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New rights bill in House

By J. Jennings Moss
THE WASHINGTON TIMES

House Democrats yesterday trotted out a retooled civil rights bill they hope will alleviate the fears of business groups and gain President Bush's signature — but neither appears likely.

The changes include language prohibiting hiring and promotion quotas, a cap on punitive damages for some bias victims, a chance for white men to sue for reverse discrimination and an apparent ban on adjusting test scores to benefit minorities.

"It has been a long, arduous process trying to accommodate all the different interests involved, but I think it is fair to say we have done just that," Rep. Jack Brooks, Texas Democrat and chairman of the House Judiciary Committee, told reporters.

But Republicans who last year stood behind Mr. Bush's veto of a similar bill said true accommodation can be reached only when Democrats accept more of the president's proposals.

"What they are portraying as a compromise is a compromise with themselves," said Rep. Henry Hyde of Illinois, a high-ranking Republican on the Judiciary Committee. "They continue to meet amongst themselves incestuously and work something out, but it really isn't a compromise."

The comments from both sides foreshadow a floor debate that is likely to be a repeat of last year's in many ways. Republicans labeled that version a "quota bill" that would bankrupt businesses and make some

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RIGHTS

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people more equal than others. Democrats called this a smoke screen to scuttle the anti-job-discrimination measure.

The current bill, like last year's, would reverse six recent Supreme Court decisions that make it tougher for people to bring discrimination suits. Mr. Bush vetoed the bill, and the Senate failed to override the veto by one vote.

Certain aspects of the Democrats' plan had surfaced during the past week, but the nine-point proposal released yesterday failed to answer a host of lingering questions. The only official information distributed was a one-page summary.

For example, the explanation for how the package will deal with "race norming" — the practice of adjusting job tests higher for minorities and other protected groups — consumed two sentences. When pressed for details, Mr. Brooks and civil rights leaders could not say what the final language would say.

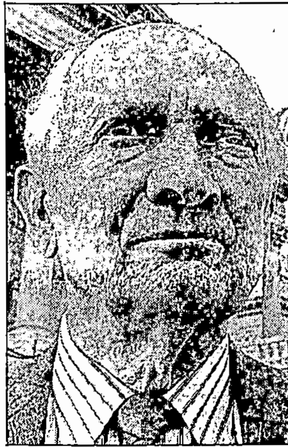
The outline said such changes to test scores would be prohibited and tests that "are not valid and fair" would not be allowed. "In addition, it would permit an employer to use alternative selection procedures," the summary said.

Mr. Hyde, who unsuccessfully pushed in the Judiciary Committee an amendment to prohibit race-norming, said he was encouraged to see Democrats address the matter but remains "suspicious."

The two biggest issues that continue to separate Democrats and Republicans are quotas and caps.

On quotas, the new package says that hiring or promoting minorities or women according to set ratios is prohibited. The earlier version said this was not "encouraged."

"What this bill is doing is disallowing quotas. It would make quotas illegal," said Ralph Neas, executive director of the Leadership Conference on Civil Rights, a coalition of civil rights groups that is the prime lobbyist in the debate.



Rep. Jack Brooks

Rep. Patricia Schroeder

Said Mr. Hyde: "You can say this isn't a quota bill . . . but you know if you take a bottle of muscatel and put a label on it that says Cordon Rouge 1812, it's still a bottle of muscatel."

Earlier in the day, before the Democrats released their plan, a White House spokesman pushed the president's bill.

"The president is committed to signing a strong civil rights bill and he will not sign a quota bill. The president has a bill in Congress, and we think it is the best bill," said the spokesman, Roman Popadiuk.

Business lobbyists said yesterday that even with a ban on quotas in the bill, businesses would end up hiring by the numbers to protect themselves from potentially costly lawsuits.

Although there would be no cap on punitive damage awards for racial discrimination, the Democrats agreed to a maximum of $150,000 or the amount of compensatory damages, whichever is higher, in cases of discrimination based on sex; religion or disability.

Republicans contend that such an arrangement is really no cap at all. They would like to see the current situation of providing back pay continued as well as giving extra damages for sexual harassment.

Rep. Patricia Schroeder, Colorado Democrat, believes no caps should be placed on damages and it's not fair to give some victims unlimited damages while placing limits on others.

One new twist in the package outlined yesterday was allowing white men to challenge reverse discrimination in court and possibly win monetary damages.

Today, the Rules Committee will consider how the floor debate, expected to begin May 30, should take place.

Republicans are expected to wage a fight in the committee because of Democrats' tentative plans to limit debate to three proposals — the Democrats' bill, a Republican alternative and an amendment to strip the cap.

"It's outrageous they would even think of having a modified or closed rule," said Rep. Gerald B. Solomon of New York, the ranking Republican on the committee. He noted that when the House has dealt with civil rights bills, it traditionally has allowed an open debate so a variety of amendments can be offered.

Rep. Joseph Moakley, Massachusetts Democrat and chairman of the Rules Committee, said Monday that the debate needs to be focused because of the complexity of the issue.

CIVIL RIGHTS' NEW LOOK

An outline of the changes House Democrats made to a new civil rights bill.

- A limit on punitive damages of either $150,000 or the amount of compensatory damages, whichever is higher, for those who prove discrimination.
- A statement saying that hiring and promotion quotas are "not permitted."
- Ban on adjusting test scores to favor a protected class of people, a practice called race norming.
- A right of businesses to defend themselves against discrimination lawsuits by arguing that a certain practice has a valid business necessity.
- Necessity for those who file discrimination suits to identify specific biased practices the employer engaged in, unless the court rules such a burden is not necessary.
- A six-month reduction in the statute of limitations for discrimination suits from 2 years to 18 months.

Source: House Judiciary Committee

The Washington Times

Photocopy-Preservation

H.R. 1 vs. The President's Civil Rights Bill

Common features of the two bills:

- Overturn the Patterson decision, greatly expanding the rights of racial minorities to sue for on-the-job harassment, as well as discrimination in promotions and dismissals.

- Overturn the Lorance decision, ensuring that victims of discriminatory seniority systems have a fair chance to challenge those systems.

- Put the burden of proof on employers to defend "business necessity" in cases of unintentional discrimination.

- Extend the statute of limitations in cases involving the U.S. Government, and authorize the award of interest against the government.

- Authorize the award of expert witness fees in civil rights cases.

Critical differences between the bills:

- In "disparate impact" cases -- those in which the employer is accused of using practices that unintentionally exclude disproportionate numbers of minorities or women -- H.R. 1 creates a complicated set of new rules that would make it almost impossible for employers to defend themselves successfully. As a result, they would have little choice except to adopt quotas so that their numbers come out "right."

  The President's bill shifts the burden of proof to the employer in defending practices that cause disparate impact, which is a major concession to the civil rights groups. In other respects the bill essentially codifies the law as it stood prior to the Wards Cove decision in 1989.

- H.R. 1 creates new rules designed to prevent victims of illegal quotas from challenging consent decrees that mandate such quotas.

  The President's bill preserves the existing rights of these victims by codifying the Supreme Court's decision in Martin v. Wilks.

- H.R. 1 would radically alter Title VII by introducing jury trials, unlimited compensatory damages (including pain and suffering awards) and unlimited punitive damages in cases of intentional discrimination.

The President's bill permits awards of up to $150,000 in cases of harassment. It is only in harassment cases that existing remedies (backpay and injunctive relief) are inadequate, because harassment victims often do not suffer lost wages.

- H.R. 1 would overturn the Price Waterhouse case, in which the plurality opinion was written by Justice Brennan. The effect would be to hold employers liable for discrimination even when an employer's "bad thoughts" caused no adverse action against anyone.

  The President's bill leaves current law intact, preserving the basic rule of no liability where no harm is done.

- H.R. 1 purports to apply Title VII to Congress, but provides for no enforcement by an impartial tribunal.

  The President's bill allows congressional employees to seek redress in the court, just like other victims of discrimination (including those who work for the Executive branch).

- H.R. 1 includes attorney fee provisions that would encourage litigation and create disincentives for amicable settlements.

  The President's bill does not contain these provisions.

- H.R. 1 includes a "comparable worth" provision.

  The President's bill contains no such assault on the basic premises of the free market system.

- H.R. 1 applies retroactively.

  The President's bill applies only to new cases.

- H.R. 1 instructs the courts to resolve all doubts against the employer.

  The President's bill allows the courts to apply normal rules of statutory construction.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release February 27, 1991

REMARKS BY THE PRESIDENT
IN ANNOUNCEMENT OF OPPORTUNITY ACTION PLAN
TO CIVIC AND CHARITABLE ORGANIZATIONS

The J.W. Marriott Hotel
Washington, D.C.

11:08 A.M. EST

THE PRESIDENT: Thank you very, very much. And what a wonderful reception. And I interpret that, I think properly, the same way I interpreted the applause at the State of the Union message -- as strong support for those men and women that are serving our country overseas. And now the war is almost over, and I think we owe them a vote of thanks, and I think I heard it right now. So thank you, Bill, and I'm just delighted to be here.

I want to shift and talk about domestic matters. And Bill, I couldn't help but glance at this marvelous quilt coming in here, and I do think that we owe you and all the others in the association a vote of thanks for following through and, indeed, being points of light.

I want to salute our Attorney General who is with us today; our two able Secretaries so concerned also about what we're talking about today, Secretaries Kemp and Sullivan; Ted Sanders, who is doing a superb job as our Acting Secretary at Education; and, of course, my old friend, a man so well-known to all of you, Bob Woodson of the Center for Neighborhood Enterprise. You know, it's hard to believe that a year has passed since the challenge Bill mentioned, since I challenged the members of ASAE to channel the tremendous energy of this organization and transform a nation through community service. And what a terrific job you've done.

Looking around the room today, peeking, before I came in here, I see so many familiar faces, so many people that are making a difference in the lives of others. Every man and woman here believes in the power of the individual, and is bolstered by the conviction that America is indeed a land of opportunity. For more than 200 years, America has been the home of free markets and free people. And there is no question: opportunity in America is the envy of the entire world.

The story of America has been the story of opportunity. Throughout our history, we've pioneered the frontiers of liberty for all humanity. Our Founding Fathers created perhaps the most simple yet profound document in modern history -- our Constitution and Bill of Rights. Abraham Lincoln broke forever the chains of human slavery. The suffrage movement made the promise of democracy a reality for women. The founders of our public schools unleashed our national potential through universal education. And by their struggle for equal rights, the leaders of the civil rights movement helped bring dignity to the oppressed and disenfranchised. The story of opportunity in America is the story of Thomas Paine and Frederick Douglass, Clara Barton, the Wright brothers, Rosa Parks.

But it doesn't end there, with these heroes from our past. There are the new American heroes of today, many of them in this room. And they, too, are inspired by pride, integrity, faith in the dignity of man, and courage -- yes, courage to overcome the odds. It's called leadership by example -- and it's made America the world's great beacon of freedom.

MORE

These modern visionaries are the ones that are making history -- propelling us into the next American century.

Theirs is a movement -- it's more than 200 years old -- as old as the Declaration of Independence -- a movement defined by what Jefferson called "the American mind" and what I've been calling "the American idea." It continues to sweep our country today with a vigor as strong as ever. It's a vision driven by the strength and power of the American Dream.

And I share that vision -- for what is the American Dream if it isn't wanting to be part of something larger than ourselves? If it isn't creating a better life for our children than we might have had? If it isn't the freedom to take command of our future?

For most people, these aspirations mean enjoying the blessings of good health or having a home to call one's own, or raising a family, holding a stake in the community, feeling secure -- secure at home or in our neighborhood.

But for others, sadly, America has not yet fulfiled the promise of equality of opportunity. We know who they are: They're the hopeless and the homeless, the friendless and the fearful, the unemployed and the underemployed, the ones who can't read, the ones who can't write. They are the ones who don't believe that they will ever share in the American Dream.

I'm here to tell any American for whom hope lies dormant: We will not forget you. We will not forget those who have not yet shared in the American Dream. We must offer them hope. But we must guarantee them opportunity.

