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U. S. COMMISSION ON CIVIL RIGHTS

In the Matter of:)
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CIVIL RIGHTS ACT OF 1990)

Wednesday,
May 16, 1990

I.L.G.W.U. Building
35 South Fourth Street
Conference Room
Philadelphia, Pennsylvania

BEFORE: DR. SUSAN M. WACHTER, Chairwoman
Pennsylvania Advisory Committee

HENRY A. HEIMAN, Esq., Chairman
Delaware Advisory Committee

P R O C E E D I N G S

1:45 p.m.

DR. WACHTER: Good afternoon. My name is Susan Wachter, and I chair the Pennsylvania Advisory Committee, the U.S. Commission on Civil Rights. With me today is Henry Heiman, who chairs the Delaware Advisory Committee. Also with us are Joseph Fisher, our host today, and we thank you, Joseph, Inez Miles, John Taylor, Mark Stolarik, and Morris Milgram of the Pennsylvania Advisory Committee; and Lynn Wilson, Raymond Wolters, Robert Young, and Emily Morris of the Delaware Advisory Committee.

The 11-member Advisory Committees from each state consist of residents of different areas within their respective states who serve as 'the eyes and ears' of the eight commissioners in Washington, D. C. The Commissioners and the 51-state advisory committees around the U.S. inquire into issues pertaining to discrimination or denial to equal protection based on race, color, religion, gender, age, handicap, or national origin, or in the administration of justice.

On this occasion, we are pleased to have with us one of the eight commissioners, Russell G. Redenbaugh. He is a resident of Philadelphia and an alumnus of the Wharton School, where I teach, who was appointed to his post this past February. So I am particularly pleased to welcome

Commissioner Redenbaugh to what I am told may be his first state advisory committee meeting and forum. Welcome Commissioner.

MR. REDENBAUGH: Thank you, Dr. Wachter.

DR. WACHTER: If you would, would you care to make a few comments?

MR. REDENBAUGH: Briefly.

DR. WACHTER: Thank you.

MR. REDENBAUGH: As Dr. Wachter mentioned, this is my first state advisory meeting, and it is very good for me to be here. I am here today, really, to learn.

The U.S. Civil Rights Commission is in a moment of rejuvenation. We are having the support of the Congress, of the White House, and of the Executive Branch for returning the U.S. Commission on Civil Rights to its prior effectiveness and prior prestige.

As part of that, the Civil Rights Commission will expand its work to include the civil rights of the disabled. This is probably the first time that being disabled helped me get a job. Always up till now it has been an impediment. But it is because I am disabled that the administration was particularly interested in placing me on the Commission at this time.

Thank you for welcoming me here. I'm glad to be able to learn today. Thank you, Dr. Wachter.

DR. WACHTER: Thank you very much for your comments, and once again, welcome.

Our panelists this afternoon have volunteered to share their views and recommendations on recent U.S. Supreme Court Decisions and on the proposed Civil Rights Act of 1990.

According to front-page Washington Post reports appearing Monday and yesterday, the issues surrounding the Court's decisions and particularly the Civil Rights Act of 1990 are under discussion this very week at The White House. On Monday, black leaders - including the Chairman of our own Commission, Arthur Fletcher - met with President Bush regarding the proposed act. And, according to yesterday's Post, some differences between the legislation and The White House's position are narrowing and are now up for compromise.

Today, representatives of labor, Hispanic, and women's organizations are scheduled to meet at The White House. Tomorrow morning, Pennsylvania and Delaware Advisory Committees will be represented by Joseph Fisher and Mr. Heiman, respectively, at The White House. Joseph Fisher is our past Chair, and I am very pleased that he will be able to attend that meeting. They will accompany Commissioner Redenbaugh and the other Commissioners to a meeting and Rose Garden ceremony with President Bush.

Of course, our final report to Commissioner Redenbaugh

and his colleagues will be made after a draft summary of this afternoon's forum has been formally reviewed and approved by our two committees. But it appears that today's review occurs at the cutting edge of the issue. The debate on the recent Supreme Court decisions continues, and the fate of the Federal Civil Rights Bill proposed in reaction to some of those decisions, seems dependent on compromises to be met in the near future.

Thus, both committees, and I feel sure, Commissioner Redenbaugh, deeply appreciate your generous cooperation in this forum. To the extent possible, we hope you might consider recommendations on compromises we believe are acceptable, and also, those that are not acceptable to you. As you may see from the agenda, ten speakers from Southeastern Pennsylvania and from Delaware have been divided into two panels. My counterpart from Delaware will moderate the first panel, and I, the second panel. We turn now to the first panel and Mr. Heiman. Thank you.

MR. HEIMAN: Thank you, Dr. Wachter and Commissioner Redenbaugh. Let me start by mentioning that at the request of Ms. Susan Frietsche, the Deputy Director of the Pennsylvania ACLU, Doreena Wong, the ACLU's staff counsel, will represent that agency. Four of the five panelists who are the first panel have already taken their seats. They are Dr. Barnett, Mr. Smith, and Ms. Reese.

Councilman Ortiz is, apparently, not here yet.

Let me note that these proceedings are being transcribed and that the transcript will be maintained in the Washington offices of our staff in accordance with the privacy act. You, our guest panelists, should know that for access to the information and recommendations volunteered by you and stored in Washington, you may contact the Commission' solicitors at the address shown on the agenda.

Federal law also requires that all persons refrain from degrading or defaming individuals while providing information. At the same time, all persons addressing the committees have the right not to be reported or photographed by the media. Should anyone wish to exercise this right, please let us know now so that the request can be accommodated or a separate interview arranged.

Our committees anticipate issuing a summary report of this forum. That report will be based on the transcript, supplementary interviews, and other relevant information now in our staff's files or obtained in the coming weeks. Now I understand by some of the submissions, that you panelists may provide us. Having stated these requirements, let me welcome a fellow Delawarean, Dr. Larry Barnett, our opening speaker. He is from Widener University Law School in Delaware and has volunteered to provide an historical perspective on the kind of legislation under discussion

today. Dr. Barnett?

DR. BARNETT: Thank you. While I teach at a law school, I am also by training a social scientist, in particular, a demographer. And about five years ago, I became interested in looking at the social science research literature on the effects of law. I became quite interested in trying to decipher what the role of law is in our society. The conclusions I came to, at which I have arrived, have surprised me. In the past ten years the social sciences have made dramatic advances, and they have accumulated a body of evidence that raise questions about the general view of law and its ability to accomplish ends in our society.

To give you an understanding of how the social science is perceived and the kinds of evidence that are available, let me distinguish two kinds of research. Most social science research has proceeded with the use of cross-sectional data - what we call cross-sectional data. The social scientists involved compare different individuals or different states at a single point in time. They try to adjust statistically for all differences between those individuals except two; one of which they believe is the cause and the other the effect of the cause.

There was a study, for instance, of divorce rates and the permissiveness of divorce legislation in 1960 in the

American states published by two political scientists in the Journal of American Family. What we are finding, and what they ultimately found, is that cross-sectional research is likely to generate relationships that are not found when you use what we call "longitudinal data", where we follow events over a period of time. The same two researchers, two years later, went back and looked at divorce rates over time in a series of states. And while they had concluded in the first study that there was a relationship between permissiveness of divorce legislation and divorce rates so that more permissive states had hired divorce rates, in the second study they concluded there was basically no relationship.

Longitudinal data - data where we follow events, phenomenon over time - yield different conclusions, and in the last five to ten years we have accumulated a relatively impressive amount of research using longitudinal data. Now longitudinal data is itself of several varieties. When you use it, you also have to make sure you have data both that starts before your statute, enactment of a statute or a court decision, and after. Data just after the event are not sufficient to see what was happening before and whether the legislation or court decision had an impact.

If you look at the number of abortions, for instance, after Roe vs. Wade, you find they rise. And that has led some people to believe that Roe vs. Wade has increased the

number of abortions. But when you start to look at the relatively limited, admittedly limited data, on the number of abortions before Roe vs. Wade, you find that there was very little change. That there was an increase after Roe in the number of abortions, but that the increases were going on long before Roe vs. Wade was decided.

It's this longitudinal data that is vital for ferreting out the role of law in our society - what law can do and what law cannot do. And that leads me to what the literature now seems to say about the impact of law on human affairs, on social affairs. Let me emphasize at this point that my concern is with social issues, not economic issues. Economists, for whatever reason, have done a lot of research on the impact of law on economic issues. There's less research on the impact of law on social issues - crime, divorce, discrimination, alcohol abuse, and so on.

The literature seems to say now that with regard to regulation, law is relatively is unable to change the course of social events, social issues. Its effects are small in duration, generally, and/or brief. -- I'm sorry, short in duration, or small in magnitude. There are some exceptions. There are some exceptions, but they are just that. They are exceptions. Regulation, law that regulates, seems not to be able to generate much of a response.

With regard to side effects, something that we're just

beginning to pay attention to, we don't know much. We really don't know much. But let me give you some illustrations from the research literature, studies that I consider rather good. Actually, some of the negative side effects are unanticipated side effects of a lot of them. And these are the kinds of issues that we need to understand in order to use law wisely, effectively.

There are two studies, or two articles, looking at the effect on the birth rate in the South after Brown vs. Board of Education, and what this research suggests is that there was a temporary small drop in the birth rate after Brown vs. Board of Education was decided. We're not sure why, but this was one of the unexpected side effects of Brown vs. Board of Education.

There is a wide -- there is a large body of research that concludes that OSHA, OSHA regulations have not improved the safety of work sites. There is one recent study, and I cannot assess its quality because it's methodology is beyond my expertise, but it suggests that OSHA regulations have harmed, have damaged economic productivity, or the growth of economic productivity in the United States.

There's a study that was done that I just happened to find, although it was published in 1981, that concludes that the 1971 federal statute that banned smoking commercials, cigarette commercials, on television and radio increased

smoking, increased tobacco consumption because 1) it eliminated anti-smoking ads; and 2) it may have caused the price of cigarettes to drop. More companies were able to enter the market because they did not have to make a heavy investment in advertising that caused the price drop in consumption went up.

There is also, of course, a negative side effect of something you are all, I'm sure with, and that is "white flight" from the schools. Regulation, in short, does not seem to have, on social issues, a large effect or a durable effect, with some exceptions, perhaps, and it may have some negative side effects that we have not seriously considered. The way law seems to have an effect on events, on social issues, the way the legal system government can effect social patterns, is by providing individuals with what they need to do, what they want to do.

For instance, social security has allowed people to retire in larger numbers than they would otherwise have been able to. It has allowed women - poor people, to use -- or I guess in this study it was poor women -- use medical care that they would not otherwise have had access to. It has allowed individuals to own homes because of the financial assistance through the tax code - the interest deduction under the federal income tax. And it may also -- the law may also be able to change social patterns when it provides

information; information such as the health effects - the negative health effects - of smoking.

Regulation, then, based upon the best information that now seems available, longitudinal data which extends over a long period of time, regulation does not seem to have any significant long-term major dramatic effect on the course of social issues, whereas assistance to individuals to allow them to fulfill social goals, they have their own goals.

Having said that, there is one other role that law may play that's very important, but that's not really been studied. It's a suspicion of mine, and that is that law is important for its symbolic value. That law is the cement that helps to hold our society together, and when we pass laws against sex, against discrimination, or whatever, it has a symbolic impact that is important to the fabric of our society.

I have to say - if I didn't say originally - that the views I've reached were surprising to me. I did not, when I started this project, expect that I would come to the conclusions I have come to. I feel, though, that the research literature and the quality of the evidence that's now available leaves no other reasonable conclusion. We've got a lot to learn about the role of law, but that's where we are, it seems, at this moment.

MR. HEIMAN: Thank you, Dr. Barnett. I think

we're going to hold questions until all of the panelists have had an opportunity to spend their 10-12 minutes to talk to us. That way we will be fairer in dealing with each of them. I should mention, also, that Dr. Barnett is in the last stages of writing a book - obviously not supposed to plug the book - but, if you're interested, I believe that what he is discussing today is part of what the book will be about. Is that correct?

DR. BARNETT: Yes.

MR. HEIMAN: And will be published when? Within the next year?

DR. BARNETT: Beats me.

MR. HEIMAN: Our next speaker will be the staff counsel for the ACLU, Doreena Wong.

MS. WONG: Thank you. Good afternoon. I appreciate this opportunity to present the views of the ACLU concerning the recent Supreme Court cases and the Civil Rights Act of 1990.

The ACLU of Pennsylvania is a state affiliate of a nationwide non-partisan organization of more than 275,000 members devoted solely to protecting the rights and liberties guaranteed by The Constitution.

For the panel, today, I will present a shortened version of my statement which I asked the committee to include in the official transcript. I will discuss some of

the Supreme Court cases and the legislative responses to them.

In 1989, as you are all aware of, I'm sure, the Supreme Court dealt several disastrous blows to the statutory framework of two established civil rights laws, and in the process, sent the struggle for equality in the American work force plummeting.

The Court's decisions reversed long-standing judicial precedence under two of the most important laws that Congress has enacted to provide opportunities that were historically denied to racial, ethnic, and religious minorities, as well as women. The Court has made it much more difficult for plaintiffs to get to court in the first place by reducing the statute of limitations and limiting the applicability of anti-discrimination statutes. If the plaintiff does make it to Court, the chance of prevailing on a civil right claim has been substantially reduced because the burden of proof has been shifted to the plaintiff to prove that a certain employment practice does not serve the legitimate goals of the employer.

Moreover, even if the plaintiff can prove that intention of discrimination has occurred, he or she may still lose because the employer can prevail by merely establishing that its discriminatory motive was only one factor in its decision not to hire or promote or discharge

the plaintiff.

Finally, the Court has ruled that there is no deadline for filing reverse discrimination suits challenging Court approved affirmative action plans which are intended to remedy years of unlawful discrimination.

The Civil Rights Act of 1990 is proof that Congress recognizes the reality of discrimination in America's work force. The legislation restores the scope and strengthens the effectiveness of federal civil rights laws. It also addresses anomalies that are found in our existing fair employment laws. The Act is necessarily a broad remedy to many of the ills in our present employment laws, or more pointedly, in the Supreme Court's narrow interpretation of those laws.

Each section of the bill is designed to create tangible, undeniably positive results in the struggle for equality in the work place. It is for this reason that I urge your support for the bill.

