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THE DANFORTH "COMPROMISE": ANOTHER QUOTA CIVIL RIGHTS BILL

(Updating *Executive Memorandum* No. 302, "Why the So-Called 'Civil Rights' Bill Would Still Mean Quotas," June 3, 1991.)

George Bush last year vetoed a so-called "civil rights" bill because it would encourage employers to adopt racial quotas in employment decisions. A revised version of the bill, called the "Civil Rights Act of 1991" (H.R. 1), was introduced this year and already has passed the House of Representatives, although with less than the two-thirds majority needed to override the President's promised veto. The House rejected an alternative bill offered by Bush.

Attention now has turned to the Senate, where Senator John Danforth, the Missouri Republican, has introduced a "compromise" civil rights bill (S. 1745). As in the House, the Senate debate has focused on the issue of whether the legislation will promote quotas. Danforth insists that it will not. Yet while Danforth has made significant changes in his bill since it was first introduced this summer, it remains a quota bill.

What Is A Quota Bill? In its original, narrow usage, the term "quotas" referred only to the practice of setting aside a fixed number or percentage of employment positions for members of a particular race, color, religion, sex, or ethnic group. In recent debates over civil rights legislation, however, the term has come to be used for all forms of race-conscious decision-making or preferential treatment based on group membership, including such terms as "goals" and "timetables." The term "quotas" also refers to laws that force employers to abandon perfectly legitimate hiring practices simply because they happen to produce statistical disparities between the racial or ethnic composition of an employer's work force and that of the general population. This broadened definition is more in line with the commonly understood idea of a quota. Thus, a policy of giving job applicants an advantage in the hiring process merely because they are, say, black or Hispanic, would count as a quota, as would a policy of always choosing a minority whenever two applicants are otherwise equally qualified.

A bill can fairly be classified as a quota bill if its effect would be to give an employer the incentive to adopt quotas to protect himself from potential lawsuits based on the percentage of minorities in his work force. Or it would be a quota bill if it changes the rules of civil litigation to make it impossible for victims of employment discrimination to challenge quota plans adopted by employers under court order or in settlement of prior litigation. It is in these two senses the Danforth bill qualifies as a quota bill.

Avoiding Disparate Impact Suits. Current civil rights law allows individuals to sue an employer over legitimate and nondiscriminatory hiring practices if these practices happen to produce a racial or ethnic mix in the employer's work force that is different from that found in the general population. A statistical disparity between the racial or ethnic composition of an employer's work force and that of the general population is called a "disparate impact." The Danforth bill would alter the standards in disparate impact suits, making it more likely that em-

ployers will lose in court, and more expensive for them even when they win. This would encourage employers to try to avoid being sued in the first place by giving special preferences to groups that otherwise might be underrepresented in the employer's work force.

Two changes the Danforth bill would make to current law are especially harmful:

First, once a plaintiff has demonstrated that particular employment practices used by an employer cause a disparate impact, Danforth's bill would shift the burden of proof to the defendant employer, requiring him to show that each of the challenged practices is "required by business necessity." This change represents a radical departure from previous law. Putting the burden of proof on the defendant is contrary to the tradition of Anglo-American law, under which a defendant is presumed innocent until proven guilty: the burden of proof is on the plaintiff, not on the accused. The change proposed by Danforth also is contrary to the customary practice in other kinds of civil rights cases, and in virtually all other areas of civil litigation. Since defendants accused of intentional discrimination do not have to prove their innocence, it would be odd and perverse to require defendants who are accused merely of getting their work force numbers wrong—perhaps inadvertently—to prove theirs. Nonetheless, that is exactly what the Danforth bill would do.

This change alone would create pressure for employers to adopt quotas. Not only would putting the burden of proof on defendants make it more difficult for them to defend themselves against disparate impact suits, but it would make it almost impossible for defendants to obtain summary judgment and thereby avoid the expense of a trial.[1] Consequently, even if an employer were completely confident that he could show the business necessity of his hiring practices at the trial, often it would still be cheaper simply to change the practices to produce the "right" mix of employees, and thereby avoid being sued in the first place.

Second, and of even greater concern, the Danforth bill would change the standard for deciding whether an employment practice that causes a disparate impact is "required by business necessity." The current standard is based on whether a challenged practice serves a legitimate employment goal of the employer in any significant way. The new standard would require that challenged hiring or promotion practices bear what the bill calls a "manifest relationship" either to the performance of the "actual work activities required" by the job, or to any other "behavior that is important to the job" in question. The differences between the current standard and Danforth's proposed new standard may appear to be slight. However, there are many legitimate employment practices and goals which, under Senator Danforth's formulation, would be treated as forms of racial discrimination.

Example: An employer who requires all his employees, including janitors, to have a high school diploma could be found guilty of racial discrimination because the possession of a high school diploma does not bear a manifest relationship to the job of sweeping floors. This means that attempts by local businessmen to encourage local teenagers to finish high school by favoring high school graduates for employment almost certainly would be ruled illegal.