It's been said, "Hope is a waking dream." That awakening begins with learning, understanding the power and potential of individual effort, developing a skill, and with it, independence, earning a living, with dignity and personal growth. More skills mean more freedom -- more options for even greater opportunity.

Today, our administration is proposing an agenda to expand opportunity and choice for all. It involves more than six major initiatives across the scope of our entire government: restoring quality education, ensuring crime-free neighborhoods, strengthening civil and legal rights for all, creating jobs and new businesses, expanding access to homeownership, and allowing localities a greater share of responsibility. In its entirety, I believe it represents one of the most far-reaching efforts in decades to unleash the talents of every citizen in America.

In several weeks, I will have legislation to enact this agenda on the desk of every congressman. The administration's Educational Excellence proposals, by way of example, will put choice in the hands of students and parents -- so that they can choose the best school to attend. Our higher education system is clearly, unquestionably, the finest in the world -- creative, innovative and highly competitive. From the G.I. Bill to Pell Grants, college students already have the power to choose. And now it's time that our education system, all of it, became the finest in the world.

We're also proposing education reforms to build flexibility and accountability into our school systems. We've seen what education reform can do, from East L.A. to East Harlem. We're encouraging governors to bring together teachers, parents and administrators to work together to meet the needs of all students. We must cut the dropout rate and ensure that every student in America arrives at school ready to learn, and graduates ready to work.

For some time now, the administration has called for the restructuring of American education. We've got to raise our expectations for our students and our schools. But if we're going to ask more of them, it wouldn't be fair to tie the hands of the teachers and principals -- particularly those who make a difference.

MORE

We need responsive schools -- customer-driven ones, if you will. Schools that are more market-oriented, and performance-based, because it's time we recognize that competition can spur excellence in our schools. Choice is the catalyst for change, the fundamental reform that drives forward all others. These ideas will stir us and guide us toward meeting the national education goals the governors and I set up after that famous Education Summit -- because we can't expect to remain a first-class economy if we settle for second-class schools.

Millions of jobs await America's graduates in the coming years. But to fill those jobs, entrepreneurs will look increasingly to America's minorities: blacks, Hispanics and Asians, and to people just entering the economic mainstream, workers with disabilities, and mothers who have chosen to work outside the home. The majority of those jobs are safer, are cleaner, higher skilled, better paying jobs. And they will go to the ones who have what it takes -- a quality education.

Everyone knows the best education takes place in a safe, drug-free environment. It is difficult for children to learn if there's violence in the classroom. Or crime out in the schoolyard. Or drug pushers along the way home. And older students and workers find it hard to attend night school or put in late hours at the office because of the danger that darkness brings, especially in crime-ridden neighborhoods.

Low-income Americans are the ones more likely to be intimidated by crime, less likely to be able to take advantage of opportunities that may be across town or even just around the corner. They're the ones defending themselves and their families from the drug dealers and muggers down the hall or down the street. And they're the ones who need opportunity the most.

It is in their name that this battle for the streets of our cities must be waged. The thugs and the gangs and the drug kingpins should be the casualties of this war. Our tactics: mandatory sentences for using a firearm in a violent crime, strengthened protection against sex crimes and child abuse, tough prosecutors, courts that mete out equal justice, swiftly and surely, a prison system that is up to the job. And finally, our strategy must include an unequivocal commitment to our young people. There are meaningful and adventurous alternatives to a life of crime. And it starts with education, a neighborhood that's safe and secure.

Opportunity is built on these foundations, but the door is opened by one thing -- a job. Every American who wants a job should be able to get one. Of course, vestiges of the past remain. Bigotry and discrimination, regrettably, still do exist. But we have powerful legal tools for eliminating discrimination. And remember, the legal guarantees of equality of opportunity are largely in place: Brown vs. the Board of Education, the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Acts of both 1968 and 1988, the Americans with Disabilities Act of 1990.

To assure that every American enjoys the equality of opportunity and access, I am determined to continue the vigorous enforcement of these and of all our civil rights laws.

And where our laws need improvement, I am committed to refining them. We will soon introduce legislation with strong new remedies to protect women from sexual harassment and minorities from racial prejudice in the workplace. And I call on the Congress to act promptly on this important initiative.

But legislation that only creates a lawyer's bonanza helps no one. We all know where opportunity really begins. It begins, as I said above, it begins with a job.

In our hardest hit urban and rural areas our enterprise zone proposal will create new small businesses. We're providing new incentives for employers to hire more workers, by eliminating the

MORE

capital gains tax on businesses in these areas, and attracting more seed capital. Our proposals mean economic growth, more minority entrepreneurs and most importantly, again, jobs.

The American dream also means choosing where to live and, for many working people, owning a home someday. We're offering public housing residents not only control and management of their own community, but for the first time, access to home ownership and private property to gain a stake in their communities. We've asked the Congress to provide much-needed funding for the HOPE program in 1991, to make this opportunity a reality in our inner cities this year. And we're proposing that Americans be allowed to use the money from their IRAs to buy their first home. These initiatives will bring us closer to our goal of one million new homeowners by 1992.

You know, there's something reassuring about becoming a part of a neighborhood, a community that pulls together in times of crisis, that looks out for one another. Each community in America is different, and its residents know best how to take care of each other, what the best options are for programs and services for those who need a hand. And so we're proposing to allow communities to restructure programs at the local level.

Our strength as a nation lies in the strength of our communities, the sum of our neighborhoods and families, our hopes and dreams for the future. This is our administration's agenda for opportunity. It begins in the heart of every person who believes in freedom and lives on in the American Dream. Every man and woman in this room shares its vision. The great poet, Carl Sandburg, put it this way: "nothing happens unless first a dream." Our mandate is to make the dream a reality.

We face a new century, a new American century. Half a world away, our allied troops face a defining moment in the new world order. And they are succeeding in their battle because each and every one of them possesses a pride in their country, integrity in their cause and courage in their heart.

Our troops will be home soon -- coming home to a grateful nation. And I want to ensure that their return is to a land of equal opportunity. And just as they have stood to safeguard our freedom -- the world's freedom -- let us stand with pride, integrity and courage in our hearts and expand the freedoms of all Americans. It's up to each of us to secure the triumph of "the American idea." And that idea is opportunity.

With God's help and yours, we will succeed. Thank you all very much. And may God bless our troops, and may God bless the United States of America. (Applause.)

END 11:30 A.M. EST

Bush's commencement speech at Hampton University was met by a student protest against his affirmative-action policies

DIANA WALKER FOR TIME

Quota Quagmire

While racial tensions are rising in the country, Washington politicians are bogged down in a rancorous dispute over a new civil rights bill

By PRISCILLA PAINTON

Here are examples of what passes these days for communication across the color line: In Tamarac, Fla., a 20-year-old black cook was questioned by police for 45 minutes after officials at the bank where he wanted to open an account reported that he planned to rob it. In New York City a rumor that a soft drink sold in poor neighborhoods had been secretly manufactured by the Ku Klux Klan to make blacks sterile worked so well that sales plummeted 70%. And a University of Chicago survey of racial attitudes found that 3 out of 4 whites believe black and Hispanic people are more likely than whites to be lazy, less intelligent, less patriotic and more prone to violence.

These are among the signs that blacks and whites are still talking past each other, that the nation could stand to pause and have a long, constructive conversation about race. Instead, the political establishment in Washington has transformed what should be a serious discussion about civil rights legislation into a festival of sophistry.

Last week the verbal posturing gave way to desperate, eleventh-hour arm-twisting and compromises, as House Democratic leaders scrambled to find the votes they need to override a possible presidential veto. It was a spectacle the Republicans enjoyed. "The Democrats are not going to get the votes they need, and that will finish off civil rights for this year," crowed G.O.P. whip Newt Gingrich. Privately, civil rights lobbyists acknowledged that Gingrich was right.

The key aim of the bill, which is scheduled to reach the House floor this week, is to make it easier for minorities and women to sue against "unintentional" employment discrimination, such as a hiring exam that may look fair but has the effect of keeping out members of some groups. The White House and congressional Republicans claim that the Democratic bill would go too far, encouraging the use of racial hiring quotas, subjecting white males to "reverse discrimination" and rewarding more lawyers with more money. Democrats reply that the White House alternative does not go far enough, and would make victims of discrimination jump through hoops to prove they are victims.

A central issue is who should bear the "burden of proof" when a worker com-

Have affirmative-action programs helped blacks get better job opportunities?

	WHITES	BLACKS
Helped	52%	45%
Hurt	10%	5%
No difference	28%	41%

Have job opportunities for blacks become better in the past five years?

	WHITES	BLACKS
Better	64%	39%
Worse	5%	22%
Haven't changed	26%	37%

Do we need more government efforts to help blacks get better job opportunities, are existing programs adequate, or do they go too far?

	WHITES	BLACKS
More programs	19%	58%
Adequate	41%	23%
Go too far	31%	13%

Do affirmative-action programs for blacks sometimes discriminate against whites? If "yes," does this happen a lot or only sometimes?

	WHITES	BLACKS
No	17%	44%
Yes, a lot	17%	7%
Sometimes	60%	42%

From a telephone poll of 504 white and 504 black American adults taken for TIME/CNN on April [illegible] by Yankelovich Clancy Shulman. Sampling error is plus or minus 4.5%. "Not sures" omitted.

plains that a company discriminates in its hiring and promotions. Until two years ago, it was up to the employer to show the "business necessity" of practices that have a "disparate impact" on minorities. Under that standard, plaintiffs were not required to prove that an employer had deliberately set out to be unfair to minorities; statistics showing that qualified minorities were underrepresented in a company's work force or had been consistently denied promotions were enough to make the case.

But in a 1989 case called *Wards Cove Packing Co. v. Atonio,* the U.S. Supreme Court ruled that it was up to complaining workers to prove a lack of "business necessity" for such practices. Statistics were no longer enough; lawyers in effect had to read employers' minds to demonstrate that they had consciously planned to favor whites.

Both Republicans and Democrats want the decision reversed, a remarkable consensus that should have yielded a law by now. But the Republicans have turned the legislative battle into the opening round of the 1992 election campaign, and the Democrats are fumbling for a way to counterattack. Despite the fact that there are no truly significant differences between the competing proposals, the debate has sunk to the realm of the picayune. While Democrats use language like "significant relationship to the successful performance on the job," for example, the Republicans want to say "a manifest relationship to the employment in question."

The Republican goal is to associate the Democrats with the dread word quota. George Bush's private polls have underscored the lesson North Carolina Senator Jesse Helms delivered in his ugly finale against black Democrat Harvey Gantt last November—that wavering white Democrats will scurry into the G.O.P. camp at the mere suggestion that blacks deserve special treatment to compensate for centuries of bigotry. A last-minute weapon in Helms' arsenal was a TV spot showing white hands holding a job-rejection slip, while a narrator intoned, "You needed that job, and you were the best qualified. But it had to go to a minority because of a racial quota." Helms won by 4%.

Bush has not shied away from exploiting the issue. When he vetoed a similar civil rights bill last year, he talked about the "destructive force" of quotas in the same warrior tones Ronald Reagan once hurled against the "evil empire." Although the Democratic bill explicitly discourages the use of quotas, the Republicans argue that the idea is clearly implied in that version. They say that if the bill becomes law, companies will try to "inoculate" themselves against discrimination suits by quietly trying to match the percentage of blacks on the payroll with the percentage of blacks in the local labor market. Though Republicans say that would be unfair to whites, the Federal Government does it every day. In fact, Bush's Office of Federal Contract Compliance Programs uses precisely the same standard to determine whether corporations that do business with the government are complying with laws against discrimination.

Some White House officials, however, are so determined to keep quotas alive as a political issue that they have interfered with efforts to reach a compromise. Last month chief of staff John Sununu and counsel C. Boyden Gray put pressure on members of a group of top corporate executives called the Business Roundtable, who were trying to forge an agreement on the bill, to break off their talks with civil rights leaders. The two Bush aides also criticized the Roundtable's involvement at a White House meeting with representatives of small businesses who oppose the bill. That was the last straw for Robert C. Allen, chairman and chief executive officer of AT&T, who had initiated the negotiations. He withdrew on April 19, taking with him the influence and good intentions of the 200-member organization.