One of the statutes affected by the court decision last term is the Civil Rights Act of 1866. This cause of action has been robbed of much of its modern vitality as a result of The Court's decision in Patterson vs. McLean Credit Union. Congress enacted the Civil Rights Act of 1866 in order to eradicate racial discrimination. The right to "make and enforce contracts" which governs the employment

relationship is meaningless if that right is constricted through judicial interpretation to exclude the enjoyment of a work place free of racial harassment.

To fully understand the devastating effects of Patterson, one need only look closely at the facts. In Patterson, the plaintiff worked at the McLean Credit Union for ten years as an accounting clerk despite the fact that she had a college education. Her employment was riddled with repeated occurrences of racial harassment. As a lone African-American employee, she was told at the onset that her white co-workers probably would not like her because they weren't used to blacks. She was the only clerical worker assigned to dusting and sweeping the office, and her work was constantly scrutinized by her supervisor.

Unlike her perfect counterparts, she was publicly chastised whenever she made a mistake. One supervisor claimed that blacks were known to work slower than whites. There was no doubt that she suffered these indignities on account of her race. In her final year, she was denied a merit increase that was given to all her white counterparts because she had "a bad attitude". That same year she was laid off despite the fact that she had more seniority than any of her white co-workers. She filed a Section 1981 lawsuit to challenge her discriminatory treatment. The lower court dismissed the lawsuit because it held that the

statute did not reach such claims. The Supreme Court affirmed the lower courts and held that Section 1981 does not prohibit an employer from racially harassing its employees or otherwise prohibit racial discrimination that arises after an employee is hired.

Prior to Patterson, Section 1981 had been an effective and viable remedy in combating racial discrimination. Section 1981 reaches other areas besides employment because it applied to all types of contractual relationships.

In order to see the immediate devastating effects of Patterson, we could look at other cases that have happened after. According to one study, then, by the NAACP Legal Defense and Education Fund, approximately one case per day was dismissed between June 15 1989 and November 1, 1989 - well over 100 cases.

One example that I will just share with you involved an African-American, Terrell McGinnis, who worked for an Alabama-based firm for five years. As the District Court recognized, "he suffered more racial indignities at the hands of the company than anyone citizen should be called upon to bear in a lifetime." The litany of discriminatory acts that he endured included being removed from the foreman's position solely because of his employer's belief that "it just don't look right to have a nigger foreman." He was also required to clean bathroom and to prevent black

visitors from using the restrooms.

On one occasion, a gun was pointed at his head shortly after he was called a "black S.O.B." by his supervisor, and he was physically abused by his supervisor on at least two occasions. During a business trip lunch break, he was further humiliated by his supervisor who placed his sandwich on the floor and told him to retrieve it, saying "Here you go, my nigger." in a restaurant where all the other patrons were white.

Mr. McGinnis' injuries, horrible as they are, may never be remedied, and his employer's conduct may remain unchecked because a Court of Appeals in the 11th Circuit in the wake of Patterson, remanded that the case go back to the District Court and directed the trial judge to reconsider his judgment and award of fees since claims of racial harassment and discriminatory work conditions were on longer actionable under Section 1981.

Now the Civil Rights Acts corrects the Patterson holding by expressly defining that the right to make and enforce contracts includes the making, performance, not modification and termination of contracts including the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

Be reaffirming the broad scope of Section 1981, Congress ensures that individuals have the same rights with

respect to employment and other contracts regardless of race. An employer who is prohibited against discriminating against African-Americans at the time of hiring, should similarly be prohibited from harassing African-American employees a week after they start working.

The other federal statute whose interpretation has suffered is Title VII of the Civil Rights Acts of 1964. The importance of Title VII in promoting work-place equality for racial minorities and women, derives largely from judicial interpretations which has made it possible to remedy not only acts of intention of discrimination, but also the subtler and more arbitrary forms of decision-making which have an adverse effect on women and minorities seeking employment.

Regrettably, Title VII has been impaired through the Court's restricted view of congressional intent and through a reversal of its own established precedence. For example, The Court has overturned its 18 year old landmark decision in Griggs that has been used successfully to eliminate unnecessary barriers to equal employment opportunity. In Wards Cover Packing Co. vs. Atonio, The Court ruled an employer no longer bears the burden of demonstrating the business necessity of certain practices that tends to adversely affect minorities and women, and that victims in such cases must isolate the precise factors that caused the

discriminatory impact even though it may be impossible to do so.

The facts of Wards Cove are particularly. It begins as a class action lawsuit filed in 1974 alleging employment practices that individually, and in combination, created a patently racially stratified work environment at three of Aspen's salmon canneries. Among the elements contributing the discriminatory result were a history of job segregation, recruitment practices that targeted non-whites for lower paying jobs, while applicants for better jobs were sought from a predominantly white labor force. Rehire preferences, word of mouth hiring, nepotistic practices, subjective hiring practices, racial segregation and the provision of housing and meals and common use of overt racial designations and characterizations.

The record in Wards Cove is replete evidence that the challenge to employment practices operated free historical patterns of racial discrimination. The preliminary matter, I think, I would like to stress several important points. First, it's difficult in a complicated matter to establish a prima facie under the disparate impact theory as elaborated in Griggs. Nothing in this act would ease this difficulty. Second, the judicial rules and definitions established by several supreme court cases, should have governed the disposition of Wards Cove which it would have compelled the

conclusion that employers at issue had failed to rebut the dramatic evidence of discrimination or to demonstrate that their practices were justifiable.

So the principles of stare decisis should have precluded the result which is now the subject of this act. In our view, the court should have affirmed its long-standing rule that practices fair in form, that discriminatory inoperation are unlawful and that's affirmatively justified by the employer, is necessary to the successful operation of the business.

The Wards Cove decision severely undermined the existence of the disparate impact theory as a message for challenging employment discrimination, thereby effectively overruling its landmark decision in Griggs. Among other things, the decision weakened the court's earlier definition of business necessity. In fact, the Wards Cove majority weakened the definition to the point of eliminating any necessary requirement.

Most importantly, though, case law does not support the Wards Cove court's decision that a business necessity would encourage employers to adopt quota systems. Moreover, employers have been able to defend successfully against disparate impact claims under the business necessity standard that existed pre-Wards. The Civil Rights Act corrects Wards Cove by prohibiting facially neutral

employment practices that have a tendency to affect, adversely, women and minorities, and upon a showing by the plaintiff a disaffect, the burden of proof shifts to the employer to prove business necessity by showing that the practice bears a substantial and demonstrable relationship to effective job performance. The Act also permits discrimination victims to rely on the disparate impact of a group of discriminatory practices operating together so the cumulative effect of the practices can be examined, and the plaintiff does not have to separate out the effects of individual disciplinatory practices.

Another Supreme Court case which requires clarification concerns the statute of limitations problems which arose in the Lorance v. AT&T Technologies. In Lorance, the court required employees to anticipate future adverse applications of a seniority system no matter how speculative or unlikely the application might be. The Civil Rights Act would reverse Lorance, re-establishing that the statute of limitations for challenging employment practices generally does not commence until the effects of the injury are felt by the charging party.

Now the Bush administration has indicated its support for legislation to overturn the court's decision in Patterson and Lorance. However, the Administration's proposal of the Civil Rights Protection Act falls far short

of truly remedying most of the current problems. Additional measures like those embodied in the Civil Rights Act are necessary to achieve the national objective of a fair work place. In addition to the cases just discussed, the Civil Rights Act addresses other rulings which restrict or modify the reach of equal employment opportunities laws. For instance, in Price Waterhouse v. Hopkins, it illustrates the court shift away from full protection against discrimination. I won't through the facts of the Price Waterhouse case, but basically, the decision not to promote a senior manager at Price Waterhouse was based on motivations based on her gender.

For examples, partners criticized her for being too macho and expressed a belief she should enroll in charm school. She was told she should walk, talk and dress more femininely, to wear makeup, have her hair styled and wear jewelry in order to improve her chances of partnership. Despite these obvious stereotypical notions, Justice Brennan said that when a plaintiff proves in a Title VII case that her gender plays a motivating part, the defendant can avoid liability by showing by preponderance of evidence that it would have made the same decision if it had not taken the plaintiff's sex into account. The Act makes clear that actions for which discrimination is a motivating factor, are violations of Title VII.

A final case which the Act specifically addresses is Martin v. Wilks. In that case, the City of Birmingham, Alabama entered into a agreement with the plaintiffs to remedy the city's long and infamous history of racial discrimination in its fire department. Unfortunately, the court allowed white male fire fighters who sat on the sidelines while the case was being litigated, to challenge the affirmative action plan.

Under this ruling, employers would be less likely to agree to anti-discrimination hiring or promotion trends to settle lawsuits for fear that they will be endlessly challenged in reverse discrimination suits years after the settlement is implemented. The Civil Rights Act facilitates the prompt and orderly resolution of challenges to employment practices implementing litigated or consent judgments and limits collateral tax on them. The order would be consider final and could only be challenged under limited circumstances.

MR. HEIMAN: I hate to cut you off, but unfortunately there are other people who we have to get through today. You have provided for us, that is, the members of the Commission, a statement, a large amount of which you have told us about. I am asking your permission to append this to the report is that is what you want us to do.

MS. WONG: That would be fine.

MR. HEIMAN: In addition, you have given us a report by the ACLU on the Wards Cove decision --

MS. WONG: Right.

MR. HEIMAN: -- would you feel that this is also appropriately part of our report?

MS. WONG: Yes. Thank you.

MR. HEIMAN: Just as an aside, I assume you are aware of it, but the case that you talked about, the Price Waterhouse case, the remedy was reported in today's paper. The court decided that she should be required to be hired as a partner and was awarded $400,000 in back wages.

MS. WONG: Well, that's great.

VOICE: Which court?

MR. HEIMAN: Federal District Court of Washington. I assume that's D.C.?

VOICE: Yes.

MR. HEIMAN: Our next speaker will be Ralph Smith. Mr. Smith?

MR. SMITH: Thank you and good afternoon. My name is Ralph Smith. I am a member of the faculty of the University of Pennsylvania Law School. I am here this afternoon as a member of the board and Vice President of the Fellowship Commission. The Fellowship Commission is one of the nation's oldest metropolitan human relations

organization that continues to work in Philadelphia since 1941 committed to the cause of civil rights, race relations and justice.

I am please to have the opportunity on behalf of the Fellowship Commission this afternoon, to share with you some reactions to the topic posed. And I must begin by saying that the topic posed invites an expression of deep concern. In a number of recent decisions, the nation's highest tribunal appears to have embarked on a search and destroy mission with respect to civil rights. In case after case, the majority of justices have aligned themselves with the crunch elements to undermine and erode a national consensus on the paramount importance of dismantling structural racism, eradicating the badges and insolence of slavery, and promoting equality of opportunity in all areas of American life.

What began several years ago as a rightward drift attributable to the changing composition of the court, has matured into a full scale all-out assault on nearly all aspects of civil rights law. Within its strategic arsenal for this assault, the Supreme Court has had, first of all, a propensity to ignore threshold questions of justiciability, as it dismisses those questions as mere technical asides when such questions would delay or derail its intended outcome.

The Supreme Court has exhibited a callous disregard for legislative history, unambiguous statutory language, and even its own precedence and interpretations, when any of the above would produce other than the outcome desired. The Supreme Court has manifested an Orwellian-like analysis which have the effect of using constitutional provisions, especially the civil rights statutes and the Civil War amendments, most harshly against those they were designed to protect. And in all of the above, the Supreme Court has demonstrated a willingness to discount, ignore, or even sanction the enduring, pervasive, perverse and corrosive impact of racial impact on American society as a whole, and on its institutions, and on ordinary people who daily make decisions that affect the lives, livelihood and well being of their fellow citizens.

The court's retreat seemed most apparent in the area of affirmative action. After more than a decade unable to speak with one voice, unable to find a coherent majority, the court, has in recent years, rendered three decisions: Wygant, Memphis vs. Stotts, and Croson vs. Richmond. And in those three decisions, the court has, by either a divided opinion with multiple opinions, undermined affirmative action, created chaos in cities and counties across the land, and severely compromised the ability of minorities who were previously excluded from participating in the nation's

economy to do so. The court has taken all three of these cases even though at the time these got to the United States Supreme Court, it was clear that they were mute and ought not to have been decided. This trilogy of cases, Wygant, Stotts, and Croson, has allowed the court to make it exceedingly difficult to expand the participation of African-Americans, women, and other minorities in the nation's economic mainstream.

In and of itself, this would be a matter of grave concern. This comes, however, when the court has plunged equal employment opportunity law into complete an utter disarray. In a series of decisions that go beyond even what the Reagan-Meese administration wished, the court has abandoned a sensible, orderly, experientially developed and subtle course, substituting in its stead one that is confusing, outcome determinative, and a set of standards which are as lacking in coherence as they are in principles.

Attorney Wong has discussed these cases: Wards Cove Packing vs. Atonio, Price Waterhouse vs. Hopkins, Martin vs. Wilks, Lawrence vs. AT&T Technologies, Patterson vs. McLean Credit Union. I'm not going to discuss these cases except in response to questions. The discussion, however, will be included in the full statement.

Congress has sought to respond with the Civil Rights Act of 1990. This Act is the focused, balanced, and

tempered effort to restore equilibrium to the area of equal employment opportunity law. Nonetheless, in an incredible letter of April 3 and 4 of this year, the Attorney General, speaking on behalf of the administration, threatened a veto. The Attorney General raised questions about every substantive provision of the law, including:

-- Section IV which would restore the burden of proof in the disparate impact cases;

-- Section V which would clarify the prohibition against impermissible considerations of race, color, religion, sex in employment practices;

-- Section VI which would facilitate calm and orderly resolution of challenges to employment practices, implemented litigated consent judgments or order;

-- Section VII, dealing with the statute of limitations;

-- Section VIII which provides damages in cases of intentional discrimination,and Section IX which clarifies attorneys fees, and especially Section XII which restores the prohibition against all racial discrimination in the making and enforcement of contracts.

In responding to the requests of the Chair, it is difficult to propose yet another compromise. This legislation, having been thoughtfully considered by committees in both houses of the Congress, this legislation hasn't been proposed jointly, both by Senator Kennedy and

Representative Hawkins. After broad consultation within the civil rights community, broad consultation with employees and the like, legislation which now has broad support in both houses of Congress reflects compromise.

