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Executive Memorandum

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WHY THE SO-CALLED "CIVIL RIGHTS" BILL WOULD STILL MEAN QUOTAS

George Bush last year vetoed a so-called "civil rights" bill because it would encourage employers to adopt racial quotas in employment decisions. This year's version of the bill, the "Civil Rights Act of 1991" (H.R. 1), was introduced in the House by Representative Jack Brooks, the Texas Democrat. Again there is a debate over whether this legislation promotes quotas, and again the proponents of the legislation claim that it does not. By the end of last week, the bill had seen several revisions, each an attempt to allay the fears that the bill is a quota bill. Yet there are still solid grounds for such fears. It is still a quota bill that deserves a presidential veto.

Useless Provision. The latest version of H.R. 1 ostensibly would prohibit the use of quotas. Its definition of a "quota" is so narrow, however, and it has so many loopholes, that the provision would be useless. While employers would supposedly be prohibited from setting aside a fixed number or percentage of positions for people of a particular race, color, religion, sex or national origin, they would be free to engage in other forms of preferential treatment. Example: Employers could give job applicants extra credit on employment tests for being black or Hispanic, and could adopt a policy of always choosing a minority whenever two applicants are otherwise equally qualified. Moreover, an employer could use quotas as long as everyone hired met the minimum necessary qualifications to perform the job. And while it might be illegal for an employer to fire a department head for failing to meet a hiring quota, the employer could make department heads' bonuses, raises and promotions contingent on achieving quota targets.

Current civil rights law allows individuals to sue an employer over legitimate and nondiscriminatory hiring practices if such practices happen to produce a racial or ethnic mix in the employer's work force different from that found in the general population. This is called a "disparate impact." Section 102 of H.R. 1 would alter the standards in disparate impact suits, making it more likely that employers will lose, 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 any groups that might otherwise be under-represented in the employer's work force.

Among the changes H.R. 1 would make:

1) It would not require plaintiffs to identify the specific employment practices that produce a disparate impact. Under the current language of the bill, all a plaintiff would have to do is to allege that all of the defendant's employment practices taken together produce a disparate impact. The burden of proof would then shift to the defendant to identify which of his employment practices, if any, actually produced the disparate impact, and to show that every one of these practices is "required by business necessity" – an enormously difficult, if not impossible, task.

2) It would change the standard for deciding whether an employment practice that produces a disparate impact is "required by business necessity." The current standard is whether a challenged practice serves any legitimate employment goals of the employer in any significant way. The new standard would require that challenged practices bear "a substantial and manifest relationship to the requirements for effective job performance," thus making the standard much more difficult for employers to meet.

3) It defines its standard of business necessity solely in terms of "effective job performance," thereby precluding consideration of other nondiscriminatory factors that can legitimately bear on employment-related decisions. For example, if a manufacturer were to close an unprofitable plant with a high percentage of minority workers, and the workers whose jobs were eliminated were to challenge the plant-closing decision based on its disparate impact, H.R. 1 would require the manufacturer to defend its decision solely in terms of the affected workers' performance, attendance, punctuality, and so on – even though such factors had nothing to do with the closing, and even though the real reason clearly was non-discriminatory.

Many employers almost surely would conclude that defending against disparate impact suits simply is not worth the effort and would instead alter their hiring procedures to produce the "right" mix of race and sex within their work force. That is, the employer would adopt quotas.

Ignoring Provisions. Even if the anti-quota language in H.R. 1 were to prohibit any form of racial preference, it would not change other aspects of the bill which create powerful incentives to promote quotas in the first place. Several sections of the Civil Rights Act of 1964, meanwhile, already prohibit quotas; yet the courts have generally ignored these provisions. And if the H.R. 1 anti-quota provision were effective, it would put employers in an impossible situation: They could be held liable if they failed to adopt quotas and their work force happened to become imbalanced, but they also could be held liable if they used quotas in an effort to keep their work force numbers in line.

In addition, Section 104 of H.R. 1 also would restrict severely the right of individuals harmed by quotas or other race-conscious "remedies" imposed by consent decrees or court orders to seek redress through an anti-discrimination lawsuit of their own. Thus, for example, if an employer is ordered by a court to give half of all promotions to blacks, better qualified Asians or Hispanics who are denied promotions because of the new quota could be denied a day in court. The real point of Section 104 is to lock in quotas by protecting them from subsequent challenge.

Despite its revisions, emendations and explanations, H.R. 1 remains a quota bill. It thus still deserves a presidential veto.

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