The Democrats, in the meantime, have gone into contortions to keep the bill from appearing to be about skin color. In their attempts to get backing for their version, they have called it a "job opportunities bill" or a bill "for all working Americans." But their main effort has been a campaign to stress that women could be the major beneficiaries. To attract support from the 43% of the population that is both white and female, they have included a provision that would allow women who are discriminated against to sue in federal court for an unlimited amount; under current law, only victims of racial discrimination have that right.

The proposal made uneasy conservative Democrats even more uneasy. So last week House leaders accepted a limit of $150,000 on jury awards to female plaintiffs. Though that might attract more conservative supporters, it alienated the Congressional Caucus on Women's Issues and many of their allies in the civil rights community. Says Ed Dorn, an analyst at the Brookings Institution: "The strategy on the issue this year has been exceedingly awkward and poorly planned."

In the Senate there has been no strategy because there has been no bill. Democrats there have reason to be skittish. Of the 35 Senators up for re-election in 1992, 19 are Democrats and 11 of them are freshmen. Five are from the South, where they need both white and black support to win and where a vote on a civil rights law is sure to offend one group or the other.

The problem of how to reconcile blacks

and working-class whites, once the backbone of the Democratic Party, is compounded by the recession. "People are feeling very vulnerable in their job situations," says Democratic Congressman Timothy Penny of Minnesota. "Quotas mean jobs for some and pink slips for others." The racial split so torments Democrats that it has overshadowed every other issue. At a meeting in Cleveland earlier this month, members of the moderate Democratic Leadership Council spent most of the time wrangling over the phrase "We oppose discrimination of any kind—including quotas." Warned Paul Tsongas, the former Massachusetts Senator who is the only declared Democratic candidate for President: "We must tread lightly here. These are our family jewels. If we discard them, we will wander into the wilderness with those who have no moral purpose." But others, like Ron Gamble, a state representative from Pennsylvania, said the word could cost the party the next presidential election. "If we have to appease this interest group or that interest group," he said, "we will leave Cleveland as losers." The inelegant compromise left everyone dissatisfied, and party chairman Ron Brown felt the need to remind his fellow Democrats to turn their fire on the Republicans.

While politicians mangle the language and one another, there is fresh evidence that blacks continue to face strong barriers in the workplace. A study by the Urban Institute released last week showed that in 1 out of 5 attempts to get an entry-level job, a white applicant advanced further in the hiring process than a black applicant who was equally qualified. Since the late 1970s, the gap between the average earnings of black and white workers has failed to narrow: the average annual income of black workers in 1989 was $8,747, compared with $14,896 for white workers.

Despite these inequities, some blacks have turned their attention away from Washington—to the deteriorating inner-city neighborhoods—and concluded that the semantic dueling in Washington is beside the point. "If Congress passed their version of the civil rights bill tomorrow, would things be all right in black America?" asks Charles R. Stith, founder of the Boston-based Organization for a New Equality, a six-year-old civil rights group. "The answer is no. It's a solution to a political problem. The problem we now face is fundamentally an economic problem." From that perspective, it does not matter whether the current bill passes, since neither version would help a single crack addict kick the habit, persuade a youngster to stay in school or give an unwed mother the training she needs to get a job. —*Reported by Laurence I. Barrett and Nancy Traver/Washington and Sylvester Monroe/Los Angeles*

Does Affirmative Action Help or Hurt?

Black conservatives say their people become addicted to racial preferences instead of hard work

By SYLVESTER MONROE LOS ANGELES

For Mignon Williams, 42, a black marketing executive in Rochester, N.Y., affirmative action means opportunity. Recruited by Xerox Corp. in 1977 under a pioneering plan to hire women and minorities, Williams rose from saleswoman to division vice president in just 13 years. While Williams attributes her success mainly to hard work and business savvy, she acknowledges that her race and her sex played a role in her rapid rise. Affirmative action, she says, "opened the door, but it's not a free pass. If anything, you feel like you're under a microscope and have to constantly prove yourself by overachieving and never missing the mark."

ED KASHI FOR TIME

The professor talking with students at San Jose State University

"Blacks now stand to lose more from affirmative action than they gain."

—SHELBY STEELE

For Roy V. Smith, 40, a black 18-year veteran of the Chicago police force, affirmative action means frustration. Since 1973, court-ordered hiring quotas and the aggressive recruitment of minorities have expanded black representation on the 12,004-member force from 16% to 24%. Smith contends, however, that gender and race have not opened doors for him but shut them. He has been denied promotion to sergeant so that Hispanics and females who scored lower on exams could be given the higher-ranking positions set aside for those groups. He worries that even if he is promoted, the achievement may be so tainted by affirmative action that he will be perceived as a "quota sergeant." Last fall he joined a reverse-discrimination lawsuit against the city of Chicago by 313 police officers, mostly white. "I am not anti-affirmative action," he says. "I am just against the way it is being used. It's something that started out good and now has gotten out of hand."

Williams and Smith reflect an increasingly acrimonious debate among African Americans about the effectiveness and desirability of affirmative action. On one side of the argument, a small but widely publicized group of black neoconservatives contends that efforts to combat racial discrimination through quotas, racially weighted tests and other techniques have psychologically handicapped blacks by making them dependent on racial-preference programs rather than their own hard work.

Shelby Steele, an English professor at California's San Jose State University, has emerged as the most eloquent proponent of this view. He asserts that affirmative action has reinforced a self-defeating sense of victimization among blacks by encouraging them to pin their failures on white racism instead of their own shortcomings. Says he: "Blacks now stand to lose more from affirmative action than they gain."

On the other side, the heads of civil rights organizations—and most African Americans—insist that racial discrimination is so entrenched at all levels of U.S. society that only affirmative action can overcome it. They charge that Steele and other critics greatly understate white resistance to black progress. To support their view, they note that self-reliance has long been a part of the black gospel for advancement. "There's nothing new in the statement that we can and should do more for ourselves," says John Jacob, president of the National Urban League. "It's not a debatable issue." But, say supporters of affirmative action, expecting blacks to pull themselves up by their bootstraps alone is unrealistic. Argues Benjamin L. Hooks, executive director of the National Association for the Advancement of Colored People: "It's still the responsibility of the government to provide a good school system for us and fair and equal access to jobs."

Adding irony to the dispute is an often overlooked fact: government efforts to "level the playing field" by giving blacks special treatment were first adopted not by blacks or white liberals, but by conservative Republicans. In 1959 then–Vice President Richard M. Nixon, as head of President Eisenhower's Committee on Contracts, recommended limited "preferential" treatment for qualified blacks seeking jobs with government contractors. Following up that recommendation, John F. Kennedy issued an Executive Order in 1961 calling for "affirmative action" as the means to promote equal opportunity for racial minorities in hiring by federal contractors—the first official use by the government of the now controversial term.

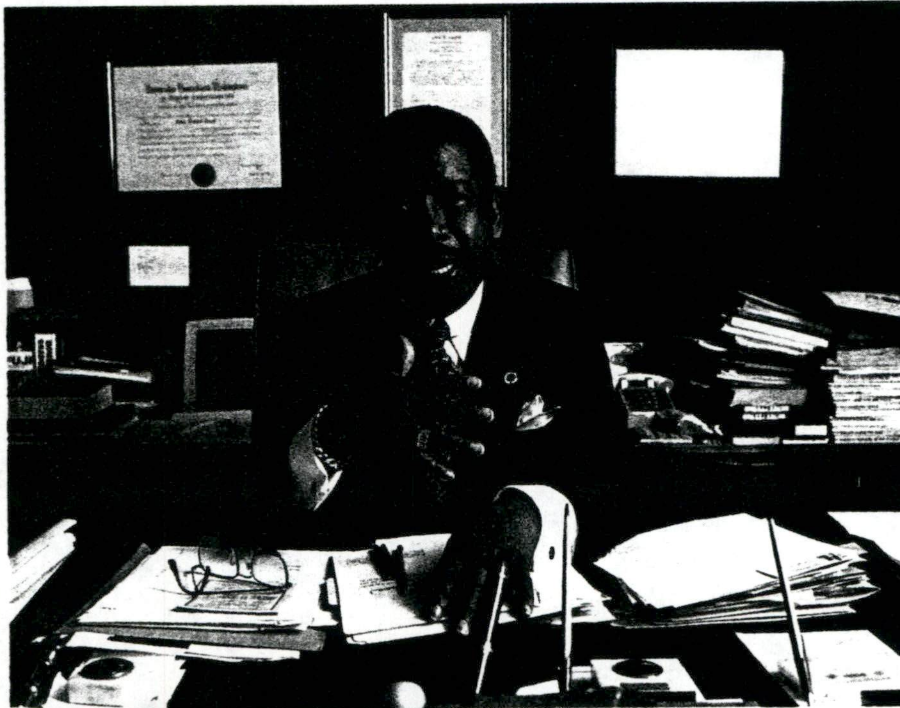
Eight years later, Nixon, as President, beefed up the Office of Federal Contract Compliance Programs, which, along with the Equal Employment Opportunity Commission, has become one of the government's two main enforcers of affirmative-action policy. It oversees 225,000 companies, with a combined work force of 28 million, that do business with the Federal Government. In 1971 Nixon's Labor Department started the Philadelphia Plan, a quota system that required federal contractors in Philadelphia, and later Washington, to employ a fixed number of minorities.

Such efforts have vastly expanded job opportunities for blacks. But they have also touched off complaints from many whites that blacks are benefiting from reverse discrimination. Much of the anger is aimed at so-called race norming, in which scores on employment-aptitude tests are ranked on different racial curves. Whites usually score higher on such examinations than blacks and Hispanics. To be ranked in the top 99% of applicants on one widely used test, for example, a white applicant must score 405 out of a possible 500 points. To get the same ranking, a black would have to achieve a 355.

Even the strongest black advocates of affirmative action concede that it is not a perfect tool. Like Steele, they decry the widespread view among whites that virtually all blacks who are hired, promoted or gain admission to élite colleges are less qualified than their white counterparts. "There have been casualties—minority kids who are depressed or feeling incompetent because of the stigma," says sociologist Troy Duster of the University of California, Berkeley. Duster tells of a black student who complained to him, "I feel like I have AFFIRMATIVE ACTION stamped on my forehead."

For most blacks, the opportunities that affirmative action affords outweigh any potential psychological threat. Many reason that once they are on the job or in the classroom, their performance can erase negative stereotypes. Moreover, while many barriers to black advancement have been shattered, few African Americans have penetrated the top levels of corporate management. A recent survey by Korn/Ferry International shows that white males still control at least 95% of the real power positions in corporate America.

Faced with white opposition and their own misgivings about affirmative action, a growing number of blacks would prefer to moot the argument by expanding opportunities for all Americans, whatever their color. They believe that instead of fighting for a fair share of the crumbs from a shrinking economic pie, blacks should concentrate their energy on making the pie big enough to guarantee a slice for everyone. That would require improving schools so that every child could obtain the skills needed to be competitive in the labor market, a thriving economy that could provide a job for everyone who wants to work, and more access to capital markets for minorities who want to start their own businesses. Meeting those tasks is more difficult than parceling out opportunities according to a racial formula, but in the long run more worthwhile. ■



TED THAI FOR TIME

The head of the National Urban League in his New York City office

"There's nothing new in the statement that we can and should do more for ourselves."

—JOHN JACOB

Wall Street Journal 22 May

Executive Life Restructuring Plan Is Proposed

California Officials Unveil 'Rehabilitation' Measure; Creditors Facing Losses

By Frederick Rose

Staff Reporter of The Wall Street Journal

LOS ANGELES—California regulators unveiled an intricate, two-part plan to restructure Executive Life Insurance Co. that would offer difficult choices to policyholders and clearly signaled for the first time that they and other creditors could suffer substantial initial losses.