Example: An employer who prefers to promote from within the organization might face legal problems. Many employers believe that such a policy is good for employee morale, or believe that on-the-job observation provides a more reliable basis for choosing upper-level employees than a one-hour interview. Such em-

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1 A court may decide in favor of a party without first holding a trial if, based on those facts which are not in dispute, one party is entitled to prevail as a matter of law. Such a ruling without trial is called a summary judgment. It generally is harder for the party having the burden of proof on an issue to obtain a summary judgment on that issue.

ployers thus might require certain entry-level employees to have skills and educational credentials above those necessary for the entry-level position. But under the Danforth bill such an employer could be found guilty of racial discrimination since the additional requirements would not bear a sufficient relationship to "the employment in question."

Example: An employer who uses a test to determine which employees should be promoted to a higher position that requires special training could be found guilty of racial discrimination if he is unable to show a sufficient statistical correlation between performance on the test and performance in the job in question. It may be that the verbal and analytical skills evaluated in the test would indicate an employee's capacity to understand the material in the training program, and mastery of such such material may be indispensable to successful performance of the job. Nevertheless, these facts by themselves might not be a sufficient legal defense.

The standard in the Danforth bill would require employers to defend their hiring and promotion practices exclusively in terms of performance of work activities required by, or other behavior important to, the job in question. Thus, employers would be forced to abandon employment practices and goals not directly related to the job in question. Yet many employment practices and goals not directly related to the job in question may be legitimate and sensible. For example, given the already dismal state of American education, it would seem absurd for Congress to punish employers for requiring high school diplomas. Indeed, employers are being urged by Congress and the Administration to encourage prospective employees to finish high school. Moreover, regardless of whether an employment practice or goal is socially desirable or not, the fact that it may not be directly related to "the job in question" does not automatically make it a form of racial discrimination.

With the restrictions that the Danforth bill would place on the acceptable justifications an employer can offer in defense of a policy that happens to produce a disparate impact, many employers would conclude that offering a defense is not worth the cost. Instead employers would seek to avoid being sued in the first place by altering their hiring procedures to produce the "right" mix of race and sex within their work force. In other words, they would adopt quotas.

There is another aspect of the Danforth bill that, by itself, also would be sufficient to make the bill a quota bill. The measure would restrict severely the right of individuals harmed by quotas or other race-conscious "remedies" imposed by consent decrees or other court orders to seek redress through an anti-discrimination lawsuit of their own. For example, if an employer who is sued agrees to give half of all promotions to blacks, or is ordered to do so by a court, better qualified Asians or Hispanics might subsequently be denied promotions because of the new quota. But under the Danforth bill, these workers could be denied their day in court if they wished to challenge this as unfair. This denial of due process and civil rights thus would lock in quotas by protecting such a hiring policy from subsequent challenge.

Proponents of this legislation, including Danforth, repeatedly have called for a compromise. What they refuse to recognize or acknowledge is that the Administration's alternative bill already is a compromise bill. In fact, Bush already has gone farther than is prudent in trying to compromise on the issue of quotas. Even his bill would shift the burden of proof on the issue of business necessity to defendants. The undesirable effects of this departure from the normal presumption of innocence would be reduced greatly, however, because the standard of business necessity in the President's bill is less restrictive than that in the Danforth bill or in H.R. 1.

Missing the Real Issue. Perhaps the greatest weakness of the Danforth bill is that it focuses exclusively on making arcane, legalistic refinements in the civil rights laws that were passed a quarter of a century ago. Like H.R. 1 and last year's Kennedy-Hawkins bill, the Danforth bill overlooks the fact that civil rights laws are irrelevant to the most pressing problems facing America's neediest individuals. Like its predecessors, the Danforth

civil rights bill mainly would benefit middle- and upper-class minority Americans who have the education and skills to benefit from *de facto* quota hiring. Because low-income minority workers tend to work in the kinds of jobs in which, if anything, they are already over-represented, they would not be particularly affected by the bill. Where employers would have to make changes to reduce their exposure to litigation is in the middle- and upper-level job categories, in which minorities tend to be "under-represented." The only minority workers who can occupy these jobs, however, and thereby benefit from any increase in the demand for minority employees, are those with higher skill levels. Relatively underprivileged or unskilled minority workers would not be able to take advantage of increased opportunities the bill might create, and the bill would do nothing to help those who lack necessary skills to acquire them. At the same time, by saddling employers with another layer of employment laws and regulations, imposing additional administrative costs and litigation expenses, the bill actually might tend to reduce employment opportunities for the neediest minority workers. Thus, while the Danforth bill might increase the salaries and employment prospects of minority engineers and doctors, it would do so at the expense of high school dropouts struggling to climb up the employment ladder.

Empowering Minorities. A more forward-looking civil rights agenda instead would create real economic opportunities for minorities. Reduced taxes on low-income Americans and on businesses would create more job opportunities. Removing government restrictions and high taxes on small - and medium-sized enterprises in the inner cities, through enterprise zones, would promote business creation in areas where there are high concentrations of disadvantaged Americans. And allowing parents to choose the schools to which they send their children would help ensure that future generations of poor and minority Americans are qualified for the best jobs. Such empowerment strategies would improve the employment opportunities of disadvantaged workers. Quotas would not.

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