The Heritage Foundation Issue Bulletin

No. 159 | The Heritage Foundation • 214 Massachusetts Avenue • N.E. • Washington, D.C. • (202) 546-4400

July 2, 1990

WHY KENNEDY-HAWKINS WILL MEAN QUOTAS

INTRODUCTION

The "Civil Rights Act of 1990," sponsored in the Senate (S. 2104) by Edward Kennedy of Massachusetts and in the House (H.R. 4000) by Augustus Hawkins of California, both Democrats, soon will be taken up by the full Senate. The bill poses crucial questions that go to the heart of what is meant by the term "civil rights." In particular, the legislation will force lawmakers to make an historic choice: Should they support a bill that will lead inevitably to racial quotas in America, or should they instead take the opportunity to adopt a new vision of civil rights that focuses on the neediest and most deserving members of society – one that enhances the progress of minority Americans by removing obstacles to individual initiative?

Negotiations are underway on a possible compromise between the White House and the Senate on the Kennedy-Hawkins bill. George Bush has indicated that he wants to sign "a civil rights bill." But he has also made clear that he will not sign any bill that, notwithstanding the language of the measure or the intentions of its sponsors, in practice, will lead to the adoption of quotas by U.S. businesses. Bush is right to declare that the test of his support depends on the likely outcome of the bill, not the professed intent. And without major changes in the Kennedy-Hawkins bill, the measure cannot pass that test.

CHECKLIST FOR A CIVIL RIGHTS BILL

In its negotiations with the bill's sponsors, the White House should set several minimum requirements for any acceptable civil rights bill. Among the key principles:

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1) Anything good enough for the American public ought to be good enough for Congress.

Whatever changes are made, the final measure should include a provision making all federal civil rights laws (including but not limited to Kennedy-Hawkins) applicable to Congress itself. The current bill exempts Congress from its own provisions. But if Congress is not prepared to take the moral lead on civil rights, it should hardly expect other Americans to do so.

2) The bill should not lead to quotas.

The bill must be stripped of all provisions that would tend to promote quotas in any way. Racial quotas are repugnant and alien to the philosophy of the original civil rights movement. "Quotas," moreover, should be understood broadly to include all forms of race-conscious decision making, including "goals" and "timetables," as well as the abandonment by employers of legitimate employee hiring practices simply because they happen to produce statistical disparities between the employer's work force and the general population.

Section 4. Although the Kennedy-Hawkins bill never mentions the word "quota," several of its current provisions appear very likely to lead to that result. The most significant of these is Section 4, which would in effect overturn the 1989 *Wards Cove* decision of the U.S. Supreme Court. This section would relieve plaintiffs of the need to identify the specific employment practices that allegedly produce a disparate impact on the racial composition of a firm's employees. It would require defendant employers to demonstrate "by objective evidence" that their hiring and promotion practices are "substantially and demonstrably related to effective job performance." And it would shift the burden of proof on the issue of business justification from the plaintiff to the defendant – in effect treating employers as guilty unless they can prove their innocence.

The effect of the provision would be to stack the deck so heavily against employers as to make it almost impossible for them to defend themselves successfully against disparate impact suits. Moreover, even if it were possible for employers to mount a successful defense, the cost of doing so would in many instances be far greater than under current law. In fact, no matter what standard of business-relatedness is used, putting the burden of proof on the defendant would make it almost impossible for employers to obtain summary judgment and thereby avoid the expense of a trial. Thus many employers inevitably would decide that defending against disparate impact suits would be so costly and uncertain that they simply would alter their hiring policies to produce the "right" mix of race and sex within each segment of their work force – in other words, adopt quotas.

Contrary to Legal Tradition. Although Section 4's standard of job-relatedness has been changed from the requirement in an earlier version that any challenged practice be "*essential* to effective job performance" [emphasis added], the new language does not even begin to solve the quota problem. Section 4 would continue to put the burden of proof on the

defendant. This is contrary to the tradition of Anglo-American law, under which a defendant does not have to prove his innocence, and contrary also to the customary practice in disparate treatment cases and in virtually all other areas of civil litigation. The new language, moreover, like the original, defines the standard of job-relatedness exclusively in terms of "effective job performance." This narrow focus would artificially preclude consideration of other nondiscriminatory factors that can bear legitimately on employment-related decisions. For example, if an employer were to close a particular plant for cost reasons and terminate all its employees, thereby producing a disparate impact, the decision could be altogether unrelated to how effectively the terminated employees performed their jobs and yet be essential to the survival of the business.

The new language in Section 4 also would require defendants to meet their new burden of persuasion solely by means of "objective evidence." While this term is not defined, it would appear to mean that employers would have to commission statistical validation studies in support of every test or criterion for hiring and promotion except those that the employer can prove do not produce a disparate impact. Because such studies can be very expensive, many employers would be forced to abandon legitimate practices because the cost of validating them would be prohibitive.