The proposed resolution of the nation's largest insurance failure—termed a "rehabilitation blueprint" by California Insurance Commissioner John Garamendi—is only a suggested structure for prospective bidders for the insolvent insurer, a unit of Los Angeles-based First Executive Corp. until it was seized April 11 by state insurance regulators.

It isn't clear what the complicated blueprint could produce for the nearly 170,000 life insurance policyholders, 75,000 individual annuitants and members of retirement and other plans covered by 307 guaranteed investment contracts. The results will depend in large part on the bids offered by investor groups. But, by one estimate, holders who choose to keep their policies with a successor company to Executive Life might initially have policies worth 70% or so of the value assigned them by Executive Life. More could be recovered over time, depending on a recovery in the junk bond market and final recovery from state guarantee funds and legal settlements.

Holders of certain municipal securities backed by Executive Life are likely to get 30 cents or less on the dollar under the plan, the insurance department said.

Mr. Garamendi, who has promised maximum recoveries for policyholders and annuitants, warned that his proposal is dependent on a reversal of a $643 million claim by the Internal Revenue Service for back taxes. Mr. Garamendi, together with his New York counterpart, Salvatore Curiale, will appear today before a congressional committee looking into the Executive Life collapse.

The plan announced yesterday makes no provision for a second First Executive unit—Executive Life Insurance Co. of New York, which was seized by regulators in that state. Regulators have in the past suggested that a resolution might be cast for the two companies, whose combined assets before their failure totaled more than $13 billion.

Under the California plan, two entities would replace Executive Life. The first, a

Civil Rights Bill Unveiled by House Panel In Bid to Neutralize Conservative Attacks

By Timothy Noah

Staff Reporter of The Wall Street Journal

WASHINGTON—Attempting to neutralize attacks by the White House and conservative groups against the civil rights bill, members of the House Judiciary Committee unveiled their compromise measure.

House Democratic leaders directed committee members to devise the new version to win more support from moderate Democrats. The legislation, which would make it easier for employees to sue businesses for discrimination, is expected to come to the House floor next week.

The new measure incorporates compromise language drawn partly from negotiations with business leaders. The earlier version, which cleared two House committees in March, was similar to a bill that was passed by the House and Senate last year but vetoed by President Bush.

The substitute, sponsored by Judiciary Committee Chairman Jack Brooks (D., Texas) and Reps. Hamilton Fish (R., N.Y.) and Don Edwards (D., Calif.), would explicitly outlaw hiring and promotion quotas. Quotas previously have been ruled illegal by the Supreme Court, but there currently isn't a statutory ban.

White House spokesman Roman Popadiuk charged the substitute measure "still is a quota bill," and added that President Bush remains committed to an earlier, administration-sponsored Republican substitute. He said the administration hadn't yet reviewed the new bill.

Rep. Brooks said Bush administration aides "see this as a red hot political issue that they can exploit to the fullest in next year's election."

Several business and conservative groups have been running radio and television advertisements attacking the original civil rights measure as a "quota bill." One spot currently being aired by the National Congressional Club, a political action committee created by Sen. Jesse Helms (R., N.C.), features footage from a much-criticized 1990 Helms ad showing a white man's hands crumpling a job-rejection letter. "The liberals' quota bill could affect your job, your promotion, your family's future," says the announcer.

Ralph Neas, executive director of the Leadership Conference on Civil Rights, charged that the ad is a "reprehensible use of the big lie technique" because "this bill has never been a quota bill." But Carter Wrenn, executive director of the Congressional Club, said the group would continue running its spot.

Much of the legislative language in the new civil rights measure is drawn from recent negotiations between the Business Roundtable and the Leadership Conference on Civil Rights. For instance, it incorporates a definition of "business necessity," one important defense against some discrimination lawsuits, that was hammered out in those talks. The new language allows employers to defend employment practices as necessary if they bear "substantial and manifest" relationship to the jobs at issue.

The Business Roundtable talks were halted as a result of pressure from the White House and some business groups. The Roundtable has dissociated itself from the Democratic leadership's attempts to promote a compromise. "We've always said that until everything was agreed, nothing was agreed," said American Express lobbyist Richard Moose, who participated in the talks.

The new measure also would cap damages available to women, the handicapped, and religious minorities in employment-discrimination lawsuits at $150,000 or the amount of compensatory damages. The cap is opposed by many civil rights groups and by many women in Congress.

The bill would prohibit adjustment of employment test scores on the basis of race, color, sex, religion, or national origin, a practice known as "race norming." And it explicitly would prohibit the use of discriminatory employment tests. Supporters of "race norming" have argued that it is necessary to correct for the bias in many tests.

Hickel Authorized to Seek New Settlement on Oil Spill

By a Wall Street Journal *Staff Reporter*

JUNEAU, ALASKA—The Alaska Legislature approved a resolution authorizing Gov. Walter J. Hickel to try again to craft a settlement of claims arising from the Exxon Valdez oil spill.

The state Senate passed the resolution yesterday by a vote of 19-0. The House approved the resolution Monday night, by a margin of 39-0. Three weeks ago, the House rejected a $1.1 billion plea agreement that had been pushed by the governor, effectively dooming it.

Under the original plea agreement, worked out between the state, Exxon Corp. and the Justice Department, Exxon would have paid $100 million in fines related to guilty pleas on criminal charges. It would have paid up to an added $1 billion for civil damages. That agreement collapsed unexpectedly early this month, after federal Judge H. Russel Holland rejected the criminal fines

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Washington Post 22 May

Democrats Outline Revised Rights Bill

Republicans Scoff at Assertion That Quotas Would Be Forbidden

By Sharon LaFraniere
and Tom Kenworthy
Washington Post Staff Writer

House Democrats, struggling to regain lost political ground on an issue Republicans have used to their advantage for more than a year, yesterday unveiled the broad outlines of a new civil rights bill they said would expressly forbid the use of quotas in the workplace.

Supporters of the bill hope the explicit language will enable them to gain the upper hand in the war of labels that has consumed debate on the civil rights bill through two sessions of Congress. The administration's bill, one Democratic strategist pointed out, does not prohibit quotas. "Their bill is silent," he said. "We go farther than the Republicans."

Wake up, ol' Democrat Wakeup!

As described by its sponsors, the new bill would simply restate restrictions on quotas already set by a series of Supreme Court decisions over the past decade. But Rep. Barney Frank (D-Mass), who supports the legislation, said the wording will give needed political cover to Democrats afraid the "the average voter" is "predisposed to believe Democrats are in favor of quotas."

"You arm the members and the members, being armed, can go home and defend it," Frank said.

House Republicans yesterday derided the new language, sketchily outlined in a one-page synopsis released by the bill's sponsors. Rep. Newt Gingrich (Ga.), the minority whip, said Democrats were engaged in "a desperate effort to design . . . a fig leaf." White House spokesman Roman Popadiuk said the White House was unmoved by the changes. "That still is a quota bill, as far as we regard it," he said.

House leaders began pushing for changes in the bill last month after negotiations between civil rights and business groups broke down under pressure from the White House. House Speaker Thomas S. Foley (D-Wash.), who normally avoids predicting votes, said yesterday that the revised bill will attract enough votes to overcome a presidential veto. "If I'm wrong, I'll [illegible]

[illegible] bill is designed to counter six recent Supreme Court decisions that make it more difficult for employees to bring and win discrimination suits. Last year President Bush vetoed the legislation on the grounds that it was a "quotas" bill, and the Senate failed to override by one vote.

REP. BARNEY FRANK
. . . says Democrats can "defend" bill

Last year's bill stated that nothing in it "shall be construed to require or encourage "quotas." But Bush and other Republicans insisted that businesses would be forced to resort to quotas because the bill made it too easy for workers to mount and win discrimination suits.

> *"Current law [on quotas] is pretty much the same. We are just restating it."*
>
> —Rep. Jack Brooks

The revised bill will state quotas are not permitted, according to House Judiciary Committee Chairman Jack Brooks (D-Tex.), its prime sponsor. At a news conference attended by Rep. Hamilton Fish (R-N.Y.) and Rep. Don Edwards (D-Calif.), Brooks said that if the bill becomes law a worker who is injured by an illegal quota prac- [illegible] damages.

The legislators also said they intended to cap the amount of punitive damages available to a victim of intentional discrimination at $150,000 or the amount of compensatory damages; to prohibit employers from using separate scoring systems in testing white and minority applicants and workers, and to modify the wording of the standard that employers can use to defend themselves against certain discrimination suits.

The cap on punitive damages was included in the bill Bush vetoed. The new language on the standard for an employer's defense grew out of the failed negotiations in recent months between civil rights groups and the Business Roundtable, a leading business organization that is now behind the administration's bill.

Supporters of the bill said it would not place any further restrictions on workplace quotas than the Supreme Court has already set. "Current law is pretty much the same," Brooks said. "We are just restating it."

The court has upheld quotas in hiring and promotion cases, but strictly limited their use. In general, it has ruled that quotas must be temporary, flexible, narrowly tailored and designed to remedy past discrimination.

"Quotas are acceptable to right a wrong. They are not acceptable for keeping jobs divvied up according to race," said Michel Rosenfeld, a Yeshiva University law professor and author of a book on affirmative action.

In 1986, for example, the Supreme Court upheld a consent decree that required the city of Cleveland to promote one black firefighter for every white promoted over a four-year period. The court found that the plan did not require the promotion of unqualified blacks and was necessary to remedy past discrimination against blacks.

In another case, the court upheld a lower court order requiring a union that had persistently refused to admit blacks to increase its nonwhite membership to 29 percent by a certain date.

But the court ruled the same year that it was unconstitutional for a school [illegible] teachers in order to preserve the jobs of blacks with less seniority, finding that was "too intrusive" a burden on white workers.

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By J. David, Agence France-Presse

MOCK FRUSTRATION: President Bush threw his arms in the air and smiled broadly when reporters asked health questions during a photo session Tuesday. Bush said his doctors had given him a 'clean bill of health' after a new checkup for his thyroid problem. (Story, 1A)

GOP, Democrats scramble for advantage on civil rights

By Richard Benedetto
USA TODAY

Strip away lofty rhetoric about equality and fairness and the civil rights bill debate comes down to one key element — partisan politics.

Realists on both sides of the issue sense growing public unease with civil rights laws.

And they are scrambling for political advantage as the latest measure to combat discrimination in the workplace winds across Capitol Hill.

Republicans, armed with polls showing more white voters believe current civil rights laws are either adequate or go too far in favor of minorities, figure they can win two ways:

▶ Vetoing a Democratic bill that angers white voters.

▶ Forcing a compromise President Bush will sign.

Democrats, meanwhile, find themselves on the defensive over anger expressed by whites who feel current laws give minorities unfair advantages for college and jobs.

So they're pressing to craft a compromise bill that either attracts enough GOP votes to override a Bush veto or wins Bush's signature.

"There's enough (racial) unease out there that one does not need to put any more strain on the atmosphere," says Democratic pollster Peter Hart.

Led by Bush, the GOP argues the Democratic bill would encourage employers to impose racial and gender hiring quotas to avoid discrimination lawsuits.

Democrats charge the Republicans with a "distortion," of the Democratic position.

"Have the Republicans managed to distort the issue to the extent where the American people have been misled (about quotas)? Yes, they have," says Democratic National Committee Chairman Ron Brown. "And because of that distortion some compromises are probably necessary."

Bush and other Republicans have denied the distortion charges.

Brown's instincts are to fight for a tougher bill. But he's caught between holding onto his party's strong minority base and the need to persuade more middle-class whites to vote Democratic.

"Republicans are adept at driving wedges between people of common interest," says California Democratic Chairman Phil Angelides.

Bush, meanwhile, wants to sign a civil rights bill he can use to attract minority voters to the GOP. But advisers are pressing him to make the Democrats squirm on the issue.

"If they compromise, we take it off the political agenda," says GOP strategist Charles Black. "If they force a veto, it might be a big issue in 1992."

employment discrimination. The House and Senate passed a similar bill last year, but President Bush vetoed it.