To compromise more would be to exceed to this Supreme Court and to say to the course of action which would create confusion, which would leave civil rights plaintiffs at the mercy of employers. It would send a message - a message that is unfortunate for this society, and it is my hope that the civil rights community including members of this Advisory Committee and members of the Commission, will stand firm and will say to the President of the United States that now is the time for him to put his action where his rhetoric has been. He ought to sign the bill in its current form and get on with the business of sending the message of sending a message to the Supreme Court that there is a consensus in this land, and that consensus will not be overturned.

I would be remiss were I not to say, however, that there was one bright light in the court during this current term. In E.E.O.C. vs. University of Pennsylvania, the court upheld the position of the Equal Employment Opportunity Commission that a University could not use the claim of confidentiality to shield its tenure and promotion practices from the regiment of anti-discrimination law. This landmark

case instilled hope in women and minorities in higher education across the land. The ink was barely dry, however, when it became clear that colleges and universities across the country would seek to undermine, oppose, and disregard that decision. I take no great pride in reporting that my university, the University of Pennsylvania, leads the pack.

Those of us who care about equal opportunity are concerned that colleges and universities are beginning to do in the 1990s what they did in the 1970s. You may recall that in early 1970 after the adoption of Revised Order No. 4 which included colleges and universities within the Executive Order 11246, and the 1972 amendments to the Civil Rights Act, colleges and universities led the pack in opposing affirmative action. And to protect their own narrow, privileged position, academics across this country legitimized and provided the basis and excuse for the assault of affirmative action.

As we look at the response of colleges and universities to E.E.O.C. vs. University of Pennsylvania, we have to fear that the colleges and universities are about to play that role again.

Let me, in the time remaining, enter -- how much time to I have?

MR. HEIMAN: You're a minute over, but go ahead.

MR. SMITH: I will add to the record a letter,

actually, two letters, written by faculty administrators at the University of Pennsylvania, urging the University to abandon its current course, to seek its own inter-position nullification strategy, to comply with the position of the Supreme Court, and turn documents over to the E.E.O.C. We not that this Supreme Court, as you can well expect, speaks rarely favorably on the issues of civil rights, and it is almost impossible to get this Supreme Court to speak unanimously on anything including, and especially, civil rights.

E.E.O.C. vs. University of Pennsylvania was a landmark in more ways than one. It was a unanimous decision by this court that the position of the University was unprincipled and untenable, and we ought to say the united voice is outrageous that colleges and universities which should be leading the way toward a better country, should seek to lead the way backward.

In closing, I would like to recognize that the Executive Director of the Fellowship Commission, Dr. Marjorie Duggan, is here today. I would like to bring her greetings, as well as the greetings of Willard Rouse, President of the Fellowship Commission, and say that I know that I speak for all the members of the Board of the Fellowship Commission when we urge this Advisory Committee and the United States Commission on Civil Rights to speak

loudly, forcefully, and clearly asking the President of the United States, the Congress of the United States, and the Supreme Court of the United States, to reaffirm and reassert the principles of this nation, and to say to young people everywhere that those aspects of the struggle, those gains that were made at some substantial costs are not so fragile that they can be reversed on whim; to say that it is important that we continue along a course of a commitment to civil rights and that the term of 1989 may have been a disaster, but at least it was also of admiration.

My hope is that we will speak to the President and others forcefully tomorrow and say "no compromise", sign the bill as is, it its current form.

MR. HEIMAN: Thank you, Mr. Smith.

While the other panelists were speaking, Angel Ortiz did join us and it is now his opportunity --

MR. ORTIZ: I'm ready to leave.

MR. HEIMAN: Well, okay.

MR. ORTIZ: Within the next few minutes the city council will be taking the budget question for the school budget, actually during the next five minutes. But let me express my full concurrence with the statement that Professor Smith just made.

The gains that have been made in civil rights have been few, and some communities, and some minorities in this

country have enjoyed them much better than others. Within the City of Philadelphia, the current situation, and if you take note that the Human Relations Commission of the City of Philadelphia is currently holding hearings on the state of Puerto Ricans within the employment practices and how they fair in program services and employment within the City of Philadelphia.

The picture that has been painted in those hearings up to now is not a pretty one. Even though we have had a democratic administration, an administration led by a black mayor, and the affirmative action policies have not been successful in equalizing the wrongs and the lack of presence of the Latino community within city government. In the set-asides and contracts you find, more or less, the same picture.

The Kennedy-Hawkins Bill, as Professor Smith stated, is a compromise. To go any further would be to dilute, would be even to give up the whole struggles of the 1960s, 70s, and 80s in this country. It would be said that the march to Selma, that all of the aspects that we went through in the 1960s and 70s were all for naught, and that we have to begin all over again. The message has to be clear. There is no compromise in terms of civil rights. There is no compromise in terms of equality. And the Supreme Court, the five members of the Supreme Court who have implemented and

carried out through their decisions, the Reagan revolution, cannot by their opinions and their decisions consign us back once again to a status of second-class citizens or tell us to go to the back of the bus.

I think this is the issue that we have in the 1990s. Whether we go forward and make the society an equal one, whether we have room within that mainstream for people of color; Puerto Ricans, Latinos, and women, and blacks, or we are going to create an ever-enlarging underclass, and ever-growing underclass that is going to be committed, designated, and sustained by policies of government and the court as second-class citizens and a cycle of poverty and dependency for their rest of their lives.

Those are the issues that we have before The White House and before Congress and before the Supreme Court. We have an ever-diminishing membership of social conscious justices in the court. I have no illusions that President Bush will appoint anyone as sensitive as a Thurgood Marshall or Brennan or even Blackburn when their terms to leave the court comes.

We are in a very very bad situation in this country. The inner cities and the urban areas are on the verge of - not rebellion because rebellion implies organization, implies thinking, implies planning. The inner cities are on the verge of a total anarchy and non-government and being

unable to control that underclass that in desperation goes and seeks economic opportunities in places such as the corner selling drugs and other aspects, because all of the other channels have been closed.

The other day, the black students at Temple had an altercation. But it wasn't the physical confrontation between groups that was shocking to me. It was the fact that in Temple, a university in a northeastern city, out of every ten black students, only two of them graduate from college. That is a shocking statistic, and that is a statistic that we have to be very much aware of.

And it is when you begin looking at the professional schools - the law schools and the medical schools across this country - where affirmative action at one point provided entry into those schools. And you look at Columbia, my alma mater, and you see that today they have less Puerto Ricans from New York City and the continent here in their law school than when I went to law school 15-16 years ago. That has to stop you in your tracks because it says that doors that were opened, opened by a process of struggle, are now being closed by a legal process and legal imprimatur of the Supreme Court. And those things cannot be tolerated. It means going backwards, not going forward, not creating the climate within the society of togetherness, of one society, but feeding the divisiveness that is presently

there. And unless we begin making it very clear that this bill is just one step, one step towards bringing this country together and that no more compromises shall be tolerated, I don't think that the future holds very well for places such as Philadelphia, New York, Detroit, and the urban areas of this country.

MR. HEIMAN: Thank you. If I understand you correctly, you're going to have to leave us --

MR. ORTIZ: I have to leave. The city council is getting together right now. We're voting on the school budget at this present time, and we don't have nine votes for the school, so if I'm not there, we have one less vote.

MR. HEIMAN: Angel, do you have time for one question?

MR. ORTIZ: Yes.

Q You struck a note, when you talk about being unable to contain those who feel so oppressed, could you just elaborate on that just a little?

A Well you see it every day in the Black and Latino neighborhoods of the city where violence has become a fact of life - where Black on Black crime and Puerto Rican on Puerto Rican crime is second nature to the blocks and the neighborhoods. It is whole neighborhoods where police dare not enter because there is another type of law operating, and the anger that is there. It is a very palpable anger

when you talk to the young people, that the system has failed, not that they have failed the system. You cannot keep on blaming the victim along those lines.

And we are not talking about any special privileges. But even right now when you're talking about a public school system that is under-funded and where the disparity between suburban kid and urban kid in terms of money that is spent is one in which a kid in Radnor, the cost per student and the expenditure per student in Radnor is close to $8,000, and we can only spend $4,000 per student with much greater problems that they bring into the school system, then you see a certain disparity in the way the society is functioning. And I think those things have to be equalized.

It isn't that you're asking for special favors and privileges, but you're asking for equality of the playing field so that you can compete on an equal basis. And I think that is leading to a increasing violent situation. When you have one out of every four Blacks from the ages of 19-29 in the prisons, then it is us, society, that has to ask the question why one-fourth of the young Black population of this country is now today being consigned to prisons. And I think one out of - in terms of Latinos - is a little bit smaller, but growing and pretty soon it will have the same sort of situation.

We have to begin asking is it because they were given

equal opportunity or is it because those opportunities were not present and they had to seek other methods of surviving within the society, and those other methods were generally outside of the law. So either we open up the process or we create more lawlessness, and we will have to build an increasing larger and larger prison system.

MR. HEIMAN: Thank you. Our last speaker for this particular panel will be Ms. Reese from the N.A.A.C.P.

MS. REESE: Good afternoon, everyone. My name is Gladys Reese, President of the North Philadelphia Branch N.A.A.C.P. At this point there are five N.A.A.C.P. branches in the city, and that is why I have to distinguish my branch.

I'm very very pleased to have been asked to serve on this panel this afternoon. My term as President, I'm a relatively new President. A little less than three years. Therefore, I have had to do an awful lot of research. However, I didn't know how much time I would have to speak this afternoon, so I prepared a short speech.

We had already prepared a letter, my branch in conjunction with the branches in the city had already prepared a letter to be sent to President Bush on these issues, and I was just very very pleased that the Black leaders, I believe it was Monday in a meeting with the President, said they had emphasized to the President the

importance of the Kennedy-Hawkins bill, and of course, I was very very pleased that the other speakers had touched on that - Mr. Smith, I think, and all of the panelists, I imagine.

As you know, we have a terrible time competing in the Black community in the job market and in the employment agencies in general. And when they talked about reversing the burden of proof, that really struck a nerve with us because we felt we didn't have that time in-roads to begin with.

As one of the other speakers has said, our gains have been few enough. We need more gains, certainly not less. As a matter of fact, since the 60s, we at the N.A.A.C.P. feel that we have lost some, and not really gained that much. When the council person spoke on the problem at Temple University just a couple weeks or so ago, I met with the college branch of the N.A.A.C.P. students as well as some of the white students, and as it came out, it was not so much that there was just Black/White tensions, it was an overall picture of just what direction that we are headed into today. It wasn't that I hate you or you hate me, and of course, these are things that we in the Black community have to cope with everyday.

I'm glad that the council person got out in time to go to that budget hearing because we certainly - in the public

school system - we certainly need his vote there.

I'm a retired person, not from the school system, but I have three children in the public school system, and the stories that I hear everyday about the funding and the things that they have to do without in the public school system is really heartbreaking, so I'm glad he's there on time to vote for it in order that we may be able to get a better budget through for the funding for the public school system.

We in the Black community, and I say Black and that includes in the North Philadelphia area that's Black as well as Hispanic - of course, the communities are sort of changing over gradually with having Temple University there in the area. We are in contact with a lot of other ethnic groups, but we are especially concerned about the Blacks and Hispanics.

Last summer our branch was dealing with a case of a person being fired from his job because of he didn't get the promotion and he was not happy about it, naturally, and we realize, as they tell us all the time, that discrimination is never intended, but it happens. Of course, one of the excuses we get sometimes is the fact that they have to go on a population quota. That is all right if we get our share, which is all we are asking. So it is extremely important that this latest bill, the Kennedy-Hawkins bill be kept in

the limelight for us.

As has been said before, there have been compromises, compromises, compromises. If we make any other compromise, there is nothing that we can really look forward to on this issue, and I would think, in closing - as I say, I didn't know how much time I would have so my remarks are very brief - I would say in closing, though, there may be compromises in many things, but in this instance there is no further compromise.

MR. HEIMAN: Thank you very much. I certainly appreciate all of the panelists.

Now we have the opportunity where any of the Commission people here can ask questions, or if any of the panelists have any questions that they would like to ask each that you think would be illustrative or illuminating for our purposes, certainly we would entertain that. Are there any questions? Yes, sir, if you would state your name --

Q My name is Morris Milgram. I am a member of the Pennsylvania Commission and a developer of the negro council. I'm curious and perhaps one of the speakers can explain why they believe that at this particular time, the U.S. Supreme Court has started moving in reverse away from Brown vs. Board of Education, etc. What has at this time caused the move?

A MS. WONG: I think we're feeling the effects of

the Reagan area. There has been a shift to the right in the courts and when you look at the number of federal judges that have been appointed, Reagan has appointed well over half of the federal judges, and he had an opportunity to replace - I'm not even sure how many, I think three? - three of the Supreme Court justices so that where there were more liberal judges that stepped off the bench, they were appointed by much much more conservative judges, and so now there is a solid conservative majority, at least five, where sometimes, you know, even more. There is a solid liberal wing of about three votes, and then there's one or two that swing in between.

MR. SMITH: I think there is also in the country, a sense that some of the problems have been solved. That, in fact, the good Councilman Longstreth left, but I recall that he was quoted as saying, several weeks ago, that we now are playing on a level playing field, and therefore, there was no need for minority set-asides. He was quoted as saying that, and I really wish I had the opportunity to ask him whether or not he did.

But there really is that sense of growing constituency, and what that has done is tend to give, I think, to members of the Supreme Court who can tend to get isolated from reality, give them a false sense as to what civil rights is about, and given the ideological orientation that they bring

to the task, they're then given far more reign and a far broader area within which to work than the court has assumed in the past. Consequently, what you find, a group of decisions which not only ideologically suspect, but which make no sense even from the standpoint of employers.

Having grown accustomed to the great standard and having developed elaborate mechanisms to essentially transform the way employees are hired, promoted, and the like, having invested significant amounts of money in human resources, departments, policies, and strategies, I would think that the last thing much of corporate America wants right now is to have to go back through and be sued all over again by everybody, and that is essentially what the court has done.

The court has said, on one hand, you no longer know whether what you're doing is unlawful and you may be sued by the minority employees who feel that they have been treated unfairly, and in addition, even if you settle and you establish a plan, you may be sued by some employees who object to the plan. And not only that, they can sue you a long time from now. So again, if you are just talking ideology, that would be one regular debate, what has happened is the court has left a realm of reality that is now basically operating in a sphere which lacks coherence, either intellectual coherence or practical coherence in

terms of implementing civil rights law, especially in the equal employment area.