Given the nature of these problems, it is doubtful whether anything short of a wholesale deletion of Section 4 would avoid quotas as the inevitable result of Kennedy-Hawkins. The central problem is that any legislative change altering the standards of disparate impact litigation from those set out in *Wards Cove* would increase the anticipated costs of litigation to employers and thereby create pressures to avoid litigation in the first place by instituting quotas.

Section 6. While Section 4 has attracted the most attention, Section 6 of the bill has every bit as much to do with quotas. This provision deals with the 1989 *Martin v. Wilks* decision, in which the Supreme Court held that persons who are not parties to an employment discrimination consent decree that contains racial preferences are not precluded from challenging decisions taken as a result of the decree in a subsequent employment discrimination suit of their own. Section 6 would overturn *Wilks* and sharply curtail the right of individuals affected adversely by consent decrees or court orders calling for quotas or other race-conscious "remedies" to bring challenges to such orders or decrees. Specifically, the section would bind anyone who had notice of a proposed judgment, and a reasonable opportunity to present objections before its entry, to that judgment. It would also bind anyone whose interests are deemed to have been represented adequately by a party to the original litigation. In addition, Section 6 would preclude subsequent challenges whenever "reasonable efforts were made to provide notice to interested persons."

The practical effect of Section 6 would be to lock in quota programs by protecting settlement agreements and court orders calling for quotas from any subsequent challenge. Practices that otherwise would be *per se* illegal

under Title VII of the Civil Rights Act of 1964 would be rendered immune from legal challenge by judicial decree. Consent decrees and court orders that do not involve quotas or other racial preferences impairing the rights of persons not before the court are not likely to be challenged in the first place, and they are likely to withstand any challenge, so they would not be affected by Section 6. In practice, the only kind of court order or consent decree that would be protected by Section 6 would be one calling for some form of race-conscious relief. Thus Section 6, like Section 4, really is about quotas.

3) The bill should uphold fundamental fairness and due process of law.

Just as Section 4 of Kennedy-Hawkins would reverse the customary presumption of innocence by placing the burden of proof on defendants, Section 6 would violate the basic principle that no person may be bound by an agreement to which he or she was not a party, or (with certain limited exceptions) by a judgment in a proceeding to which he or she was not a party. It would also violate the principle that every American deserves his or her day in court.

Section 5 of Kennedy-Hawkins raises similar concerns. As a general matter in civil litigation, the plaintiff has the burden of proving that his injury was caused by the defendant's illegal act if he is to recover anything from the defendant. However, in a so-called mixed motive case, in which an employer bases a decision on legitimate as well as discriminatory considerations, the defendant's decision may have been due to either type of consideration. Since the defendant is responsible for creating the uncertainty as to causation in the first place, it may be appropriate in such a case to shift the burden of proof on the issue of causation from the plaintiff to the defendant, at least after some appropriate initial showing by the plaintiff. This is the rule in cases of joint causation in tort, and the rule used by the Supreme Court in the 1989 case of *Price Waterhouse v. Hopkins*, one of the decisions prompting Kennedy-Hawkins.

Defending Motive. At the very least, however, the defendant in a mixed motive case must be allowed an opportunity to prove that the action or decision that affected the plaintiff was not in fact due to the improper motive, and if the defendant can do so, it should be relieved of liability under Title VII of the Civil Rights Act. For example, say a 100-person partnership votes unanimously not to admit the plaintiff into the partnership, with one of the 100 partners basing his or her decision on the plaintiff's race, sex, or religion. But say the other 99 partners take no account at all of such factors. In such a case, there would be no reasonable basis for holding the partnership liable for damages to the frustrated candidate.

Under Section 5 of the Kennedy-Hawkins bill, however, even if a defendant in a mixed motive case could prove that the same decision would have been made or the same action taken in the absence of an improper motive, the defendant still could be found liable for a violation of Title VII and made to pay damages and attorneys' fees. Under Section 5, the issue of whether the defendant's decision was actually caused by a discriminatory motive would only affect the plaintiff's right to be hired, reinstated, or

promoted. In effect, Kennedy-Hawkins would punish the defendant for bad thoughts even when those bad thoughts made no actual difference to the plaintiff.

4) The legislation should not trigger an avalanche of litigation.

Section 8 of the Kennedy-Hawkins bill would make compensatory damages (and, in some cases, even punitive damages) available for intentional discrimination in employment in violation of Title VII. Fortunately, Section 8 specifically does not apply in disparate impact cases. However, if compensatory damages – let alone punitive – are to be made available under Title VII, it is imperative that additional steps be taken to guard against the tendency of the civil rights laws to foster too much litigation. Some amount of litigation of course is necessary and desirable when there are wrongs to correct. What is to be avoided is not litigation *per se* but rather any incentive for frivolous but expensive lawsuits. One way to limit this would be to adopt the so-called English Rule for awarding attorney fees. Under this rule, the loser pays the winner's attorney fees regardless of who wins. However, under the Supreme Court's interpretation of Title VII's provision for fees, a losing defendant must always pay the plaintiff's attorney fees, but a plaintiff who loses is made to reimburse the defendant's costs of defending the suit only when the plaintiff's position is found to have been unreasonable, frivolous, or without merit – something that courts rarely find. This one-way fee-shifting confronts prospective plaintiffs and their attorneys with a "heads I win, tails you lose" situation and thus is grossly unfair to defendants as well as a powerful inducement for litigation. Adoption of the English Rule would cause plaintiffs with a weak case to think twice before bringing suit. Restoration of a pure American Rule, under which each party must bear its own costs regardless of outcome, also would level the playing field and thereby discourage frivolous litigation. The American Rule, however, does have the shortcoming that victims of discrimination would not be fully compensated, since they would incur attorney fees without reimbursement if they prevail. Still, either approach would be better than the current one-sided situation, which transforms Title VII from a tool for the compensation of victims into a vehicle for the enrichment of lawyers.