Bush says it would add to employers' burden of proof in discrimination suits, forcing them to hire or promote by quotas based on race or sex to avoid costly lawsuits.

House Speaker Thomas Foley, D-Wash., predicted that unlike last year, the bill will win the two-thirds majority needed to override another veto.

▶ Lets women, religious minorities, and disabled people collect punitive damages if they prove discrimination — but limits such awards to $150,000. Now they can only collect back pay.

Victims of racial discrimination may sue for unlimited damages under a 1866 law.

▶ Bans grading employment tests according to the applicant's race, sex, religion, or national origin and outlaws tests which are "not valid and fair."

Extending a helping hand

Whites see better results from affirmative-action employment programs than blacks, according to a recent poll:

Affirmative-action programs have:

	Whites	Blacks
Helped	52%	45%
Hurt	10%	5%
Made no difference	28%	41%

Blacks say more programs needed

	Whites	Blacks
More programs	19%	58%

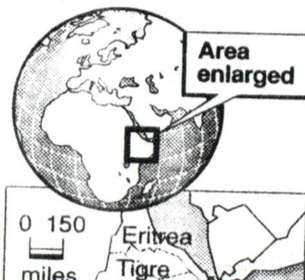
Whites say programs go too far

	Whites	Blacks
Go too far	31%	13%

Source: Time/CNN poll of 504 white and 504 black adults by Yankelovich Clancy Shulman. Sampling error: 4.5%.

USA TODAY

Ethiopia's ruler flees rebel forces



By Sharen Shaw Johnson
USA TODAY

Kuwaiti court 'picks up' on pressure, delays trial

By Jack Kelley
USA TODAY

tatives, agreed to the postponement because "it has picked up" on the worldwide outrage

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can congressman from New Jersey. "It doesn't relate to the military installations."

Commission member Alexander Trowbridge resigned last week because of his position on two companies that serve military bases.

And commissioner James Smith agreed to abstain from voting on six bases because of

terests in firms dealing with bases on the closing list.

Rep. Patricia Schroeder, D-**Colo., chairwoman of a House military installations subcommittee,** said the upheaval on the commission will create problems for the panel. It's supposed to recommend by July 1 whether to accept, reject or modify the Pentagon's list of 43

Rep. Steven Schiff, R-N.M., added "that when anyone has dual loyalties, that raises a **question, but not one that prevents one from serving."**

Courter said he's consulting with Grumman on the F-14 Navy fighter, a carrier-based plane unaffected by any base closings.

He also may sign up to work

Courter in a letter: "None of the interests that you have in various contractors doing busi**ness with the Department of Defense is inconsistent with** your responsibilities."

And Grumman spokesman Larry Hamilton said the base-closure commission "has absolutely nothing to do with anything we manufacture."

...ota ban added to rights bill

...se! No health questions!

By J. David, Agence France-Presse

...TRATION: President Bush threw his arms in the air and smiled broadly when ...ed health questions during a photo session Tuesday. Bush said his doctors had ...lean bill of health' after a new checkup for his thyroid problem. **(Story, 1A)**

But opponents call compromise 'illusory'

By Leslie Phillips
USA TODAY

Democratic House leaders Tuesday sketched the outlines of a compromise civil rights bill they hope will blunt Republican charges the measure encourages racial quotas.

But key Democrats conceded the changes involved politics more than substance. Republicans dismissed the compromise as illusory.

Hoping to attract more votes from conservative Democrats and moderate Republicans, the bill's sponsors said they will add a provision saying quotas aren't "permitted."

That would let supporters "defend themselves better" against GOP attacks, said Rep. Barney Frank, D-Mass.

But Rep. Henry Hyde, R-Ill., said, "What they are portraying as a compromise is a compromise with themselves. You can say this isn't a quota bill in 15 languages . . . but if you take a bottle of muscatel and put a label on it that says Cordon Rouge 1812, it's still muscatel."

(handwritten: There are quotes w/ this "same wine in different bottles" message)

At issue is a bill — scheduled for a House vote next Thursday — **to make it easier to prove employment discrimination. The House and Senate passed a similar bill last year, but President Bush vetoed it.**

Bush says it would add to employers' burden of proof in discrimination suits, forcing them to hire or promote by quotas based on race or sex to avoid costly lawsuits.

House Speaker Thomas Foley, D-Wash., **predicted that unlike last year, the bill will win** the two-thirds majority needed to override another veto.

Civil rights groups hope to call the White House bluff by using the same anti-quota language offered last year by Senate Minority Leader Robert Dole, R-Kan. Dole still opposes other parts of the bill.

It would be the first time that anti-quota rulings by the Supreme Court are written into law.

But even "if there was a **death penalty on quotas, (the White House) would still say it's a quota bill," said House Majority Leader Richard Gephardt, D-Mo.**

"Current law says pretty much the same thing," added Judiciary Committee Chairman Jack Brooks, D-Texas.

Lobbyists for small businesses remain dissatisfied because of standards by which employers must defend themselves in discrimination suits. Without correcting that, they say employers will be forced to resort to illegal quotas.

"Frankly, if you're a small employer, you're damned if you do and damned if you don't," said David Rehr of the National Federation of Independent Businesses.

The compromise also:

▶ **Lets women, religious minorities, and disabled people collect punitive damages if they prove discrimination** — but limits such awards to **$150,000. Now they can only collect back pay.**

Victims of racial discrimination may sue for unlimited damages under a 1866 law.

▶ **Bans grading employment tests according to the applicant's race, sex, religion, or na**tional origin and outlaws tests which are "not valid and fair."

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whites who feel current laws give minorities unfair advantages for college and jobs.

So they're pressing to craft a

Ron Brown. "And because of that distortion some compromises are probably necessary."

Bush and other Republicans

Extending a helping hand

THE WHITE HOUSE

Office of the Press Secretary

Embargoed for Release
Until 11:05 a.m. EST
Wednesday, February 27, 1991

February 27, 1991

FACT SHEET

EXPANDING CHOICE AND OPPORTUNITY FOR INDIVIDUALS, FAMILIES, AND COMMUNITIES

In his State of the Union Address, the President said: "The strength of democracy is not in bureaucracy. It is in the people and their communities....We must return to families, communities, counties, cities, states and institutions of every kind the power to chart their own destiny, and the freedom and opportunity provided by strong economic growth."

The Administration is committed to strengthening the power and opportunity of individuals and families, to breaking down barriers to independence and self-reliance wherever they exist, and to providing hope to distressed communities.

This means giving people access to jobs and the ability to make choices that will better their lives and the lives of their families. People with access to housing, jobs, and quality education have a stake in their community, and a greater incentive to lead productive lives. More important, people with economic opportunity have hope for the future -- an important and powerful weapon against poverty and despair.

The Administration seeks to use numerous administrative, regulatory, and budgetary means to expand economic opportunity for low-income individuals. In addition to these continuing efforts, the President today announced that he will seek Congressional action to promote choice and opportunity on several fronts:

1. educational choice;
2. educational flexibility;
3. homeownership for low-income persons;
4. enterprise zones;
5. anti-discrimination laws;
6. community opportunity areas;
7. the social security earnings test; and
8. anti-crime efforts.

Legislation, where required, will be transmitted to Congress in the next several weeks to implement these proposals.

- more -

GIVING PARENTS AND STUDENTS CHOICE IN EDUCATION:

Choice programs provide parents the opportunity to select the most appropriate school for their children -- based on informed judgments about which school offers the best education. Choice leads to healthy competition among schools by focusing on proven educational quality as the way to attract students. Clearly, parents should have the opportunity to send their children to schools of their choice. Choice can lift the performance and quality of all schools.

The President will propose a new **Educational Excellence Act** which contains strategic initiatives to improve the learning achievement of all Americans and to restructure the nation's educational system. Initiatives in the Educational Excellence Act will:

- o Stimulate fundamental reform and restructure our education system through promoting educational choice and alternative certification for teachers and principals.
- o Assist educators in their mission to improve student performance by: rewarding schools that demonstrate improved achievement among students; rewarding excellent teachers; and promoting innovation in training school administrators.
- o Provide incentives to school districts to design and implement innovative approaches to mathematics and science education; enhance the endowments of Historically Black Colleges and Universities; and contribute to improving literacy.

PROVIDING EDUCATIONAL FLEXIBILITY IN RETURN FOR ACCOUNTABILITY:

Federal Departments and agencies administer hundreds of separate programs that provide or support education services; each has its own statutory and regulatory requirements. Program requirements can impede the ability of local schools and districts to provide the best possible education. Flexibility in administering Federal education programs will allow Governors, school administrators, teachers, service providers, parents, and others in the community to work together to develop effective education programs that meet the needs of all students, particularly those students who are educationally disadvantaged.

- more -

- **The Educational Excellence Act of 1991** would promote local control and innovation in education by providing increased flexibility in the use of Federal funding in exchange for enhanced accountability for results. The Administration's bill will be guided by the following principles:

  -- Flexibility should be linked to accountability for improvements in educational outcomes.

  -- Flexibility should result in delivering services to current target populations in a more effective manner.

  -- Flexibility should retain key protections in current laws (e.g., protection of the disabled).

PROVIDING HOMEOWNERSHIP OPPORTUNITIES:

Low-income Americans have a greater stake in their communities when they have the opportunity to own their own homes. The HOPE (Homeownership and Opportunity for People Everywhere) initiative is a new grant program to increase homeownership opportunities. By offering residents greater control and access to property, the HOPE program will instill pride of ownership and enhance incentives for maintenance and improvement. While HOPE was enacted into law last year, Congress provided no funding for the program in Fiscal Year 1991.

- The President has requested $500 million in Fiscal Year 1991 supplemental funding to start the HOPE program immediately. The President's Budget also requests $1 billion in 1992 for the new HOME program -- a housing block grant program providing States and localities greater flexibility in meeting the housing needs of their low-income residents, with incentives for use of housing vouchers.

- HOPE Grants will be made on a competitive basis to resident management corporations, resident councils, cooperative associations, non-profit organizations, cities and States, and public and Indian housing authorities. Funding will help participants design and execute their plans for resident management and buyouts of public and assisted housing.

- The HOPE initiative also targets $258 million in 1992 for a new "Shelter Plus Care" program to help the homeless. The Shelter Plus Care program will link housing with the full range of services needed by the homeless. The program will combine shelter with the support services -- job training, health care, and drug treatment -- that help people achieve dignified and independent lives.

CREATING JOBS IN ENTERPRISE ZONES:

Enterprise zones will attack poverty by promoting investment in economically distressed neighborhoods. Enterprise zones will attract new seed capital for small business start-ups, create new incentives for entrepreneurial risk-taking, and reduce high effective tax rates on those moving to work from welfare.

- The Enterprise Zone and Jobs-Creation Act of 1991 will target tax incentives and regulatory relief to some of our nation's most economically depressed areas.

- The Secretary of Housing and Urban Development would designate up to 50 (urban, rural, and Indian) enterprise zones over a four year period. Designation will be based on the level of distress, as well as on the nature and extent of State and local efforts to improve living conditions and to eliminate government burdens to economic activity. Designation will be for a maximum of 24 years.

- The legislation will provide tax incentives to attract seed capital, stimulate employment, and increase the economic return from work for the working poor:

  - Workers will be eligible for a 5 percent refundable tax credit for the first $10,500 of wages earned in an enterprise zone business. This will put up to $525 more income in the pockets of low-income workers. The credit phases out between $20,000 and $25,000 of total annual wages.

  - To spur investment, capital gains taxes will be eliminated for gains on investment in tangible property (e.g., buildings and equipment) used in a business located in an enterprise zone for at least two years.

  - To encourage entrepreneurial risk-taking, individuals will be permitted to expense investments in the capital of corporations engaged in enterprise zone businesses. This essentially provides an immediate write-off for investments in enterprise zone businesses. Corporations must have less than $5 million of total assets. Expensing will be permitted up to $50,000 annually per investor, with a $250,000 lifetime limit.