MR. HEIMAN: Dr. Barnett, in terms of your theory, do you under the questions we've just heard, is the court following or is the court leading us into a new area?

DR. BARNETT: A few months ago there was a book published that examines a large number, 18-20 Supreme Court decisions, it finds that in almost every case, the Supreme Court follows public opinion. And I think it is unfortunate to blame the Supreme Court for a particular problem or a particular precedent or particular justices on the court.

Law follows social trends, and the 1960s and the 1970s were a period of rapid social change. I guess no society can sustain rapid social change for a long time.

What I have come to appreciate in writing this book is the historical perspective. There came a point a few years ago when I was getting into this where I came to realize I had a jettison most of my assumptions about the role of law, and the one thing that I came to realize was that we all are captains of historical eras. My parents were captains of an era in which the depression of the 30s occurred and World War II occurred. I was a captive of the era in which we got into the war in Vietnam.

We lived in the 60s and in the 70s in an era of rapid change. I suspect societies simply cannot sustain that.

The President of the United States is elected, he reflects popular will, he appoints the judges. Legislators, members of Congress, members of state legislatures are elected and they reflect social needs. And what you are seeing now is a drift away from the situation that prevailed in the 1960s and the 1970s. I think it's better to look at large scale social trends if you want to understand what is happening in the legal system rather than particular members of government or particular members of the judiciary or a court - a particular body.

If I may add one thing to my previous remarks, it's occurred to me that every piece of major legislation really ought to provide for funding for research to assess the effects of the legislation. We enact legislation, but we really do not make provision for determining whether the law or a court decision is going to have the effects we seek, nor do we make any provision for ferreting out the negative side effects that could occur. It seems to me entirely appropriate to provide the funds to do that kind of research.

As it stands now, individual social scientists must, through one mechanism or another, find the data by means of which they can test the effects of particular court decisions or legislation. And its unfortunate, I think, that each major bill that goes through Congress or even a

state legislature, does not make some provision for research on that topic.

MR. HEIMAN: Mr. Fisher, Dr Wachter has a follow-up question on that.

DR. WACHTER: A quick comment and then a follow-up question. I appreciate your call for money for doing research on legislation. I regard that as a full employment law for us academics, and I --

(Laughter)

If, in fact, the reason that the justices have moved on these decisions in the direction they have is that it reflects public opinion. We have also heard that the Kennedy-Hawkins bill has substantial support in Congress. Does that not reflect public opinion?

DR. BARNETT: It might not. I don't know. I'm not familiar with public opinion polls on the particular bill, and I don't know.

DR. WACHTER: Thank you.

MR. HEIMAN: Mr. Fisher?

MR. FISHER: Yes, I would just like to express another opinion in terms of why the Supreme Court appears to be moving backwards in terms of some of their decisions, and I think that the Supreme Court does reflect public opinion, and I think that there is a growing perception among many people, and I emphasize the word "perception", because I

think it's far from fact that there is a growing number of people that feel that Blacks and minorities have gotten much too much. They are now being favored and that a lot of things that are happening is at the expense of those that are not Black, and I think that this perception is being translated into politics, and they're electing people that share that view, and these people are appointing the Supreme Court justices, etcetera, etcetera, and I think that they have made a conscious decision to try to reverse that perception which is not a reality.

For an example, most of us heard, I guess a month or a couple of months ago, that Forbes, I think it was Forbes, made a contribution to the United Negro College Fund, and I happened to be listening to talk show which happens to be - I won't call it right-wing or whatever, it seems to be a lot of the people that call in have views that are way to the right, as far as I'm concerned. I mean these people were literally livid, the fact that Forbes had the gall to make a contribution to black institutions - What do they want? Why did he give it to the Blacks? Why don't he give it to the poor whites?

I mean, it's a distorted perception out there that I'm afraid that's growing, and I would like to be able to take a lot of these people around and introduce them to the reality of just what's happening in the minority communities, but I

think that kind of a perception is translating into the political stream, and these people are electing people that share that view, and I think that's why you'll see the phenomenon of people like David Dukes running for public office and getting support, and I think that we're going to see a lot more of that because that's what a lot of people unfortunately are believing now.

MR. HEIMAN: Commissioner Redenbaugh has a question or a comment.

MR. REDENBAUGH: I would like to make a comment to supplement my prior remarks and comment on the general presentation of the panel.

I would be much more optimistic about the future of civil rights in this country if I thought the problem were only the Supreme Court. But I believe it's not the court that's moving backwards, but the country. And one of the things that I've begun to see and be more sensitive to now that I'm on the Commission, is the increase in racism, violence and bigotry across the country, and displacement in our college campuses.

I am very concerned about the kind of country we are likely to become in the next century if we don't not only maintain the social progress of the last 25 years in the area of civil rights, but if we don't stop the development and the growing underclass, and I believe that the highest

priority of civil rights and of the Commission and of my work on the Commission, must be economic opportunity - jobs and promotions for those groups that had been left behind in the prosperity of the 80s, and I think without that we are going to have an unacceptable and unattractive and very unstable country. And I encourage us to examine the direction in which the country is going and not merely be concerned with the court. I think in this case the court may, in fact, be lagging, not leading.

MR. HEIMAN: Dr. Wachter has a comment.

DR. WACHTER: Actually, I have a question, but rather than holding it since it fits very much into the Commissioner's comments, I thought I would perhaps ask it now, and that is - this is addressed to any of the panelists who wish to respond - to what extent do you feel the Supreme Court decisions and the civil rights legislation of 1990 proposed would have an impact on 1) the social climate, which I think I certainly agree with the comments of the Commissioner, and also, we have in our Pennsylvania Advisory Commission done a report on a hate crimes bill, which indicates evidence of increasing such crimes, again, the impact of the Supreme Court decisions and the proposed legislation on the social climate and also on the growing underclass?

MS. WONG: This is Doreena Wong from the ACLU.

It's always difficult to be able to evaluate how effective a piece of legislation is, but I think in some ways it's true that whatever the Supreme Court decisions do or whatever legislation is passed that it's symbolic in that it sets a tone for the rest of the country in terms of intolerance for discrimination, then it would encourage more equal opportunity for people.

I believe that civil rights, this particular piece of legislation, because of a recent Supreme Court decision, are so disastrous in terms of providing equal opportunity for women and minorities, that we need it because if we leave the status quo as is, at this point women and minorities will be very discouraged from participating fully in the work place. And so to combat the negative effects of the Supreme Court decisions, we have to propose and we have to enact legislation which will tell the public and tell the Supreme Court this is not the direction we want to go.

Instead of going backwards, we want to go forward, and I think it's very important for the public to react in terms of enacting this legislation - to change the trend, because I think there is a trend, and I don't know if it's because of perception or what, but we have to change the environment and the direction that the country is going into.

MR. HEIMAN: Do any of the other panelists have any comments?

DR. BARNETT: Yes. This is Larry Barnett. You pose a challenging set of questions, Dr. Wachter. I wish we knew more of how law behaves in a social system. It's possible the Civil Rights Act of 1990 could have a positive effect on the social climate of the United States. It's also possible it could have a negative effect, that it could cause a negative reaction. We just don't know how law behaves.

With regard to your second question, the underclass, I would doubt that regulation would have much of a beneficial effect. Title VI of the Civil Rights Act of 1964 does not seem to have had any marked long-term effects. It had some, but they've not been substantial. It would seem to me more likely that, on the basis of what we now know, that the government would proceed more effectively if it provides financial assistance to individuals that will allow them to accomplish the goals they have.

For instance, Councilman Ortiz mentioned that the graduation rates among Blacks, I guess it was a Columbia - he was speaking of one university has declines, but that's a nationwide phenomenon - the Black enrollment rate in and rate of graduation from colleges and universities in the United States has, I believe, declined sometime since the late 70s. And there is the suspicion that that is because there is insufficient financial assistance available to

Blacks to cover the cost of higher education. That could be a way in which the law could be very effective.

I don't know, really, how the Small Business Administration works, but I understand they do have some informational assistance programs that allow small businesses to get started and sustain themselves, and that, too, could be of assistance.

Unfortunately, we know very little of what law does and does not do.

MR. HEIMAN: Professor Smith, do you have something you want to add?

MR. SMITH: Yes. Ralph Smith. I'm always amazed at social scientists. I stand in awe at their feet as we confess to not knowing what to do and not knowing enough to do anything.

My sense is that paralysis in the area of public policies is an unacceptable option, and so we have to do something. And the question is, could we conclude, based on what we do know, that the actions of the Supreme Court and the proposed action of Congress could affect either climate or the life chances of the underclass? And I would like to submit, based on what we know, that the answer is yes.

If one were to ask you what would you expect the behavior, the perceptions of those who came of age during the decade of Reagan, to be? Would you expect their

perceptions and behavior to be different from, in substantial respects, from those who came of age during the 1940s and the post-war era? During the 1950s and the decade of Brown vs. Board of Education? During the 1960s and struggles to enact civil rights legislation and to end the war in Vietnam and to be concerned about the environment?

If you were to ask about the generation of the 1980s, I think you would say that that generation is probably different. It's different in what they know, different in the way they behave, difference in their level of social consciousness, and that we see these differences played out in colleges and universities across this nation should not surprise us.

Colleges and universities are populated by the babies of the Reagan decade. These were students who came of age when people were attacking civil rights, not promoting civil rights. These were people who came of age when affirmative action was a no-no, not something toward which one ought to aspire.

I do believe that one of the reasons that we elect presidents and one of the reasons why we vote for senators and representatives, and one of the reasons we vote for mayors and city council people, is that these people do, in fact, impact upon our lives, and impact upon the way we see the world. And I think the President of the United States

had that impact on the world, on the nation, and particularly on young people, and that, in fact, does, in fact, offer some insight into whether we have to throw up our hands with respect to the growing underclass. That problem is not an easy one. No thinking person would suggest that it is.

However, what we do know is that issues of self-esteem are important. What we do know is that in order to have a future one might have to have faith in the future. Now what we do know is that it is exceedingly difficult, exceedingly difficult, for us to say to young people in North Philadelphia, West Philadelphia, and Northeast Philadelphia, any place in this city, that one has to work hard and to aspire and that one will be judged on the content of their character rather than the color of their skin. If we say that today, we will think to ourselves that that's not true.

We can no longer take the message of hope to young people and the inability to take that message of hope, in fact, condemns them to a life of hopelessness and helplessness, and those are the hallmarks of the emergent underclass.

Those of us who care about young children believe that if we can find ways to motivate them to raise their self esteem, that we then stand a chance of having those children join with us in changing their life chances. We believe

that no matter how much money we throw at the problem, unless we deal with faith in the future, sense of self and sense of community, that it wouldn't matter what we do. So I think we know enough to answer the question and to impose our leaders, upon the Supreme Court and upon the Congress of the United States, fairly high standards for action.

MR. HEIMAN: I think we'll take one more question. Mr. Stolarik had asked. I'm sorry, Mr. Young. I apologize. Certainly I would hope that the panelists would remain for the second panel, and then perhaps we could have questions as to all of the panelists thereafter.

Q (by Mr. Stolarik) Yes. Very recently three of you said that --

MR. HEIMAN: Do you want to give your name?

Q Morris Stolarik. I'm with the Pennsylvania Advisory Council. Three of you basically said that there have been enough compromises and that you don't want any more compromises and that the bill should be passed. Are you talking about compromises in general terms over the last twenty years, or are you talking about specific compromises that Senator Kennedy made with the President about this bill? Have they actually gotten together and discussed it?

A If I may, I'm Gladys Reese, President of the North Philadelphia Branch, N.A.A.C.P. We are speaking, I think, I spoke, for the most part, on the present bill, on the most

recent bill. However, I think there has been enough compromises also on the bills over the past twenty years.

Q (by Mr. Stolarik): Are we talking here when Senator Kennedy and other who are supporting this bill, did they put this bill together without consulting the President at all, or have there been consultations back and forth and have the two sides compromised, or has this been a confrontational situation between the President and Congress? I'm concerned about the word "compromise". Has there actually been compromise, or are you talking in general terms about the last twenty years?

A (by Ms. Reese): Now I wouldn't be able to answer question. I don't know if there has been compromises --

MR. FISHER: Maybe I can help. It could be that President Bush has indicated or somebody had indicated they would veto the current bill the way it was.

It's my understanding that President Bush has been meeting with a group of Blacks and others in order to work out a compromise on this particular bill, meaning, I would assume, that President Bush is looking for some changes to be made in this present bill - the Kennedy-Hawkins bill. And I believe that the term "compromise" in that context means that we're hoping that the group of Blacks and others do not change the bill at all from its present form as it has been presented. I think the compromise is going on now

or has been going on where they're meeting and they're trying to work out something or make some changes in the current bill so that the President can sign the bill, and I think the fear is what are you going to change in the current bill to make it acceptable to him? Is it going to end up that the bill is going to be so watered down that it means nothing? At least that's my view of what the word "compromise" is being used in this context.

MR. HEIMAN: I think that the point is that politics is the art of the possible, and if Bush is going to take the position that he's going to veto this bill, is it better to have a watered down version of something or to take a stand and have nothing, and I guess the question that was asked of us to ask of the panelists was whether there was any movement available within the bill as it presently exists that they felt would be allowable that we could pass on then suggest that perhaps this was some movement that would allow, if you excuse the word "compromise", that would allow Bush to sign it and the people who are supportive of the bill to accept it, and I think that's what we were talking in terms of.

I realize that most of the panelists believe that the bill as it stands already, if I understand them correctly, is a compromise on their beliefs as they already exist and that to do anything further to it would be an injustice to

the entire civil rights movement.

MR. SMITH: Ralph Smith. For one, the bill has been changed as it has wound it's way through the legislative process from the way it was originally introduced. Reflecting the reality that to put together the votes needed on the piece of legislation, you've got the response, the concerns and the interests on both sides of the isle. So the bill has evolved in that in that way.