Preserving Title VII's Primary. Section 12 of Kennedy-Hawkins would amend 42 U.S.C. Section 1981, which already provides damages for racial discrimination in the making or enforcing of contracts, to cover such practices as on-the-job racial harassment. If Section 1981 is amended, an effort should be made to rationalize and integrate Section 1981 with Title VII. One way to do this would be to require prior exhaustion of remedies under Title VII and compliance with Equal Employment Opportunity Commission (EEOC) conciliation procedures as a precondition to any Section 1981 suit (not just those involving harassment) to which Title VII also applies. This would preserve Title VII's status as the primary federal statute for dealing with employment discrimination, along with its focus on fostering conciliation through the mediation of the EEOC. It would also bring Section 1981 under the same procedural and jurisdictional safeguards that are already provided under Title VII.

5) Various unintended effects in the legislation need to be corrected.

Section 4 of the Kennedy-Hawkins bill would have the practical effect of requiring employers to ask all job applicants to disclose their religious affiliations, even though this surely is not the intent of the sponsors. The reason for this is that employers would be far more vulnerable under the bill to disparate impact suits of all types, including suits alleging that employment selection procedures admit or promote too few members of particular religious denominations. Thus employers would be wise to keep records of the religious affiliations of employees and applicants so that they can defend themselves in the event of a suit. This would be distressing to many Americans, who feel that their religious affiliation should remain a private matter.

Kennedy-Hawkins also would make each of its major provisions apply retroactively to the dates of the various Supreme Court decisions the legislation seeks to overturn. While Congress arguably may have the authority to alter the rules to be applied in cases that are still being litigated at the time it acts, Section 15 of the bill would reopen cases that already had proceeded to final judgment – something long recognized as beyond the power of Congress to do. This is yet another example of Kennedy-Hawkins being inconsistent with due process of law. Before there can be any compromise on the bill, the Administration should insist that Section 15 be amended to make all of the bill's provisions apply prospectively only.

CONCLUSION

The deficiencies of the Kennedy-Hawkins legislation are so profound, and its implicit focus on quotas so pronounced, that the Administration should insist on a major rewrite of the bill to avoid a veto. But President Bush also should point out that the bill's deficiencies illustrate a disturbing characteristic of many of today's civil rights advocates – their obsession with trying to guarantee the advancement of minority Americans by strengthening civil rights laws that were passed a quarter of a century ago to address the very different conditions of that era. Supporters of this approach overlook the single most important fact of civil rights today – the irrelevance of civil rights law to the most important problems facing today's neediest minority Americans.

For the most part, Kennedy-Hawkins would benefit middle- and upper-class minority individuals who have the education and skills to benefit from *de facto* quota hiring. Low-income minority workers tend to be found in those jobs in which they are, if anything, overrepresented. These minority Americans would be unaffected by Kennedy-Hawkins. To minimize the risk of litigation, employers would feel pressure to advance minorities in middle- and upper-level job categories, where minorities tend to be

"underrepresented." But relatively underprivileged and unskilled minority workers will not be able to take advantage of any increased opportunities the bill might create for skilled positions. Thus Kennedy-Hawkins may be good news to minority engineers and doctors, but it is largely irrelevant to the problems of, say, a young minority woman with only a ninth-grade education.

Building on Foundations. It is because the traditional civil rights strategy is irrelevant to poorer, less skilled minority Americans that Congress should consider instead a new civil rights agenda that "empowers" these Americans to take advantage of the foundations laid down in the original civil rights statutes.[1] This means removing state and federal laws that block the opportunities for minorities made possible by the civil rights laws, not instituting hiring quotas while leaving those obstacles in place. A new civil rights agenda means repealing the Davis-Bacon Act and many state occupational licensing rules, the last vestiges of the notorious "Jim Crow" laws that shut out minorities from skilled professions. And it means giving minorities the same rights to decide where they will live and where their children will go to school, by enacting housing vouchers and parental choice in education. These and similar empowerment measures would do far more to help the neediest minority Americans than anything contained in Kennedy-Hawkins.

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1 For a discussion of this alternative civil rights agenda, see Clint Bolick and Mark B. Liedl, "Fulfilling America's Promise: A Civil Rights Strategy for the 1990s," Heritage Foundation *Backgrounder* No. 773, June 7, 1990.