- The legislation would also give enterprise zone communities priority for free trade area status. Such status would, for example, allow a business in an enterprise zone to import materials duty-free if the materials are used to manufacture products for export to other countries.

- Enterprise zones would reduce Federal tax revenues by $1.8 billion over five years.

STRENGTHENING AND ENFORCING ANTI-DISCRIMINATION LAWS:

A vital element in the effort to protect the civil rights of all Americans is the vigorous enforcement of existing anti-discrimination laws. Over the past two years, the Bush Administration has moved aggressively to fight hate crimes and combat discrimination in housing, voting, employment, and education. A few examples:

EXAMPLES OF WHAT WE'VE DONE

- Enactment of the Americans with Disabilities Act in July 1990 was one of the most important expansions of civil rights protections in a quarter of a century. The Administration is now pursuing swift implementation of the landmark law.

- The Department of Housing and Urban Development (HUD) is aggressively enforcing the 1988 Fair Housing Amendments which prohibit housing discrimination on the basis of race, color, national origin, religion, sex, familial status, or disability. The Bush Administration has resolved nearly 12,000 of the almost 16,000 fair housing cases.

- In 1989, the Justice Department prosecuted more than twice as many hate crimes cases as in any previous year. In 1990, the Justice Department had a 100 percent success rate in prosecuting hate crimes.

- In 1990, the Department of Education received and resolved more civil rights complaints than in any previous year of its history -- and in record time.

- The largest settlements in the history of the Department of Labor's Federal Contract Compliance cases have been achieved during the Bush Administration. A single case involving employment discrimination against women and minorities resulted in a payment of $14 million. In another case, a back pay settlement of $3.5 million will benefit approximately 1,000 women who were discriminated against in hiring.

The Administration is committed to strengthening the strong employment discrimination laws that now exist. These improvements will remove consideration of factors such as sex, race, religion, or national origin from employment decisions. This can be done without encouraging the use of quotas or preferential treatment, 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.

- A major objective of the Administration is to ensure that Federal law provides strong new remedies for harassment based on sex, race, color, religion, or national origin.

- The Administration will propose to codify a cause of action for "disparate impact," involving employment practices that unintentionally exclude disproportionate numbers of certain groups from some jobs. The burden of proof will be shifted to the employer on the issue of "business necessity."

- The time has come for Congress to bring itself under the same anti-discrimination requirements it prescribes for others.

- Other improvements, including changes in certain provisions affecting statutes of limitations and encouragement for the use of alternative dispute resolution mechanisms, will also enhance the administration of our comprehensive civil rights laws.

REDUCING FEDERAL BUREAUCRACY AND ESTABLISHING OPPORTUNITY AREAS:

Programs providing social, welfare, health, education, and nutritional services are often delivered in fragmented ways. Allowing services to be integrated will better serve the recipients of these programs and promote self-sufficiency and opportunity.

- The Community Opportunity Act of 1991 will enable local communities to develop "community opportunity systems" and allow them to restructure Federal programs to provide services and benefits in the way the community deems best to meet the needs of the individuals and families served.

- The legislation would allow a Federal administrator designated by the President to recommend a budget-neutral waiver of most Federal statutory and regulatory requirements for any Federally funded program to be included in the community's opportunity delivery system. The Federal administrator will make recommendations regarding the waiver requests to the relevant Federal agency heads.

- Communities will be able to develop community opportunity systems in which:

  -- services and benefits can be integrated, combined, and restructured at the community level;

  -- the system is neighborhood- or community-based, with a specified target group of beneficiaries;

  -- the individuals and families served can participate in the design of the system; and

  -- the delivery system offers individuals and families in the target group of beneficiaries the maximum choice and control over the range, source, and objectives of the services and benefits to be provided.

- Each community opportunity system will have clear and measurable goals and will be evaluated with regard to both the short- and long-term outcomes.

EXPANDING JOB OPPORTUNITIES FOR OLDER AMERICANS BY LIBERALIZING THE SOCIAL SECURITY EARNINGS TEST:

If social security recipients aged 65 to 69 wish to supplement their benefits with earnings, they may earn only up to $9,720 this year before their social security benefits are reduced. Beyond $9,720, each three dollars of earnings reduces their social security benefits by one dollar.

For retirees with sources of income other than earnings, such as private pensions and investment income, this limitation on allowable earnings may have little effect on their lives. Presently, the earnings test falls most heavily on elderly persons who do not have significant savings or income from pension plans, and can seriously constrain their choices of employment.

- **The President's Fiscal Year 1992 Budget proposes an increase in the amount of allowable earnings for social security recipients aged 65 to 69.**

  -- For 1992, allowable earnings would be increased $800, or 8 percent, from $10,200 to $11,000.

  -- For 1993, the increase would be $200, from $10,800 to $11,000.

  -- For 1994, allowable earnings would continue to rise to the level projected under current law, $11,400.

PROTECTING CITIZENS BY FIGHTING VIOLENT CRIME:

As President Bush has stated in the past, the right to be free from fear in our homes, streets, and neighborhoods is the first civil right of every American. Where streets are not safe and property is not secure, economic opportunity is impossible.

The President announced in his State of the Union Address that the Attorney General will soon convene a Crime Summit of our nation's law enforcement officials. A major objective of the Crime Summit is to strengthen the working relationship between the Administration and State and local law enforcement officials.

The Administration will again propose comprehensive violent crime control legislation to give law enforcement authorities the tools they need to apprehend, prosecute, and incarcerate violent criminals. The legislation will include:

- A meaningful Federal death penalty for the most heinous crimes with procedures to ensure its fair and colorblind application.

- Habeas corpus reform to reduce unnecessarily repetitive appeals that clog the courts and delay justice.

- Exclusionary rule reform to ensure that the evidence gathered by law enforcement officials in a good faith belief that they are acting lawfully can be used to help courts establish the truth.

- Provisions to strengthen Federal laws concerning the safety of women by modifying rules on the admissibility of evidence in cases of sex crimes, enhancing penalties for the distribution of illegal drugs to pregnant women, increasing penalties for recidivist sex offenders, and offering greater protection for victims below the age of sixteen.

# # #

For Immediate Release

May 17, 1990

REMARKS BY THE PRESIDENT
DURING MEETING WITH
COMMISSION ON CIVIL RIGHTS

The Rose Garden

10:02 A.M. EDT

THE PRESIDENT: Welcome to the Rose Garden and to the White House. Thank you all very much for coming. To the Attorney General and Secretary Cavazos and Secretary Sullivan, thank you for joining us. Director Newman, the same. And to Senators Dole, Hatch, and Garn, Congressman Ham Fish, thank you very much for being with us today. To Chairman Fletcher, an old friend and a man I'm very proud of, welcome, sir. To Commissioners Buckley, Ramirez, Redenbaugh, Wilfredo Gonzalez and the State Advisory Committee Chairpersons, and to the distinguished leaders. I see Ben Hooks here and others of the civil rights community across this great country. It is -- and I mean it -- an honor to have you here today.

I think we've made it a moment that's very hopeful worldwide. In a minute from now, I'll be meeting in this marvelous Oval Office with Chancellor Kohl, talking about the dramatic changes that have taken place in the world. There is a time when the thundering cry for freedom is being heard and answered from Panama, hopefully in Johannesburg, to Warsaw.

And around the world, peoples are warring against tyranny, citizens struggling against state control, economies weary of bureaucratic central planners, all are looking to America as reason for hope -- the bright star by which to chart their course to freedom.

And so it's all the more crucial now that we look carefully to the kind of country we are -- to the state of democracy here in the Land of Liberty. And we're called upon to ensure that this democracy means opportunity for all who call it home.

Few have worked harder to deliver the promise of democracy, to make an enduring dream a living reality, than the men and women assembled here today in this Rose Garden. And particularly, I want to give credit again to these men and women standing behind me.

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

Joining a new Chairman -- and as I said, my friend of many years, Art Fletcher -- are two outstanding additions: Carl Anderson and Russell Redenbaugh. I know Bob Dole shares my admiration for Russell, a man of impressive credentials, who knows, as all Americans should know, that physical disability will not be a barrier to service in this administration. That's why I remain firmly committed to the landmark Americans for Disabilities Act to help ensure equal rights and opportunities for these Americans.

And today, I'd like to announce a new member of the Civil Rights Commission, Mr. Charles Pei Wang, President of the China Institute in America, an outstanding new addition.

Over the last few days, I've met to discuss pending civil

MORE

rights legislation with leaders representing America's rich tapestry of cultural, religious, and ethnic diversity. And I got, as I knew I would, a lot of sound advice. Much of which I can accept. (Laughter.) But these leaders, this Commission -- (applause) -- the Congress and this administration, believe me, all share a common conviction for equal opportunity. It's a responsibility that I've tried to take very seriously -- especially now, when our most vital export to the world is democracy.

And we must make sure that we as a nation continue to lead by example. We must see that true affirmative action is not reduced to some empty slogan, and that this principle of striking down all barriers to advancement has real, living meaning to all Americans. We will leave nothing to chance and no stone unturned as we work to advance America's civil rights agenda. (Applause.)

This nation's progress against prejudice, from the '64 Act to the Voting Rights Act, to the Fair Housing and Age Discrimination in Employment Acts, it's all hinged on the principle that no one in this country should be excluded from opportunity. And so, we're committed to enacting new measures like the Hate Crimes Statistics Act, the HOPE initiative of housing, a revitalized enforcement of restrictions against employment bias. This administration seeks equal opportunity and equal protection under the law for all Americans -- goals that I know are shared by Senators Kennedy and Representative Hawkins, and certainly by the four distinguished members of Congress with us here today.

And so we've supported efforts to ensure an individual's ability to challenge discriminatory seniority systems. We've also moved to stiffen the penalties from racial discrimination in setting or applying the terms and conditions of employment. And today, as we work to ensure that America represents democracy's highest expression, I want to begin by offering three principles that must guide any amendments to our civil rights laws. These principles are firmly rooted in the spirit of our current laws. After the extensive discussions that we've had this week, I think they're principles on which all of us, including the leadership on the Hill, can agree. And so I will enthusiastically support legislation that meets these principles.

(1) First, civil rights legislation must operate to obliterate consideration of factors such as race, color, religion, sex, or national origin from employment decisions. (Applause.) So in essence, we seek civil rights legislation that is more effective, not less. The focus of employers in this country must be on providing equal opportunity for all workers, not on developing strategies to avoid litigation. (Applause.)

No one here today would want me to sign a bill whose unintended consequences are quotas. Because quotas are wrong, and they violate the most basic principles of our civil rights tradition and the most basic principles of the promise of democracy. America's minority communities deserve more than symptomatic relief, and we want to eradicate the disease. And that will require systematic solutions, strategies that transcend statistics.

We should empower and ennoble our minority communities. We should seek systematic change that allows every American to excel. During these meetings this week, I invited the civil rights leadership to work with me to craft a bill that moves us towards this goal. After these consultations, I am confident that this can be done. I want to sign a civil rights bill, but I will not sign a quota bill. (Applause.) I think we can work it out. (Applause.)

(2) The second civil rights legislation must reflect fundamental principles of fairness that apply throughout our legal system. Individuals who believe their rights have been violated are entitled to their day in court, and an accused is innocent until proved guilty. In every case involving a civil rights dispute, constitutional protections of due process must be preserved.

(3) And third, federal law should provide an adequate deterrent against harassment in the workplace based on race, sex, religion, or disability, and should ensure a speedy end to such discriminatory practices. Our civil rights laws, however, should not be turned into some lawyer's bonanza, encouraging litigation at the expense of conciliation, mediation, or settlement.

(4) Let me add that Congress, with respect, should live by the same requirements it prescribes for others. (Applause.) In '72, the Civil Rights Act of '64 was justly applied to executive agencies in state, local governments and Congress, however, has not covered. And this -- this is not an assault on Congress, I'm just trying to -- I've got about -- (laughter) -- but seriously, this inconsistency should be remedied to give congressional employees and applicants the full protection of the law to send a strong signal that it's both the Executive Branch and Congress that are in this together. And the Congress should join the Executive Branch in setting an example for these private employers.