Secondly, it is really not as much an all or nothing situation as it might be posed. The administration has taken the position that a civil rights bill is needed; that some legislation is needed to overturn their facts of at least two of the decisions and really, to mitigate the possible hardship consequences. So if the President does veto this bill, and that veto is sustained in Congress, there is no doubt that the administration will send back up to the hill the President's version of the Civil Rights Bill, and there will, no doubt, be ample opportunity to discuss the issue once again and to see whether, at that point in time, some substitute bill can be adopted. So this is not an all or nothing situation.

When you read the memorandum of the Attorney General, letter of April 3, you realize that same "no compromise" is not just a willingness to take the hard stand, is that in the memorandum, the Attorney General left little or not room

for compromise on the real important issues in the bill. There were some cases where one could substitute the language of the administration for the language of the bill without doing grievous injury to the bill. And if --

MR. HEIMAN: Mr. Smith, I hate to do this to you, but, should I let him continue? There are other people --

MR. SMITH: I know. This is important --

MR. HEIMAN: Okay, then, why don't you go ahead and finish your remarks.

MR. SMITH: There are about three areas in the bill, particularly on the Patterson vs. McLean and with respect to the Lorance case where the language submitted by the administration is substantially similar to the language submitted in the Senate Bill 2104. And it might well be that if a compromise is sought as a way just of breaking this thing loose and responding to the President's needs to say that some change was made in order to allow me to sign the bill, that that can be done - a sort of a technical adjustment, a substitution of the President's language for the languages currently in the bill. That can be done.

On the substantive provisions of the bill, there can be no compromise because there is no room for compromise at this time given the position of the Attorney General.

MR. HEIMAN: I said it was the last question, but Ms. Morris had indicated that she had one brief comment and

a question.

Q (by Ms. Emily Morris): Emily Morris from Delaware. Some of us are still working on the front line in the area of civil rights trying to do what we can for the young people, trying to instill in them a sense of hope, and we find that we're failing. They do not believe us anymore. It's going to be different in the 90s. It appears that there's going to be some civil unrest in this country. These young people are armed. They're very sophisticated. They're very knowledgeable about what laws are or are not and how the laws affect them or do not affect them.

Do you feel that this country can survive another civil unrest because it will be different, I believe, than what it was in the 60s and 70s. I think it will be underground, and I think it will be subtle. And I don't even think we'll be able to see who is actually responsible for causing this civil unrest. How do you see the picture?

A (by Dr. Barnett): That's an interesting question. I happened to be visiting in Los Angeles when the Watts riots broke out, and I was struck at how fragile government is; how fragile a civilized way of life is. I mean, government can break down. Anarchy can occur. And what you scares me. Part of the problem is, of course, that economically we have had a period of about 17 years in which there has been no growth in purchasing power. Incomes may

have increased, but not purchasing power. A family income today is about where it was in 1973-74 after the rapid increase in the cost of energy.

I don't know what the future holds. I'm not optimistic, though, that law is going to offer a significant solution. Professor Smith is right. Social scientists like to qualify everything they say, and does that mean you are frozen into inaction because you never know enough. But in this case, I think we know very little about the way law behaves, and there is a significant risk that if we make the wrong policy choices, there are going to be negative side effects that none of us want.

I wish we had a crystal ball and could look into the future.

MR. HEIMAN: I would like to, obviously, thank all of the panelists and the Commission people who have attended - at least this panel. I don't know whether there should break before the second panel, have a short break, and then Dr. Wachter will convene the second panel. Thank you very much.

(Whereupon, a short break was taken.)

(Back on the record at 3:40 p.m.)

DR. WACHTER: Let me mention again that Advisory Committee member Joseph Fisher is our host, and we thank him. In the last several years we have successfully arrange

to borrow space in nearby federal buildings. But that was not possible to do this time. So Mr. Fisher, a former Pennsylvania Advisory Committee chairman, was kind enough to allow us to use this conference room as he has on similar occasions years ago. Thank you.

All of the speakers on Panel 2 are here with the exception of Commissioner Longstreth who had to leave. We begin shortly, but first let me express my gratitude to Dr. Barnett for helping the Commission and to all of our speakers for contributing their time and expertise in this work. Dr. Stephenson?

DR. STEPHENSON: Thank you very much. I'm Grier Stephenson, Professor of Government at Franklin and Marshall College in Lancaster. I want to thank the Committees for the invitation to be here this afternoon.

Before I begin my remarks, just one comment or observation on what we heard during the first part, that certainly while the controversy over the pending legislation swirls around the attempt to correct certain Supreme Court decisions, it's not altogether just a controversy about corrective legislation because some of the things in the proposed 1990 legislation have to do with going forward.

For instance, changes in Title VII on introduction of monetary damages in addition to, for instance, back pay awards, and then bringing disability discrimination in under

Title VII which, of course, would then also make disability discrimination, as I understand it, also part of a damage award package.

So some of the controversy on the legislation has to do with things about which are really not corrective, but which are an attempt to simply do some new things that haven't been done before. So that's just a factual observation I thought might be helpful.

What I intend to do for the next few minutes is really to discuss an issue that's not been addressed very much thus far, and that's the Supreme Court decision of Richmond Against Croson Company, that the court decided in 1989. And as you note, this decision invalidated on equal protection grounds municipalities - 30 percent set-aside for minority business enterprises in the subcontracting of the city's construction projects. And similar laws were enforced in 36 states and in at least 190 cities, including Philadelphia.

Of the 1989 decisions that have concerned us today, Croson is unique because it is a constitutional decision. That is that it involved the construction of a constitution, not a construction of a statute, and in American government, constitutional cases are noteworthy because they set the bounds within which The Constitution or the political system functions. Its politics, as someone said, is the process of deciding who gets what, when, and how. Then the structure

and limitations of The Constitution have much to do with identifying those who may legitimately make decisions for the larger community; those who may legitimately be the recipients of benefits and penalties, government's expenses, and what those benefits and penalties may legitimately be.

Once the Supreme Court has rendered an interpretation of The Constitution, that interpretation normally prevails until the court changes its mind, or until the people correct the court by constitutional amendment.

Correction by amendment succeeds only infrequently. Only four of the 26 amendments to The Constitution that we have were driven, at least in part, by desire to overturn a specific judicial decision. By contrast, Congress has always had the authority, which it periodically exercises, to overturn the court's construction of its own statutes. The point is that constitutional decisions have a certain finality that statutory decisions lack.

Now the Croson decision remains controversial, not only because of a policy it invalidated, but because of the restriction it supposedly placed on the reach of another decision, Fullilove Against Klutzinck, which the court decided in 1980. In that case, in the 1980 case, the court upheld a congressionally mandated ten percent set-aside for minority businesses in local public works projects under the Public Works Employment Act of 1977. Considered together,

Fullilove and Croson lead to some interesting, and I suggest even surprising, conclusions.

The first conclusion is that the federal program only barely passed constitutional scrutiny in 1980. Second, federally mandated set-asides are now more firmly grounded in The Constitution after Croson than before. And third, Croson does not mean that state and local governments are powerless to enact their own set-aside programs.

Let's take these in order. In Fullilove, six justices concluded that the ten percent set-aside did not violate the equal protection component of the Fifth Amendment. However, not so many as five justices could agree on a single statement why no constitutional violation existed. Instead, Justices White and Powell joined in opinion by Chief Justice Burger, and Justices Brennan and Blackmun joined in opinion by Justice Marshall. These two groups of three justices each comprised the majority vote of six, upholding the congressional set-aside. The remaining three members of the court, Justices Stewart, Rehnquist and Stephens, concluded that even this limited set-aside crossed the line of constitutionality.

Among the six justices voting to uphold the law, only three; Marshall, Brennan and Blackmun, gave it approval without significant qualification. The remaining three justices in the affirmative went out of their way to

demonstrate a very qualified approval.

Their first qualification consisted of a particular significance of findings by Congress and the Civil Rights Commission that continuing effects of discrimination in the construction industry had kept minority participation to a minimum. Their second qualification was the limited nature of the set-aside itself. The figure of ten percent fell roughly half way between the percentage of minority contractors and the percentage of minority group members in the nation.

The Public Works Act of 1977 appropriated $4 billion meaning that approximately $400 million, under the terms of the law, would go to minority contractors. The set-aside would, thus, reserve only about 0.25 percent of all the funds expended yearly on construction work in the United States for the four percent of the nation's contracting businesses that were minority owned. The remaining 96 percent of the contractors could freely compete for the remaining 99.75 percent of the funds, public and private.

The third major qualification rested on Congress's authority under the Enforcement Clause in Section V of the 14th Amendment. No fewer than ten times, in his opinion, did Chief Justice Burger refer specifically to Congress's "unique role" under the 14th Amendment. He said, for instance, "Here we deal with the broad remedial powers of

Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress."

Yet even with this unique role, the Burger three acknowledged just how close the set-aside program came to the line of constitutionality. They referred, for instance, to the program which "pressed the outer limits of congressional authority." In other words, I think the congressional set-aside program has survived its 1980 review.

Now the voting quotient nine years later was also 6 to 3, but this time against the constitutionality of Richmond's 30 percent set-aside. Consistent with their position, Justices Marshall, Brennan, and Blackmun were to prove the municipal set-aside with no significant qualifications. The remaining hold-overs from Fullilove, Chief Justice Rehnquist and Justices White and Stephens, were all held consistent with their view in Richmond that the City had overstepped the line. That is the view in the Fullilove case that the City of Richmond had overstepped the line. The recent arrivals, Justices O'Connor, Scalia, and Kennedy voted against the plan.

Now within this division, it's important to note, I think, that eight justices accepted the constitutional underpinnings of Fullilove. That is, the Congress has

special powers under the 14th Amendment, including a limited distribution of federal funds on the basis of race, even under circumstances where the federal government had not been guilty of discrimination in the awarding of contacts. The eight justices included everyone except Justice Kennedy who reserved judgment on the question. Even Justice Scalia, who took the most restrictive position, recognized Congress's powers in Fullilove.

From this perspective, then, the victory of non-minority contractors in Croson, may have been *. The Fullilove position picked up two votes it lacked in 1980; the votes of Stephens and Rehnquist.

The final point to be made is that the 6 to 3 defeat for the Richmond program does not mean, at least in my view, that states and their subdivisions are entirely powerless to adopt set-asides. What must be understood, however, is that the court in the Croson case, indicated it will apply high standards when they do.

First, six justices agree that race-based policies, including those designed to help minorities, must be judged by the demanding constitutional task that they call strict scrutiny. There were, at most, four votes for that position in Fullilove. Marshall, Brennan, and Blackmun, by contrast, prefer a lesser standard for racial classifications, but do not stigmatize.

Second, because the standard of acceptability now is high, states and localities must do what Richmond did not. They must demonstrate a pattern of discrimination, the effects of which are to be overcome. Individual localities may not extrapolate a pattern of discrimination from findings made by Congress for the nation as a whole. Neither are findings about discrimination fungible from one jurisdiction to the next. And if one assumes that absence at the state level of the deference normally extended to Congress, the level of proof will probably be higher than that expected of Congress.

On to text in Croson, I think this is important. A strong suspicion that localities are more susceptible to falling prey to those whose interests lie more in taking advantage of government largess than in overcoming the effects of past discrimination. What remains to be seen is the level of proof the court will find sufficient. Expecting officials and contractors to line up at the confession both to violations of the law, is probably unrealistic. Litigation will have to flush out this crucial detail.

Third, a local set-aside must be, as the court says, narrowly tailored. The Richmond program included Spanish-speaking persons, Orientals, Indians, Eskimos, and Aleuts as well as Blacks, without and reference to any prior

discrimination against any but the last few. Similar questions were raised about the 30 percent figure. In Fullilove, the court deferred to Congress in its choice of 10 percent. The explanation was plausible, and the number was logged. Croson suggests that no such deference is due the states.

Fourth, given the deference paid to Congress in Fullilove and acknowledge in Croson, Congress should give serious attention under its 14th Amendment powers to legislation authorizing the states to act. Congress could establish standards for both findings and the implementation os set-asides. National action would offer uniformity and would assure suspicious justices that local policies are truly remedial and not just a raid on public purse.

Nonetheless, even without congressional action, there are at least six votes in Croson that cities are not limited to correcting official discrimination, but may eradicate the effects of private discrimination as well.

Furthermore, in proving discrimination, there are eight votes for the position that a clear statistical disparity between eligible minority businesses and minority business membership and trade associations could support an influx of discriminatory exclusions.

In short, Croson, properly understood, should not end racial set-asides. It had, instead, flashed a bright light

of caution that racial classifications today are properly suspect and should be found compatible with the Constitution only when local governments make a convincing case for a closely tailored remedy to rectify the effects that grow from a proven history of discrimination.

Those are my remarks.

DR. WACHTER: Thank you very much, Dr. Stephenson.

We now turn to Ms. Sternlight who is a partner at Samuel and Ballard.

MS. STERNLIGHT: Thank you very much for giving me this opportunity to address you all. As you've heard, my name is Jean Sternlight. I'm, in my view, the member of an endangered species. Specifically, I'm a plaintiff-side employment discrimination lawyer, and what I'm going to give you is a viewpoint that's a little bit different than any you've heard today. It's really the view from the trenches; the view of someone whose been trial litigating these cases, and I'm going to tell you why it is that I think the passage of the Civil Rights Act of 1990 is so important.

Everyday I get lots of phone calls from people who tell me that they've been discriminated against. They've been discriminated against in a number of ways; maybe they've been fired, maybe they haven't been promoted, maybe they've gotten a bad performance review, they've been harassed. All those people - and they might be claiming sex, race,

handicap, age, any kind of discrimination - all of them have one question for me, and the basic question they have is, do I have a case? They want me to tell them, is their case a good case or a bad case?

Increasingly, I keep telling those people, you know what, it really doesn't matter if you have a good case or a bad case on the merits. You shouldn't bring this lawsuit, and the reason you shouldn't bring this lawsuit is that 1) money - you can't afford to; and 2) the burden of proof is going to be very hard for you to meet. Even if in the eyes of God or somebody else, you have been discriminated against, that's not enough. You might not be able to prove it. And I want to address those two specific issues; money and burden of proof.

With regard to money, I have to tell most discrimination victims that they can't afford to bring the litigation no matter how egregious was the discrimination against them. And the basic problem is that the monetary relief currently available to civil rights plaintiffs is simply insufficient to offset the costs of civil rights litigation. The only recovery typically allowed under the Federal Anti-Discrimination Law is 1) compensation for lost wages; and 2) insufficient compensation for attorneys fees and costs, which I'll get to in a few moments.

