, or under which victims would otherwise reasonably expect their complaints to result in retaliation against them rather than in a fair investigation and effective resolution of their complaint, will not insulate the employer from liability. The new provisions of Title VII allow an employee, moreover, to petition a court for emergency relief, and they provide that the continued suffering of harassment shall be assumed to be sufficient irreparable harm to warrant judicial relief, whether or not the employee has fully exhausted a complaint procedure, so long as the employee has initiated a complaint.

This Section includes a provision reaffirming that Congress intends all issues to be decided by judges, as has always been the case under Title VII. Such a provision is important in avoiding the creation of an inefficient tort-style litigation system that is foreign to the purposes of employment law. Because the courts have relatively limited experience with harassment cases, because particular cases will undoubtedly raise issues requiring clarification, and because employers therefore require the information contained in written judicial opinions to assist them in conforming their conduct with the law, it is particularly important to avoid a profusion of unexplained and inconsistent jury verdicts if possible.

Because the monetary relief authorized in these amendments to Title VII is characterized as equitable, the courts should find that bench trials are consistent with the Seventh Amendment. Because the question of constitutionality is not free from doubt, however, this Section also provides that should a court hold that a jury trial with respect to issues of liability is constitutionally required, it may empanel a jury to hear those issues and no others. This ensures that the additional relief this scheme makes available will not become a dead letter should the courts conclude that the Seventh Amendment requires a jury trial on liability. See Tull v. United States, 107 S. Ct. 1831 (1987).

SECTION 9. ALLOWING THE AWARD OF EXPERT FEES

Section 9 authorizes the recovery of expert witness fees (up to but not exceeding \$300 per day) by prevailing parties according to the same standards that govern awards of attorney fees under Title VII. Cf. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). The provision is intended to allow recovery for work done in preparation for trial as well as after trial has begun, with the cap applying to each witness.

**SECTION 10. PROVIDING FOR INTEREST AND EXTENDING THE
STATUTE OF LIMITATIONS, IN ACTIONS AGAINST
THE FEDERAL GOVERNMENT**

Section 10 extends the period for filing a complaint against the Federal government pursuant to Title VII from 30 days to 90 days. It also authorizes the payment of interest to compensate for delay in the payment of a judgment according to the same rules that govern such payments in actions against private parties.

**SECTION 11. PROVIDING CIVIL RIGHTS PROTECTIONS TO
CONGRESSIONAL EMPLOYEES**

Section 11 extends the protections of Title VII to congressional employees on the same basis that they extend to Executive branch employees. The Executive branch, like private employers and state and local governments, is forbidden by law to discriminate on the basis of race, color, religion, sex, or national origin. The Congress, however, has exempted itself from the law. President Bush has stated that Congress "should live by the same requirements it prescribes for others" and that Congress "should join the Executive branch in setting an example for these private employers."

In addition to setting a helpful example, and providing congressional employees with the same rights enjoyed by other Americans, coverage under Title VII will provide the Congress with the valuable experience of living under the same rules that it imposes on other employers. This experience should prove useful in encouraging the Congress to give prompt and serious consideration to proposals for improving the law and in enabling the Congress to resist ill-considered proposals -- like the bill that President Bush vetoed on October 22, 1990 -- that would undermine the cause of civil rights and impose completely unjustified burdens on the employers of this nation.

It should be emphasized that this Section allows the Congress to create its own internal mechanisms for enforcing Title VII in the legislative branch. Like Executive branch employees, congressional employees would retain the right to judicial relief, but the Executive branch would have absolutely no role in enforcing Title VII against the Congress. For that reason, any objection to this Section on separation-of-powers grounds would not be well-founded.

SECTION 12. ALTERNATIVE MEANS OF DISPUTE RESOLUTION

This provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods.

In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums.

SECTION 13. SEVERABILITY

Section 13 states that if a provision of this Act is found invalid, that finding will not affect the remainder of the Act.

SECTION 14. EFFECTIVE DATE

Section 14 specifies that the Act and the amendments made by the Act take effect upon enactment, and will not apply to cases arising before the effective date of the Act.

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