Now, we seek strategies that work, putting power where it belongs -- in the hands of the people. That means new ideas, like giving poor parents the power of an alternative choice in where to send the kids to school so that all can have access to the best. It means more tenant control and ownership of public housing. Tax credits for child care to give parents more flexibility and choice. Policies that underwrite prosperity by encouraging capital flow to build more businesses in poor neighborhoods. The door is open wider now than it ever has been. Together, I believe we can open it still wider.

Today, an expanding economy is working in the service of civil rights. And so, let's not set the clock back. Let's look past the differences that divide us, to the shared principles and the better natures that we have within us. To the civil rights leadership assembled here today -- Dorothy, excuse me, I didn't see you earlier -- and so many -- I'm in real trouble if I single them out here. Look, I have offered you my hand and my word that, together, we can and will make America open and equal to all. Now, this administration is committed to action that is truly affirmative, positive action in every sense, to strike down all barriers to advancement of every kind for all people. We will tolerate no barriers, no bias, no inside tracks, no two-tiered system, and no rungless ladders. And I'm willing to take the time to make sure that this is done right, simply because it's worth doing right. Now is the time, really, to extend a hand to all that are struggling, and to devote our energies to a broader agenda of empowerment, that all might join in this new age of freedom.

I am delighted that you all came here. Thank you for bringing honor to this prestigious Rose Garden, and to paying tribute to our Commission here in which I have great confidence, and in which I take great pride.

Thank you all very, very much. (Applause.) Thank you.

END

10:16 A.M. EDT

FACT SHEET ON
ADMINISTRATION CIVIL RIGHTS BILL

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

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

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

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

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

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

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

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

- 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.

- 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.

Withdrawal/Redaction Sheet
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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	Dick Thornburgh to POTUS, re: S. 2104, the "Civil Rights Act of 1990." (10 pp.)	10/22/90	~~P-5~~	

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Office of the Attorney General
Washington, D.C. 20530

October 22, 1990

MEMORANDUM FOR THE PRESIDENT

FROM: DICK THORNBURGH
ATTORNEY GENERAL

SUBJECT: S. 2104, the "Civil Rights Act of 1990"

This memorandum sets forth my views, and those of the Department of Justice, on S. 2104, the "Civil Rights Act of 1990." Although the bill contains some provisions that we both would like to see become law, S. 2104 is fatally flawed.

On May 17, 1990, in a Rose Garden speech marking the reauthorization of the Civil Rights Commission, you outlined the principles that would guide the approach of your Administration to civil rights legislation. You stated that: (1) civil rights legislation must operate to obliterate consideration of factors such as race and sex from employment decisions; (2) it must reflect fundamental principles of fairness that apply throughout our legal system; and (3) it should strengthen deterrents against harassment in the workplace based on race, sex, religion, or disability, but should not produce a new and unjustified lawyers' bonanza.

S. 2104 is not consistent with these principles. It creates powerful incentives for employers to adopt quotas in order to avoid litigation. It shields discriminatory consent decrees from legal challenge under many circumstances. And it contains several provisions that will serve primarily to foster litigation rather than conciliation and mediation.

I. INCENTIVES FOR EMPLOYERS TO ADOPT QUOTAS

Sections 3 and 4 of S. 2104 create strong incentives for employers to adopt quotas. Although putatively needed to "restore" the law that existed before the Supreme Court's opinion in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), these sections actually engage in a sweeping rewrite of the law of employment discrimination.

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, sex, ethnicity, or religion 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 like 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, 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. Supporters of S. 2104 argue that this rule imposes an unreasonable burden on employees, and have claimed that legislation is needed to redress this imbalance. As you know, your Administration is prepared to accept the shifting of that burden to the defendant.

Sections 3 and 4 of S. 2104, however, go far beyond this shift in the burden of proof. First, the bill effectively creates a new presumption of discrimination whenever a plaintiff shows a sufficient statistical disparity in the racial, sexual, ethnic, or religious makeup of an employer's workforce, even if the plaintiff fails to identify any employment practice that has caused the disparity. Second, it defines "business necessity" in

an unduly restrictive way. Finally, it imposes unreasonable restrictions on the type of evidence an employer may use in proving business necessity. In combination, these provisions will force employers to choose between (1) lengthy litigation, under rules rigged heavily against them, or (2) adopting policies that ensure that their numbers come out "right." Put another way, the bill exerts strong pressure on employers to adopt surreptitious quotas.

A. THE PRESUMPTION OF DISCRIMINATION ARISING FROM STATISTICAL DISPARITIES

Under Section 4, a plaintiff may bring a disparate impact case by alleging that a "group of employment practices results in" significant statistical disparity. "Group of employment practices" is very broadly defined in Section 3 to include any "combination of employment practices that produces one or more decisions with respect to employment . . ."

That definition provides no limitation whatsoever: <u>all</u> practices that combine to produce, say, hiring decisions -- for example, use of a high school graduation requirement, plus an interview, plus job references, plus a requirement of a clean criminal record -- all could be lumped together as a single "group." Thus, if an employer's bottom line numbers are "wrong," the employer can be forced to prove that <u>every</u> practice is required by "business necessity."

Section 4 includes language emphasizing this point. Subsection (k)(1)(B)(i) states that "except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party <u>shall not</u> be required to demonstrate which specific practice or practices within the group results in such disparate impact" (emphasis added). The exception in clause (iii) seems at first to state the opposite, but actually takes away what it seems to give. Specificity is not required where the defendant has "failed to keep such records" as are "necessary to make [the] showing" of specifically which "practice or practices are responsible for the disparate impact."

Thus, the bill requires any employer whose workforce has the "wrong" bottom line numbers to point to records showing that one of its practices could have been challenged as "responsible for" the disparate impact. This is not a mere recordkeeping requirement: it is essentially a transfer from the plaintiff to the defendant of the obligation to make out the bulk of the plaintiff's prima facie case. The transfer of obligations is merely disguised as a recordkeeping requirement. An employer who cannot meet the burden created by this rule faces the prospect of defending <u>all</u> of its employment practices under the business necessity test.

This concealed obligation does not merely create all the record-keeping burdens one would imagine, but also a classic Catch-22: if an imbalance in the employer's workforce is caused by something other than the employer's practices (by housing patterns, for example), so that the employer could not possibly have kept records showing which of its practices was responsible for the imbalance (because none was), a prima facie case will nevertheless be deemed to have been established because the group of practices "results in" a disparate impact and the employer cannot possibly explain it from his own records.

The notion of allowing plaintiffs to attack a "group of practices" without showing that each member of the group has caused a disparate impact has absolutely no basis in Supreme Court precedent. All Supreme Court cases prior to Wards Cove focused on the impact of particular hiring practices, and plaintiffs have always targeted those specific practices. See Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Dothard v. Rawlinson, 433 U.S. 321 (1977); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); Connecticut v. Teal, 457 U.S. 440 (1982); Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777 (1988). The new rule created in S. 2104 is inconsistent with a fundamental principle of civil litigation: that the plaintiff is obliged to identify what act of the defendant is responsible for the plaintiff's injury. Even apart from other defects in Sections 3 and 4 of this bill, the treatment of "groups of practices" creates extremely powerful incentives for employers to adopt quotas rather than go through the litigation necessary to establish the "business necessity" of every one of their employment practices.

B. THE BUSINESS NECESSITY DEFINITION AND THE EVIDENTIARY RESTRICTIONS

The risk of surreptitious quotas created by the bill's provisions on "groups of practices" is compounded by S. 2104's unreasonably restrictive definition of "business necessity" and by evidentiary restrictions imposed on employers trying to meet the "business necessity" test. I will discuss each in turn.

1. The Business Necessity Definition

S. 2104 forces employers to defend any employment practice "involving selection" by showing a "significant relationship to successful performance of the job." This standard is new; it is found nowhere in any holding of the Supreme Court. On its face, it is defective because a narrow requirement of this type denies that there can be legitimate and desirable selection or promotion practices aimed at objectives other than successful job performance. Moreover, its very novelty guarantees that it will

generate litigation for employers seeking to defend themselves. Finally, the bill's peculiar treatment of prior cases is likely to suggest to courts that ambiguities should be resolved against employers. In combination, these defects again make it likely that employers will adopt quotas rather than risk expensive litigation whose outcome will be highly uncertain.

First, simply taking the definition literally, S. 2104 would preclude employers from using hiring or promotion practices serving many legitimate business objectives. Consider, for example, an employer with a policy under which promotions are given only to employees who receive "outstanding" ratings in their current jobs. The justification for such a policy might be that it provides an incentive for all employees to perform in an outstanding manner, thereby promoting overall efficiency within the firm. Under S. 2104, however, the employer could not rely on that justification. Rather, he or she would have to attempt to prove that outstanding performance in an employee's current job was "significant[ly] relat[ed] to successful performance" of the next job. In many cases, this might be impossible.

There is no sound policy reason for confining in this way the justifications an employer may offer for its selection practices. Nor were such restrictions required by Supreme Court decisions prior to Wards Cove. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); New York City Transit Authority v. Beazer, 440 U.S. 568, 587 n.31 (1979); Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2790 (1988) (plurality opinion). Indeed, the Wards Cove dissent itself made clear that under Griggs any "valid business purpose" would suffice. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2129 (1989) (Stevens, J., dissenting).

The statement in S. 2104 that the definition of business necessity is intended to codify Griggs cannot alter the inconsistency between the bill's text and the language of Griggs, or the inconsistency between the bill's text and almost two decades of Supreme Court precedent interpreting Griggs. Instead, it merely guarantees confusion as courts attempt to sort out precisely what Congress had in mind. This confusion will be time-consuming and very expensive. And it will bring no benefit to the victims of discrimination.

Finally, in attempting to interpret the confusing definition of "business necessity," some courts would likely come to the conclusion that Congress intended to bring about certain highly undesirable results. First, the bill states that it is designed to overrule Wards Cove's "treatment of business necessity as a defense." Part of that treatment of business necessity, though, was the Court's rejection of the view that an employer is required to show that the "challenged practice [is] 'essential' or 'indispensable' to the employer's business." Wards Cove

Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989). As the Supreme Court noted, "this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils," including quotas. Id. Rather, the Court quite reasonably found that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." Id. at 2125-2126 (citing Watson and Beazer as well as Griggs). On this issue, as pointed out above, the dissent in Wards Cove is in agreement.

In light of these statements, a statutory provision overruling "the treatment of business necessity" in Wards Cove could reasonably be interpreted by many courts as returning the bill's definition of business necessity to the widely criticized standard included in the original incarnation of S. 2104 ("essential to effective job performance"). This inference would be strengthened by two other provisions of the bill: Section 2 ("Findings and Purposes") and Section 11 ("Construction"). Working in tandem, Sections 2 and 11 would likely lead some courts to resolve ambiguities in the bill against prior decisions by the Supreme Court and against defendants.

2. Evidentiary Restrictions

Finally, employers who must attempt to meet the business necessity test must do so by means of "demonstrable evidence." This is a new term invented by the bill, and no definition is provided. The bill contains a long list of types of evidence that courts may "receive," but the bill does not say that any of these necessarily constitutes "demonstrable evidence." Courts will likely understand the use of this new term (particularly in light of Sections 2 and 11 of the bill) to mean that Congress is referring to some category of evidence that is narrower than the category of evidence on which courts would otherwise rely. The effect of this provision, then, will apparently be to indirectly raise the burden of proof on the defendant beyond what it would otherwise be.

I am not aware that any justification has been offered for restricting the kind of evidence on which courts may rely in this context. Nor do I believe that it is advisable to force the courts to engage in guessing games about the meaning of a novel term like "demonstrable evidence." As with several other aspects of Sections 3 and 4 of S. 2104, this provision will cause uncertainty among attorneys who must advise employers about the meaning of the law, and it will cause confusion in the courts. No good purpose will be served, and a great deal of pointless expense will be imposed on those who must live under this new legislation.