Discrimination victims are not permitted under federal

law to get compensation for the pain and suffering they've endured, and they're not permitted to get punitive damages. Race discrimination victims used to be able to get compensatory and punitive damages under an old Civil War era statute, Section 1981, and that's the statute that the Supreme Court limited extremely in the Patterson decision. It still exists. Blacks can still get that kind of relief, but in a very very few number of cases at this point.

With regard to attorneys fees, theoretically, federal law does provide that if you win a civil rights case or if you get a favorable settlement, you can recover, as a plaintiff, attorneys fees and costs from the defendant. One would think that the availability of those kinds of fees and costs would permit all persons who had decent claims on the merits to secure legal representation, and in fact, that's, of course, why Congress many years ago passed that attorneys fees legislation was to permit people with good claims to go to court and try to win them.

The problem is that in a series of decisions beginning in 1983, the Supreme Court has issued decision after decision after decision. There are many of them - each of which eat away at the availability of attorneys fees and costs to prevailing civil rights plaintiffs. And the bottom line, at this point from my perspective as a civil rights lawyer, is it's not a question of how much I'll get as a fee

if I win one of these cases, it's almost become a question of how much I'll lose. It's a given to me that I will not get my full fee. It can't happen, never happens, court won't award it, a settlement, because then it won't give it. Instead, I'm put in a position of figuring out almost how much of a loss will I take on each of these cases from what ought to be my full fee.

And the results of that is that whereas in the past, many attorneys used to handle these cases on a contingent fee basis where they would say to the client, you don't have to give me a penny, I'll take the case to court. If I win, I'll get a cut. Now, that won't happen. Attorneys just can't afford to do it. So what happens is, I tell people who call me up, I say, I'm sorry, I'd really like to help you. You might have the greatest case in the world, but unless you're willing to pay me some money, you can't bring the case.

Each firm, I'm sure, handles this in different ways, but I don't know of any lawyer in Philadelphia who specializes in plaintiff-side employment discrimination cases who takes them on a contingent fee basis anymore. Everybody requires either a substantial retainer from people or they require people to pay a certain percentage, at least, of fees as they go along.

And the problem is that these cases are very expensive.

What happens is, generally the defendants in these cases are big companies, and generally they hire big firms such as the one that Mr. Dichter works at, Morgan, Lewis, and Bockius, and those firms are very adept at defending these cases. They'll staff them with more than one lawyer. They'll send out many discovery requests and have lots of depositions, and we end up doing the same kind of thing, and what would seem at the initial interview to be a fairly straight-forward case, inevitably turns into a very big mess with documents that take up numerous file drawers. Many people get deposed, experts have to be hired. Bottom line is that even the simplest-seeming discrimination case ends up, if you look at the attorneys full hourly rate, and the costs, costing a minimum, I would say, of $50,000 to get to trial. That's what the real cost of that litigation is.

And needless to say, discrimination victims can't afford that kind of money or even a third of that kind of money to pay up front. Even if they were to have been able to afford it had they still been working, most of the people who call up have just been fired. So obviously, they don't have the money even if they ever would have, and they also can't borrow the money.

So, I would say that of the people who call me for legal advice, far more than nine out of ten, I just have to say, gee, I'm awfully sorry, but I can't help you. And it's

a depressing thing to do, and I hate to do it, but I do do it, and the result of it is that I and the other specialists that I know in this area, end up representing a very small segment of the people out there who think they have discrimination cases, and those are the people who have the money to be able to afford to hire me. And usually who it is, is age discrimination victims who are white male managers who have lost their jobs. That's a lot of my clients because those are the people who can afford to pay me to go to court for them.

Or I do represent a fair number of women, but again it's women in the higher paid jobs and there are two reasons for that: one is, they are the people who have the money in the bank to be able to afford to pay me; and the other reason is those are the people who have larger stakes in their lawsuit as a whole. If a guy who is earning $200,000 a year gets fired from his job and he has a year's back pay at stake in his litigation, that's $200,000 of back pay at stake in the litigation. A third of that would mean something to me.

On the other hand, you take a woman who applied for a job at the McDonald's and didn't get it. The reason she didn't get it was because the guy that was hiring her said, you know, we have too many niggers here anyway honey, too bad, you can't have the job. It could be the most blatant

discrimination in the world. It doesn't matter. That job, even if she had gotten it, would only have paid her $12,000 a year or $8,000 a year - whatever McDonald's pays. A third of $8 or $12,000 a year is nothing. She can't even afford to pay the costs of hiring a court reporter to take the deposition, and I have to tell a person like that, gee, I'm sorry ma'am, the legal system just doesn't work for you. I'd like to represent you, but I can't. My own firm will go down the tubes, and in fact, that's what happened to most lawyers who used to take these kinds of cases. They closed up shop or they started representing the defendants because nobody can afford to do business unless they make their clients pay. So that's one major problem with the existing situation.

Now the Civil Rights Act of 1990, which is pending, would address those problems in a few ways. First of all, the Act would increase the compensation available directly to plaintiffs. It would not only reverse the Patterson decision that I mentioned before, which is the decision limiting Blacks rights to get compensatory and punitive damages under the old civil rights statutes, but the proposed Act would also give compensatory and punitive damages to people who now can't get them; that is, people who have other kinds of discrimination claims than race discrimination claims. And the reason that it's important

to provide those kinds of damages - compensatory and punitive damages - is that it ups the value of the case. Right now when a person comes to my office, the only thing that I can really look at is the value of their back pay claim or maybe their front pay claim which is the salary that they should have been getting either in the past or into the future. But I can't take into account the pain and suffering they've gone through, and I can't hope to obtain punitive damages on their behalf. If I could, that woman who wasn't hired at McDonald's might have a much better case.

If we could show, for example, that McDonald's was discriminating like crazy against Blacks all over the place and saying these awful things, maybe we could get punitive damages, and maybe her case would be worth $120,000 instead of $20,000 or a million dollars, who knows, and then maybe I could afford to take the case and help her out. But as it is, she can't bring that kind of a claim.

And also providing for compensatory and punitive damages would help people who have claims which are not easily put in terms of money; for example, people who are harassed on the job or people who are given a bad performance review. You can't easily translate those kinds of discrimination into back pay or front pay because their isn't any immediate salary loss from harassment or from

getting a bad performance review.

Under the current statute, though, you've got to really go for pay loss. So most people who come to me with a harassment type claim, unless I can bring it under a non-federal statute where I can get those kinds of damages, I just have to say, you know, sorry. Yeah, you might have been harassed, but the law isn't going to give you any money, so what's the point of my bringing a case for you.

The other major thing that the Act would do to help out on the money side is to improve the attorneys fees situation. Specifically, it would reverse several of the Supreme Court decisions that I had eluded to that had cut into attorneys fees.

For example, one thing it would do is reverse a decision which had said that plaintiffs could be forced to waive their attorneys fees in certain situations. What the Act would say is no, plaintiffs cannot be forced to waive their fees at least in a class action situation. And that's important because right now, under the existing Supreme Court law, a plaintiff's attorney can be put in a situation in a settlement context of being forced to give up his or her own fee in order to get relief for the client. The attorney, if put in that situation, really has to do it because, after all, there are ethical obligations to their client. But in the end, that doesn't serve the interests of

clients in general because if I, as an attorney, know that on down the line I won't be able to protect myself from this forced waiver, how will I be able to afford to represent anybody in the future. It just means my fee is always on the line.

Another important thing that the Act would do is permit plaintiffs to recover compensation for monies they have to spend on expert witnesses. A recent Supreme Court decision had said that you can't recover more than $20 a day for your expert witnesses, and the Supreme Court hasn't specifically applied that yet to the civil rights area, but a lot of other courts have taken the decision to that degree.

And what that means is if you, as a plaintiff, have to go out and hire an expert witness, which you often do - you need a statistical expert if you're bringing a statistical case, or you might need an expert on gender discrimination if you're trying to prove that there were a lot of sexist comments going on, and really, it boiled down to they didn't like you because you were a woman, you need an expert on gender discrimination or what have you - all those experts aren't going to testify for free.

Those experts cost thousands of dollars. And under the law as it currently exists in most jurisdictions, the plaintiff just has to cough up that money out of their own pocket, and they can never get it back from the defendant.

And what happens in real life is the lawyer has to front those thousands of dollars. And so that's just another reason why, when the person calls up and they say, do I have a claim, I have to say, well, you know, maybe you do but that doesn't mean I can take your case.

So, those are the most important ways in which the Civil Rights Act of 1990 would help on the money front. Certainly those measures won't guarantee plaintiff the full recovery on the merits or in terms of their attorneys fees and costs, because there are other problems that the Act doesn't solve, but they would help. Those measures would definitely help.

The second major reason I have to frequently discourage potential plaintiffs against bringing suit, is that even where discrimination has occurred, the Supreme Court has made it increasingly difficult for plaintiffs to win some of those cases, and you've heard a lot today about the Wards Cove decision. That's mainly what I'm referring to.

I do want to make one clarification. Wards Cove is not quite as bad as a lot of people have been making it sound today. Wards Cove only affects one sub-category of employment discrimination cases. It's what's called disparate impact cases which are the kind of case that you bring as a plaintiff if you're trying to show that a seemingly neutral test or requirement, for example, a height

requirement, or a particular paper and pencil test is given. If you're trying to show that that seemingly neutral test or requirement, in fact, has a disparate impact on Blacks, that's the kind of case that Wards Cove is affecting. It used to be under the old decision, the Griggs decision that you've also been hearing about today, that plaintiffs got kind of a leg up on fighting against those disparate impact cases, and Wards Cove has changed the rule quite substantially and hurts plaintiffs in that one category.

Specifically under the old decisions, once the plaintiff had showed that the test had a discriminatory impact, the burden of proof shifted to the defendant to show that although the test was discriminatory, it was a business necessity. And Wards Cove changed the rules by stating that plaintiffs, in fact, bear the burden of proof at all times, and that the employer only has to show that the test serves the business in a significant way rather than showing that it's essential, which sounds just like a word change, and maybe it doesn't matter that much, but in fact, those different words can have a very significant impact in your case because it's very easy for a judge to say that something serves the business interest. It would be harder for the judge to rule that it is essential to the business. Those are two quite different things.

Wards Cove also requires plaintiffs to pinpoint the

particular practice which has the discriminatory impact rather than pointing generally to a group of discriminatory selection processes. And what that means is, if an employer has let's say, a three stage selection process where first they have one supervisor interview you, and then they have a test given to you, and then they have a second supervisor do the final selection, it's not enough for you as a plaintiff to say, the bottom line of all these three processes going on is that no Blacks are getting in, and I can't tell you whether it's the first supervisor or the second supervisor or the test, but something in there is hurting Blacks.

The Supreme Court said no, that's not enough, plaintiff. You have to show us that one of those particular stages is the one that's hurting the Blacks, and that's a very very difficult thing to do, to get down to that level of specificity.

Plaintiff-side employment attorneys like me have somewhat different attitudes towards the Wards Cove decision. Some people think it's the biggest disaster ever to hit, and others say it really doesn't make that much difference, the Supreme Court has always issued decisions that made it hard for us to prove these kinds of cases, and Wards Cove is really not saying anything that new.

Myself, I think, I have the intermediate view. I think Wards Cove is certainly a bad decision. I don't think it's

the disaster of all times. I think the main impact Wards Cove will have is that it will mean that more cases are thrown out before they get to the jury at all. It will allow more judges to just throw the cases out because the judge says, looking at the evidence, I think, in the light most favorable to the plaintiff, it's still not enough to get beyond Wards Cove, and the judge will throw it out.

And, in fact, William Coleman, Board Chairman of the N.A.A.C.P. Legal Defense and Education Fund, recently testified that since the Wards Cove decision, more than 300 cases have been thrown out of the federal courts because the judges said that the Wards Cove standard were not met.

Now what the proposed Civil Rights Act of 1990 would do would be to reverse Wards Cove in a few key respects. First, it would provide that where the employer seeks to defend a discriminatory practice on the ground of business necessity, the employer has to show that the practice is essential to job performance. And actually, I just learned today the wording has changed slightly. Now it's not "essential", now it's slightly watered down from "essential", but it's still a lot better than what it was under Wards Cove.

The second thing the statute would do with regard to Wards Cove is to remove from plaintiff the burden imposed by Wards Cove of pinpointing the specific employer practice

which had a discriminatory impact so long as plaintiff could point to a group of practices which did have that impact.

And third, the Act would reverse Wards Cove by reinstating the shifting burden of proof in disparate impact cases. In other words, once plaintiff would demonstrate that the practice or test at issue had a discriminatory impact, under the new statute the employer would have to show that that practice is required by the business necessity.

In sum, looking at both the burden of proof front and the money front, I do think that the proposed Civil Rights Act of 1990 would substantially facilitate the ability of discrimination victims, both to bring into win lawsuits. And the Act would accomplish this by increasing the damages and attorneys fees and costs available, and by restoring an appropriate burden of proof.

And I haven't had a chance to discuss the issue today, another important thing the Act would do would be to extend the statute of limitations for bringing discrimination suits. Currently, the statute of limitations for bringing discrimination suits is extremely short, much shorter than it is for bringing, for example, a car accident claim or a breach of contract claim, or any other kind of claim. To bring a discrimination claim, you have to bring it either within 180 days or 300 days of the discriminatory act

depending on what you're in, and if you're suing the federal government, you only have 30 days. Those are very short statutes of limitations. For most legal kinds of claims you get at least two years to think about whether you want to bring a lawsuit.

And what the Act would do is give you a full two years to decide whether you want to bring a discrimination claim against a private employer, and it would give you 90 days to bring that kind of a claim against the federal government, and that's very important because people, even if they know they've been discriminated against, they don't necessarily know whether they want to bring a discrimination suit right away, and that's because they don't know if they're going to be able to get another job or do something else to make up for the monetary damages. And it is better to give people a little bit longer to think about whether they want to bring that lawsuit or not, rather than force them to make a quick decision.

And finally, I've been asked to go through the Act and see whether there are any compromises that could be reached, and other people have been reluctant to do that because they think that the Act, as proposed, is all necessary, and really, I agree that the Act as proposed is all necessary, but nonetheless, what I'm going to do is just go through quickly and not perhaps compromise, but I'll say prioritize

which of the sections of the Act I think are most important, and which I think could give on without perhaps losing too much. And, in the interest of time, I will just do this very quickly.

I'm just looking at the Act itself. Section I is basically just an introduction, and Section II is as well.

DR. WACHTER: Ms. Sternlight, could you hold on one moment just to make sure that the people have it.

(Pause.)

DR. WACHTER: Thank you.

MS. STERNLIGHT: Sure. Well, Section I is just the name of the Act, and I wouldn't give on that.

Section II is just the purposes of the statute and I wouldn't give on that either.

Section III contains some definitions. Some of Section III addresses the Wards Cove problem, and I would not give on the Wards Cove problem. I do think that it's important to stand strong on the Wards Cove position if possible to protect to plaintiffs rights in disparate impact cases.

Section IV is all devoted to Wards Cove, and I wouldn't give on that unless absolutely necessary.

Section V addresses another case which I haven't yet talked about - the Price Waterhouse case, and that's the case saying that if there's a dual motive case where plaintiff can show that she was discriminated against on the

basis of her sex - she was fired because she was a woman - but employer tries to say well, she would have been fired anyway because she had lousy performance, that's the Price Waterhouse issue.

I think that this Price Waterhouse language would be a great thing to get through, but that's something I would be willing to give on. I think we've been living with, essentially, what the Supreme Court did in Price Waterhouse for a while, at least here in the Third Circuit. And we've been able to win on those cases anyway; not all of them, certainly, but I don't think that the Price Waterhouse decision is such a bad decision from the plaintiff's perspective. That would be one of the issues I would be willing to give a little on.

Section VI addresses the reverse discrimination issue, the Martin v. Wilks decision, whether the white fire fighters can come in 20 years on down the road and try to attack some consent decree that was agreed upon 20 years previously. I think it's important to keep something like the language of Section VI in the statute.

I do think that the problem of whites or any other group coming in as interveners after the facts to attack consent and settlement decrees is a very problematic issue. If employers know that any group can come in infinitely into the future and bring another discrimination against them, a

reverse discrimination suit, it's going to be very hard to get these cases settled.

I'm not wedded to the particular language of Section VI. There might be a better way to address that problem, but I think, if at all possible, we should keep something in the statute to address that problem.

Section VII talks about statutes of limitations that changes the 180-day statute of limitation to a two-year statute of limitation in Section A-1. I think it will be a great thing to have a two-year statute of limitation, but we've been living with the 300 days for a while. It works okay. That's something that we could give on if necessary.

A-2, on the other hand, addresses the Lorance decision where the plaintiffs were told that it didn't matter that they never knew that the employers practice would impact them way-back-when. Nonetheless, they should have brought the lawsuit before they even knew about the effect of the practice. The statute would reverse that, and in fact, the Bush administration has agreed to reversing Lorance, too. So that's not something where we really need to compromise.

Section VIII is the section which provides for compensatory and punitive damages in these kinds of cases. Both of them would be great. I think compensatory damages are more important to get than punitive damages, and if we couldn't get either one, I'd be very unhappy, but I don't

think they're the most important part of this legislation because for one thing, you can often get those kinds of damages under state law, at least in Pennsylvania you can - at least compensatory damages.

Section IX addresses some of the various attorneys fees provisions that I addressed, and perhaps it's my self-interest coming through; it probably is. But I think that these are really essential to keep in the statute, and apart from the self-interest of being an attorney who would get some of these fees, if you can't get attorneys to accept these cases, you can't even get out of the box. You can't even get one step towards the courtroom.

I think it's more important to make sure that people can get attorneys almost then to even accept these burden of proof issues because you can work around burdens of proof. As long as you can get halfway towards the jury, you can start to present your case. You can do settlement negotiations. You can try to get some kind of money for your client. But if the client cannot get an attorney because an attorney knows they can't get any fees, then there will never be any cases that can be won. So I would say that I view the attorneys fees legislation as among the most important aspects of the act.

Finally, let's see, Section X, one part of it addresses the statute of limitations for the federal government

changing it from 30 to 90 days. I think that's a more important change than changing it in the private sector from 180 or 300 to two years, and that's simply because the 30-day limit for suits against the federal government is just so short that many people really don't know what hit them by the time their 30 days is already run. And I think it would be very important to change that to 90 days. I've had many people call me up who were federal government employees and I say, sorry, you're out of time, and they have no idea what I'm talking about. And that's just not right.

Also in Section X there is a provision that you would be able to get interest if you brought and won a lawsuit against the federal government. You can currently get interest if you sue a private employer. There really isn't any reason you shouldn't be able to get it against the federal government except that the Supreme Court says you can't, and I that would be an important provision to keep in the statute because it's really unjust that if you bring a lawsuit against the federal government you lose all that interest. Sometimes these cases go for, you know, 10 or 15 years, and there's no reason that you should just be losing money on your case as a result.

And finally, let's see, Section XI is sort of meaningless construction stuff, and I don't really have an opinion on it.

Section XII is the Patterson decision which the Bush administration has agreed, in essence - not to the specific language, but has agreed to reverse Patterson so we wouldn't have to compromise on that.

The remaining sections are all legalistic stuff regarding interpretation of the statute, severability, and I think if compromises are necessary, they could easily be worked out, and thank you all for your patience.

DR. WACHTER: Thank you, Ms. Sternlight.

We now turn to Mr. Robert Vance who's counsel of the United Minority Enterprise Associates.

MR. VANCE: Good afternoon. Just a little bit of background: United Minority Enterprise Associates is an organization of minority contractors here in the city of Philadelphia that encompasses actually MBE's, minority business enterprises, and WBE's, women-owned business enterprises, in the Philadelphia area.

I'd like to just echo some of the comments of Ms. Sternlight. One part of my practice is in the employment discrimination area, and I feel the same pressures with regard to accepting cases that she has discussed at length as a result of some of these recent cases.

With regard to her final comments concerning the Civil Rights Act of 1990, my position on compromise is a little different. And essentially, the only thing that I really

believe that could be compromised on is the statute of limitations changing from 180 days to two years. And the reason being, I believe, 1) compensatory and punitive damages in the federal statute is very important. Although you can, perhaps, get these types of damages under some state laws, I think for the most part it's important that that aspect of damages be included in the federal law. So for that reason I would strongly urge that if you compromise in anything else or if you're going to suggest any compromises, that you not compromise on allowing a plaintiff to recover both compensatory and punitive damages.

And I would certainly agree with her that the attorneys fees section of the law should not be compromised on at all.

The conduct of the private attorney general is one that I heard, I guess, ad nauseam, at law school. But it's really an important one because people look to you to vindicate their rights, particularly with regard to discrimination there is in employment. And to the extent that you're an attorney who is not able to accept a case because you have to tell them that they can only recover X, Y, and Z, it's going to cost you this amount of money for me to prosecute your action, their only alternative is the federal government. And I don't necessarily mean to bash the EEOC, but it's not the most effective agency out there. So ultimately, these people are left with no remedy because

their lawyers won't take the cases because there's no real fee at the end of the tunnel, and they are very expensive. So that's just my comments on the bill.

What I really would like to address is the Croson decision which has not been addressed, and I want to do this briefly, again, because it is getting late, and I want to give Mr. Dichter an opportunity to speak, but also, I hope that there are some questions that the members of the committees might have for us.

I would take issue with Dr. Stephenson's statement that Croson has not meant the end for state and local governments. My experience in the courtroom has been that Croson has been a very significant negative decision of the Supreme Court, specifically with regard to Philadelphia. In April, Judge Bechtel struck down the city of Philadelphia's set-aside legislation which included Blacks, Hispanics, Aleuts, handicapped, women, etc., etc.

Judge Bechtel struck down the Philadelphia law. These laws have been struck down all across the country. I know there was some effort on the part of the Commission to get a statement from the Minority Business Enterprise Legal Defense and Education Fund, in writing , as to the effects of at least Croson - maybe some other cases, on the civil rights bar, so to speak. But from having worked with them, I can certainly tell you that Croson has been an extremely

effective tool on the part of majority contracting associations to strike down the set-aside legislation. And Croson has made it extremely difficult for localities to defend programs that are already on the books that attempt to address discrimination in the contracting industry.

Croson established an extremely high standard for race conscious set-aside programs. It's our position - and the case in Philadelphia is on appeal. Our brief have not yet been submitted. They're due in the middle of June - that Croson doesn't particularly address questions relating to the standard of review for set-aside legislation that addresses women and business enterprises, that addresses handicap-owned businesses enterprises.

We had believed during the course of the litigation in Philadelphia prior to Judge Bechtel's order, that of all the set-aside legislation in the country, the Philadelphia legislation stood a good chance of withstanding the Croson test. That was because "the record that was developed" by city council, was relatively extensive in terms of testimony from political figures at the time, from affected contractors and some others with regard to the amount of city contracting opportunities that went to minority and women-owned businesses and evidence of that sort.

We had also hoped, based on a decision rendered by a court in Milwaukee, the Milwaukee Papers Association case,

which intimated that in the Croson decision where the Supreme Court has indicated that the record that the locality used to justify its set-aside program was restricted to the record before city council. That the Supreme Court didn't actually restrict the record to the record that was before the local legislative body.

In other words, as Dr. Stephenson correctly pointed out, Croson set out the outer limits of this type of litigation. It raised probably more questions than it answered, as is typical with the Supreme Court.

We were hoping that one of the principal pins that we could hang our hat on, so to speak, was that the record issue was never definitively addressed by the Supreme Court which meant that we were not limited to bringing before the court, evidence of discrimination in contracting at the time the legislation was adopted, but rather, anything that existed both prior to the adoption of the legislation and today, 1990.

Judge Bechtel, in his decision, restricted us to the record before city council. In our view, he ignored the specific testimony of individuals as to discriminations they experienced in the contracting industry and contracting opportunities with the city. And as a result of his ignoring of that particular evidence; affidavits that had been submitted by city council persons, affidavits submitted

by my clients, ruled that the statute was unconstitutional.

Since that time, there has been an effort on the part of the city government, the contracting community to try to come up with some alternative.

It is not easy meet the burden that Croson apparently imposes on us - at least given Judge Bechtel's ruling at this time. There have been efforts underway to craft an executive order from the mayor to attempt to remedy this problem. There have been discussions about race neutral programs that city council may consider in order to remedy the problem of contracting opportunities being provided to women and minority-owned businesses.

I say all this to say that Croson is an extremely, in our view, a mean-spirited decision for one particular reason - apart from the fact that it strikes down legislation that has been instrumental in helping a lot of minority-owned and women-owned businesses get off the ground and really compete in the private sector without the benefit of government contracts - and that is, that the Supreme Court questioned not only the percentage that the city council in Richmond had established for participation of minority businesses, which was 30 percent, but also the inclusion of the other minority groups, as Dr. Stephenson eluded to, within that goal.

And essentially what that does is it pits Blacks

against Hispanics and against Asian-Americans and against women and against handicapped people to try to justify a percentage that "I'm" entitled to as a minority-owned business and that "you're" not entitled to as a Hispanic-owned business or "you're" not entitled to as a women-owned business.

That's very mean-spirited, in our view, and unfortunately, Congress chose not to address Croson in the Civil Rights Act of 1990, though I do understand why. And Dr. Stephenson I think is correct, fundamentally, why they chose not to address it.

But he also was correct in stating that because of the court's discussion about Section V, there should be an effort on the part of not only the Civil Rights Commission, but those members of Congress who have championed the Civil Rights Act of 1990, to attempt, once the Civil Rights Act of 1990 is passed in whatever form it ultimately is passed, legislation that Dr. Stephenson suggests which is, that would require or empower the local governments to seek to remedy discrimination, utilizing the unique powers that are granted to Congress in Section V.

From the standpoint of my clients, Croson, which has operated to strike down the city legislation, is now being used to challenge legislation on the Philadelphia Center project which is a multi-million dollar construction project

here in Philadelphia. There's a separate action pending to try to strike down the state set-aside program.

So in the state of Pennsylvania, at the very least in the major city of Philadelphia - I hope no one is here from Pittsburgh who's going to take issue with that - but anyway, in Philadelphia where there are at least two programs that were in place that were extremely beneficial to minority-owned businesses and women-owned businesses, one of which has already been ruled unconstitutional, and the other of which is under attack. And I hate to make predictions, but Judge Bechtel wrote a 90-page opinion striking down the city ordinance. My reading of the Convention Center ordinance is that it is, although it has better language, in practice, it's virtually the same thing. So I believe that that program is in danger.

The city council is loathed to act, really, at this point. We're almost in an election year. We're going to be electing a mayor next year, and most of the council people who are actively behind this legislation may be candidates for mayor, so there's a political cost that we have to take into account.

Croson is not addressed in the pending legislation, but it needs to be addressed by Congress. It was an omission which, as I said, I do understand. But from my clients standpoint, employment discrimination is one thing, but they

are at the point where they have established businesses, they're trying to move those businesses forward which would result in the employment of minorities and women who traditionally are not employed by others in the contracting industry, and they do need the opportunity to contract with the government, be it the local or state government. And given the Croson case, the burdens that are imposed upon the localities to justify a new program, are extremely difficult to meet. And their interest right now is in getting legislation of that type back on the books as quickly as possible.

And I think that the Commission can play a role in compelling Congress, or try to persuade - I shouldn't use the word compel - persuading Congress to address Croson and not just address the employment discrimination cases.

I think I'll leave my comments at that. I just wanted to make sure that Croson was addressed because I know that the focus of the meeting has been the employment discrimination cases, but Croson in and of itself is very important to my clients and to the minority contracting community which would help remedy some of the employment discrimination that we find ourselves fighting everyday, because I think that most of you would agree that minority-owned businesses tend to hire minorities, women-owned businesses tend to hire women, etc.

DR. WACHTER: We thank you for your comments, Mr. Vance. We turn now --

DR. STEPHENSON: Excuse me. If I may excuse myself --

DR. WACHTER: Yes. You, I understand, have to leave and maybe before you leave, I can ask a quick question that I want to pose to two of you. Did I hear correctly that there is on the Croson decision, a point on which you do agree, Mr. Stephenson, with Mr. Vance on the necessity of a remedy through Congress?

DR. STEPHENSON: Yes, I would suggest that. In fact, just one correction, because if I said something that you said I said, I didn't think I said it. It's not that way in my paper. I did not say that Croson had not ended because certainly what you say has happened, has happened. But my point was that Croson should not end - I think I used the words "should not", not that it "had not", that the decision ought not to be construed to block these things.