C. CONCLUSION

So far as I am aware, there is no reported judicial decision indicating any need for a legislative modification of the manner in which the courts handle "group[s] of employment practices" under disparate impact theory. The rule created in S. 2104, moreover, is contrary to fundamental principles of civil litigation, and it is likely to lead in practice to unjust results.

There is no sound policy reason for the imposition of artificial restrictions of the kind created by S. 2104 on the justifications that employers may offer for legitimate employment practices. Similarly, there is no sound policy reason for imposing on defendants evidentiary restrictions that exist nowhere else in the law and that are not even clearly spelled out in the proposed statute.

The effect of these proposed changes in the law is clear: these provisions, if they are enacted, would exert strong pressure on employers to avoid having to defend their employment practices; the only practicable way for employers to do this would be to avoid the statistical disparities that would require them to mount such a defense. In short, many employers will see no real alternative to adopting quotas.

II. FUNDAMENTAL FAIRNESS AND THE INSULATION OF QUOTAS FROM LEGAL CHALLENGE

The bill in its current form also promotes quotas through its treatment of discriminatory consent decrees. It does this by totally denying certain individuals access to the courts to challenge illegal agreements -- in which these individuals had no part -- prescribing quotas that exclude them from employment opportunities.

Section 6 of S. 2104 would overrule the Supreme Court's decision in Martin v. Wilks, 109 S. Ct. 2180 (1989). That case arose in the context of a civil rights action, but it turned on principles of fairness and access to court that apply in every situation. The Court held that white firefighters who had not been parties to a consent decree that mandated racial preferences could have their day in court to contend that the decree violated their civil rights.

Section 6 would in many circumstances cut off this right and deny some persons, who were never notified of these decrees and had no chance to challenge them, their right to sue. For example, a plaintiff denied a promotion as a result of a discriminatory consent decree in place ten years before the

plaintiff was hired would in some circumstances be precluded by Section 6 from challenging the decree.

At the outset, it must be stressed that only certain settlements or consent decrees can be successfully challenged after Martin v. Wilks: those containing provisions that violate an innocent third party's rights under Title VII or the Fourteenth Amendment. The only justification offered for this provision is the systemic interest in the finality of judicial resolution of disputes. But while that interest is important, it should not be pursued at the cost of the requirement of fundamental fairness that underlies our judicial system, in which individuals are traditionally guaranteed a meaningful opportunity to assert their interests in court before they are bound by judicial action.

Moreover, the concern at which Section 6 is assertedly directed, viz. the fear of repeated challenges to the same decree, is largely chimerical. Existing legal doctrines are already adequate to head off nonmeritorious challenges to decrees. The doctrines of law of the case, res judicata, and stare decisis will allow courts to deal with them summarily at little expense in time or money to the parties. In addition, the rules of joinder make it relatively easy for parties to ensure that affected people have their day in court in the original action. The threat of an award of attorney fees against the losing party who brings a frivolous suit is a further deterrent to such challenges.

The bill's treatment of discriminatory seniority systems is in stark contrast with its treatment of discriminatory consent decrees. In dealing with seniority systems, Section 7(b) of the bill appropriately corrects a defect in current law by allowing a plaintiff to challenge a discriminatory seniority system or practice at the time it is applied to the plaintiff. Current law requires the challenge to be made at the time of the adoption of the seniority system. Consistent with the view taken by your Administration, proponents of S. 2104 have rightly argued that this is unreasonable and should be corrected by legislation.

So far as I am aware, S. 2104's sponsors have given no explanation for this inconsistency between Sections 6 and 7(b) of their bill. The effect of it, however, is quite clear: unlike seniority systems, consent decrees have frequently contained provisions establishing hiring and promotion quotas or racial preferences. Section 6 prevents legal challenges to such provisions. Thus, far from enhancing civil rights, Section 6 severely abridges them.

Section 9 contains a provision complementing the provisions in Section 6. For the first time, Title VII would say that certain civil rights plaintiffs -- those challenging the legality

of quotas adopted under a consent decree -- could be required to pay attorneys fees where their lawsuit was neither frivolous nor otherwise unreasonable. The clear effect would be to discourage many challenges to illegal discrimination. The creation of fundamentally unfair obstacles to the vindication of our citizens' civil rights has no place in a civil rights bill.

Proponents of S. 2104 argue that Section 13 of the bill, which states that nothing in the bill "shall be construed to require or encourage an employer to adopt hiring or promotion quotas," is a sufficient answer to the concerns raised here and in Part I of this memorandum. In fact, however, Section 13 is entirely unresponsive to them. The problem with Sections 3 and 4 is not that they directly require or encourage quotas, but rather that employers will in fact choose to adopt quotas in order to avoid having to defend their hiring practices under the unreasonable litigation rules established by the bill. And the problem with Section 6 is not that it requires quotas, but that it insulates them from challenge. In fact, in its present form, Section 13 has an exception from the anti-quota language (and from all other provisions in the bill) for quotas that might be contained in some court-ordered remedies, affirmative action plans, or conciliation agreements.

III. EXPANSION OF REMEDIES UNDER TITLE VII AND PROVISIONS AFFECTING THE INCENTIVES FOR LITIGATION

Section 8 of S. 2104 radically alters the Civil Rights Act of 1964 by making available unlimited compensatory damages, as well as punitive damages and jury trials, in most cases under Title VII.

As you noted in your May 17 speech, federal law should provide an adequate deterrent against harassment in the workplace, and additional remedies are needed to accomplish this goal. Although S. 2104 imposes a partial cap on punitive damages, thereby setting an important precedent in the area of federal tort remedies, the expansion of remedies contained in Section 8 is excessive. Section 8 is not confined to filling the gap where existing remedies are inadequate, such as in many cases of sexual harassment. Rather, it imports into our employment discrimination laws the entire panoply of tort remedies, punitive damages, and jury trials, which runs counter to the concepts of mediation and conciliation upon which Title VII is based. This will create unnecessary and counterproductive litigation, serving the interests of lawyers far more than the interests of aggrieved employees.

Other provisions in S. 2104 will also contribute unnecessarily to fostering litigation instead of conciliation. An amendment to 42 U.S.C. 2000e-5(k), for example, permits plaintiffs to recover attorneys fees for continuing to litigate

even if the judgment they ultimately obtain is less favorable than a settlement offer they rejected. Similarly, a new paragraph (2) in 42 U.S.C. 2000e-5k creates special rules impeding waiver of attorney's fees as part of settlement, which will inevitably discourage settlements because defendants will not be able to estimate accurately the total cost of the settlement to which they are being asked to agree.

Several other provisions of this bill have little to do with promoting civil rights. Rather, they seem principally designed to give plaintiffs special and unwarranted litigation advantages. Section 7(a) gives plaintiffs 2 years, rather than 180 days (or, in certain cases, 300 days), to file discrimination claims. Section 11 creates a special legislative rule of construction for civil rights cases that seems intended to encourage courts to resolve cases in favor of plaintiffs whenever possible. And Section 15 unfairly applies the changes in the law made by S. 2104 to cases already decided.

IV. CONCLUSION

S. 2104, in the form in which it has been presented to you, is seriously flawed. While it contains certain desirable provisions, these sections are greatly outweighed by the portions of the bill that are objectionable in the particulars specified above. Taken as a whole, S. 2104 would do far more to disrupt our legal system and to disappoint the legitimate expectations of our citizens for equal opportunity than it would to advance the goal, to which you and I are both committed, of strengthening the laws against employment discrimination.

Office of the Attorney General
Washington, D.C. 20530

March 1, 1991

Honorable Thomas S. Foley
Speaker
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I am pleased to transmit a legislative proposal to make several significant improvements in our Nation's employment discrimination laws, along with a section-by-section analysis explaining the proposal. This bill reflects the President's longstanding commitment, recently reaffirmed in his State of the Union Address, to strengthening the legal tools designed to eliminate the intolerable blight of discrimination from our society. This package will accomplish the four major objectives the President set out in his address to civil rights leaders on May 17, 1990.

First, as the President has said, any civil rights bill must "operate to obliterate consideration of factors such as race, color, religion, sex, or national origin from employment decisions." Under this proposal, employers will be encouraged and required to provide equal opportunity for all workers without resorting to quotas or other unfair preferences. The bill codifies a cause of action for "disparate impact," as recognized in Griggs v. Duke Power Co., 401 U.S. 424 (1971), which outlawed certain practices that unintentionally but disproportionately exclude individuals from certain jobs because of their race, color, religion, sex, or national origin. With respect to these "disparate impact" cases, the bill places the burden of proof on the employer to demonstrate "business necessity," thereby overruling a contrary ruling in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

The bill greatly expands the prohibition against racial discrimination in the performance of contracts under 42 U.S.C. 1981, and overturns the decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). In addition, this proposal amends Title VII to eliminate a needless and unfair limitation on the time for filing challenges to discriminatory seniority systems, overruling Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989). Similarly, in the interest of ensuring that legitimate

claims can be pursued, the bill extends the time for filing a Title VII claim against the Federal government from 30 to 90 days.

The bill also permits the courts to make awards to prevailing parties for the fees of expert witnesses, and authorizes the award of interest in actions against the Federal government on the same terms on which such awards are available against other parties.

The second requirement established by the President is that a bill must "reflect fundamental principles of fairness that apply throughout our legal system." Accordingly, this bill expressly provides that the Federal Rules of Civil Procedure shall apply in determining who is bound by an employment discrimination decree, just as they apply in other civil causes of action. This provision ensures that the standard rules of joinder and intervention will operate to give all victims of illegal discrimination a fair opportunity to protect their constitutional and civil rights in court.

The third essential element of a civil rights bill is a provision to ensure that Federal law provides an adequate deterrent against sexual harassment in the workplace. Under current law, the only judicial remedy for many cases of such harassment is a directive to refrain from such conduct in the future. This cannot provide adequate deterrence. In order to rectify this shortcoming, the bill makes available new monetary remedies for the victims of illegal harassment under Title VII.

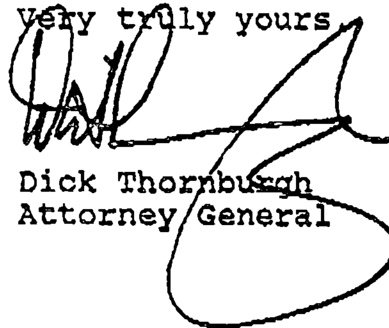
The President has also insisted, however, that our civil rights laws not be "turned into some lawyer's bonanza, encouraging litigation at the expense of conciliation, mediation, or settlement." Accordingly, this proposal for the creation of a new monetary remedy under Title VII provides for bench trials, and it caps the monetary award at $150,000. The bill also includes special incentives for employers to develop and implement meaningful internal complaint procedures for harassment claims, while allowing employees to obtain emergency relief from the courts when employers fail to respond quickly and effectively to complaints of illegal behavior. More generally, the bill encourages the use of alternatives to litigation in resolving disputes under our civil rights laws.

Fourth, the President has said that the Congress should live by the same requirements it prescribes for others. Accordingly, this bill eliminates the congressional exemption from Title VII of the Civil Rights Act of 1964, and gives congressional employees the same fundamental protections that employees of the Executive branch have enjoyed for many years. The bill gives the

Executive no role in enforcing the law against the Congress, allowing the Congress to establish its own mechanisms for enforcement. Congressional employees, like employees of the Executive branch, will be able to maintain a private right of action upon exhaustion of their administrative remedies.

Finally, the President has observed that the Congress must also take action in other areas to enhance equal opportunity. The elimination of employment discrimination, which is the aim of this bill, will have little meaning unless jobs are available and individuals have the skills and education needed to fill them. Nor can we expect young people to achieve their full potential if they grow up in neighborhoods and schools permeated by violence, drugs, and hopelessness. The Administration is proposing several initiatives to enable individual Americans to claim control over their own lives and futures. Enactment of those initiatives, along with this bill, will achieve real advances for the cause of equal opportunity.

Very truly yours,



Dick Thornburgh
Attorney General