DR. WACHTER: Thank you very much.

DR. WACHTER: We now turn to Mr. Dichter.

MR. DICHTER: My name is Mark Dichter. As previously noted, I am a partner in a large international law firm which has its roots and headquarters here in Philadelphia. I represent employers exclusively in the employment context in both counseling an litigation. I am

the immediate past chair of the ABA Labor Sections Committee on equal employment opportunity law, the management co-chair of that committee.

I'm not speaking here today on behalf of my law firm or the ABA or any of our clients, but simply expressing my own views on these issues.

You might say, initially, that I don't know of any responsible management attorney; that is, attorneys representing management in the employment context, who would favor a retreat from this country's commitment to ending or eliminating employment discrimination in the work place.

I think we've heard over the last year or so, and particularly again from the first panel you heard from today, is an amazing amount of misinformation about what the Supreme Court did and about what the proposed legislation is doing in response to that.

As Ms. Sternlight noted, many of the provisions which she talked about and was supportive of are not reversing any Supreme Court decisions whatsoever. The expanded remedy for Title VII have nothing to do with any Supreme Court decision of this past term. Other revisions she talked about are related to Supreme Court decisions, if at all, of prior terms. And I think we need to focus on that and understand exactly what we're talking about.

This legislation would significantly expand the present

law with respect to remedies and with respect to jury trials for employment discrimination. It would also go to perpetuate what is a high degree of irrationality in the employment laws as they now exist. You have one set of laws that applies to age discrimination. You have a separate set that applies to race discrimination. You have Title VII which applies to race and sex discrimination, national origin, and religion. And you may or may not have another set of laws dealing with handicap discrimination which may or may not have the same remedies as those. They have different procedures. They have different remedies. Some provide for jury trial. Some provide for non-jury trials.

Another common misimpression is that somehow Congress had so clearly established the remedies in the 1866 Civil Rights Act to apply to employment which the Supreme Court ignored the past term in its Patterson decision. In fact, the 1866 Civil Rights Act had never been interpreted to apply to private acts of employment discrimination until long after the Civil Rights Act of 1964 was passed. Obviously there wouldn't have been the impetus to pass that Civil Rights Act with its procedures for the EEOC if, in fact, there was existing legislation, or perceived to be, which covered private acts of employment discrimination.

I think that one of the problems with the proposed Civil Rights Act is it runs contrary to the concept of

encouraging a prompt, expeditious and inexpensive resolution of employment discrimination claims. You heard virtually no mention today whatsoever, except by Mr. Vance, of the Equal Employment Opportunity Commission; the agency set up by Congress in the Civil Rights Act of 1964 to deal with employment discrimination claims which is empowered to bring claims on behalf of individuals which has a policy now of litigating every case in which they find probable cause, and which charges not one penny for their services.

I think what this legislation will do will, in fact, clearly be a benefit to one particular group, and that group is the group that Ms. Sternlight and I belong to; that is, to the attorneys who litigate these employment discrimination claims. Every new plaintiff she decides to bring, there's going to be a defense attorney on the other side to defend that. And notwithstanding that, I don't think that's in the best interests of dealing with the problems in this country of opportunities for minorities and women and other entities in the work place. I think the focus needs to be on those kinds of job opportunities.

The concept of someone bringing a claim promptly under Title VII has its roots in the fact that these matters were related to getting someone's job back. You don't sit around and wait to years to decide whether or not you want your job back or you wanted that promotion two years ago. Yeah, you

may want to decide to wait two years to sue for damages in an automobile accident case, but we're talking about remedies which are injunctive relief.

That's the principle focus, were for job opportunities. And there was an agency set to deal with that, that provided for a prompt investigation, for conciliation, and for the agency bringing litigation. If that isn't working as well as it should, and I'm not the first one to suggest that it may not be, we ought to be addressing those kinds of problems.

Whereas the proposed legislation goes far beyond and its many cases, unrelated, to the Supreme Court's decisions of the past term deal with the expanded remedies under Title VII, compensatory punitive damages, jury trials, some of the statute of limitations provisions and some of the attorneys fees provisions. In fact, if you look at the 24 basic provisions of the proposed Civil Rights Act, 12 of them clearly, I think, and indisputably, go beyond any Supreme Court decision of the past term. And only really five of them, or perhaps four, are related to reversing recent Supreme Court decisions.

One of them has to do with the shifting burden of proof in the Wards Cove case; one of them has to do with the application of Section 1981, the race discrimination cases beyond hiring, the Patterson case; one has to do with

collateral attacks on consent decrees, Martin v. Wilks, which interestingly, by the way, is a case the employer lost in that case. The employer was the one trying to defend the consent decree in that case against subsequent challenge. And finally, another case dealing with attorneys fees for defending against attacks on consent decrees by interveners. Again, basically I think an anti-employer decision by the Supreme Court.

Also there is misleading information about the Wards Cove decision itself. One of the speakers in the earlier panel talked about the horrible discrimination by Wards Cove. It's sort of analogous to someone talking about the criminal activities or finding someone as a criminal or convict whose been found not guilty.

The Supreme Court dealt with the burdens of proof in the disparate impact of Wards Cove. But they also dealt with the prima facie issue; that is, whether the plaintiffs had even made out a prima facie case of showing disparity in the work place. The Supreme Court held they had not, and this legislation doesn't seek to overturn that. In fact, I think it's a recognition that the Supreme Court was simply reaffirming prior accepted standards in that regard.

So in the Wards Cove case, the finding of the Supreme Court not seeking to be reversed was that there was no prima facie case of discrimination against Wards Cove. What it

did deal with was some of the more technical aspects of burdens of proof in one fairly narrow, at least by the number of cases we see, area of cases, the disparate impact cases, the kinds of cases that Ms. Sternlight was talking about - the individual that comes to her who claims not to have been promoted or been fired or harassed on the job or disparate treatment cases. The burden of proof in those cases was not affected by any of the Supreme Court cases of the past term and has remained unaffected since originally established.

Another issue in the Wards Cove case deals with the question of whether or not the plaintiff has to attack a specific employment practice or can simply attack employment practices generally. Virtually every disparate impact case which has been litigated, going back to the original case of Griggs, the plaintiff attacked a single employment criteria. It was a college degree requirement in one case or a high school requirement in one case. It may have been a height requirement. It wasn't an attack on the overall employment practice. Pre-Wards Cove, the kind of cases we saw in the disparate impact area, were attacked - almost all of them on individual employment practices. That was not something new that Wards Cove dealt with.

Interesting to talk about the Hopkins v. Price Waterhouse, and most of us on the employment side thought

that was a plaintiff victory in the Supreme Court. And as the lower confirmed yesterday, it is not impossible for plaintiffs to win under the standard set forth by the Supreme Court in Hopkins v. Price Waterhouse since Ms. Hopkins prevailed in her case and remand in that case before the very same judge who had tried the case before.

I think that what these, and I have to be very brief given the time, analysis suggests is that what it needs to address in a more rational way, the employment discrimination laws in this country. And the kinds of patchwork approach taken by the legislation of the Civil Rights Act is not the right way to deal with those kinds of issues.

To suggest that this proposed legislation as it now exists is a result of compromise, I think is a somewhat amazing comment. No one here who would ask that question could point to any provision in the proposed legislation which presently is a compromise. It's clearly a wish list of things both to reverse Supreme Court decisions and accomplish new and expanded elements of discrimination law.

I think many of those may be justified. I think there are ways of dealing with those. I think there can be an intelligent, rational approach to dealing with employment discrimination in this country and remedying those aspects of it where there are problems. Attorneys fees area may be

a problem. The EEOC, if that's a problem, maybe things to be remedied. Perhaps even remedies in the harassment area are things that may need to be addressed. But to propose such a drastic legislation which goes far beyond any of the Supreme Court decisions of past terms is simply not warranted. Thank you.

DR. WACHTER: Thank you, Mr. Dichter. We will now take questions for our panelists.

MR. HEIMAN: Mr. Dichter, I hear you today suggesting that this legislation is poor in one reason or another, yet you are the chair, apparently, of an ABA committee that has apparently done nothing. I see no management proposal before Congress. I see no management proposals as to any of the problems that are being addressed here today. It's well and good to suggest that what is there is bad, but I don't see you doing anything about it.

MR. DICHTER: Well, in fact, let me first say that I'm the former chair of that committee as I thought I made clear. Secondly, we have been very active over the past years, and I think instrumental, in resisting attacks to dismantle the affirmative action program. We were very active, including management lawyers who were probably most instrumental in keeping in place the Executive Order 11246 against attacks by the Attorney General Meese and Brad Reynolds, the Assistant Attorney General for Civil Rights

over the eight years of the Reagan administration.

There have been extensive proposals exchanged with the staffs of the House and Senate committees to address many of these issues. There has been extensive proposals on many of these issues over the past year. Committees have been meeting for months and months on these issues. I get almost daily facts of the proposals to deal with these issues.

So to suggest that there have not been approaches to talk about this --

MR. HEIMAN: Where is the substitute bill or the proposed bill that management or your side would have?

MR. DICHTER: Well, I think the reason there is no proposed bill is the position of the proponents of this legislation have been that they are unwilling to talk of any compromise. There has been no willingness until this week of any proponent of this legislation to even say they're willing to talk of compromise. Until there is some willingness to talk about that, there isn't a basis to go forward. There may be some encouraging movement this week in that regard.

Prior today, just what you heard expressed this morning, we see no room for compromise on this legislation. If that's the attitude, there's no basis for negotiation.

MR. HEIMAN: You're suggesting that the majority of Congress has already made its decision?

MR. DICHTER: No. I'm suggesting that the proponents of this legislation are unwilling to talk of any compromises or have been unwilling to talk of any compromises with the exception of one which had to do with the hiring of drug users or people possessing drugs.

DR. WACHTER: Mr. Wolters?

Q (by Raymond Wolters, Delaware Advisory Committee): I have a few questions that pertain to just what's likely to happen in the next few weeks, and I guess I could put these to the panel as a group.

My understanding is that the Attorney General has recommended that the President veto the Civil Rights Act of 1990. If he does that, I gather the President has a substitute bill that he will bring forward to address some of these problems. Is that true?

MS. STERNLIGHT: There is already an administration bill, which as I understand it, has already been introduced, and an administration bill, rather than being 12 pages long is two pages long and addresses two of the 24 or whatever issues that are in the Democrats bill. The two issues that the administration bill addresses are 1) the Patterson decision. It would, again, broaden Blacks rights to bring civil rights claims under the old statute; and 2) it would reverse the Lorance decision which was the one that said you're claim can be time barred even if you

had no idea that you had ever been discriminated against. So those were in the original administration bill.

MR. DICHTER: And when you talk about the Supreme Court cases, most people talk about the five cases of the last term: one if Patterson which the administration bill proposes to directly reverse; a second is Lorance which again, the administration bill proposes to directly reverse. By the way, I'm not here to speak on behalf of the administration bill. I had nothing to do with drafting it. I'm not supportive of it. I have problems with it, but it certainly addresses those two Supreme Court cases directly.

The other three cases: Price Waterhouse I don't see as being a major issue. In fact, I think Ms. Sternlight seemed to suggest that that was not a major issue also. I think Martin v. Wilks, I know many employers who would be delighted to see Martin v. Wilks reversed. I think, in fact, that may be where we part company with the administration. Again, that was a case that employers lost. They would like the finality of consent decrees.

I think the Wards Cove case presents some very very difficult issues. It's not one you can simply deal with very simply as you can with perhaps Patterson or Lorance. So I think of the five Supreme Court cases, there is already, of the two which I think have been suggested as the greatest departure - or at least Patterson was, greatest

departure from prior law, in that respect, I think they've already been addressed.

I'm not convinced that's the right way to address it. I would rather put everything under Title VII and not have multiple remedies for the same kind of discrimination. And if we need to address the remedy area in the Title VII, we ought to address that. So I don't think reversal of Patterson is the right way to do it, but it's been addressed by the administration.

MS. STERNLIGHT: Just a point of clarification I wanted to make on what Mr. Dichter's been saying. He keeps talking about the Supreme Court decisions of last term, and it's true, there were five that are addressed in the Act. But just so people don't get confused, there are a number of other Supreme Court decisions, as Mr. Dichter recognized, from earlier Supreme Court terms which are also addressed in the Act, and it's not really significant to me which term they in. The Act addresses a bunch of other Supreme Court decisions, too. I just wanted people to be clear on that.

DR. WACHTER: Continue, Mr. Wolters.

Q (by Mr. Wolters): I still have a follow-up. Suppose these laws pass. Suppose that Bush vetoes it and Congress overrides the President's veto and the Civil Rights Act of 1990 becomes law. What then, does the Supreme Court do - the question I'm getting at is what is this business of

Congress overriding decisions of the Supreme Court? Is there any likelihood -- I know that the Supreme Court's decisions have revolved around the interpretation of statutes enacted by Congress. But I wonder if you think there is any likelihood that the Supreme Court would then say, the 14th Amendment, the equal protection clause, guarantees that no one shall be disadvantaged because of race, and that the Supreme Court will then simply reassert its decisions on the constitutional basis rather than on a statutory basis.

A (by Mr. Vance): The Supreme Court doesn't like to make constitutional decisions if they don't have to because those are harder to change down the line. If they're just interpreting a statute, that's fine because statutes come and go and Congress changes them. So to the extent that they can find a ground other than a constitution ground to make a decision on, they'll find it.

DR. WACHTER: Let me ask a question to Mr. Dichter, but it will also reflect on some things that Ms. Sternlight said, and perhaps I can have both responses starting with Mr. Dichter.

I must say that I became lost in where you disagreed with Ms. Sternlight on the interpretation of the Wards Cove case. My understanding of what you were saying is that the Supreme Court decision on the Wards Cove case was really

very narrow and didn't have the major impact that Ms. Sternlight was indicating it did have. Because of focus on disparate impact only?

MR. DICHTER: No. What I was saying was that the Wards Cove is only a disparate impact case. The kinds of cases we hear talked about most often is of the person who wasn't hired, who was fired, who was harassed on the job, are typically viewed as disparate treatment cases. The individuals who are coming to Ms. Sternlight, as she describes it, are disparate treatment cases.

The Wards Cove case has nothing to do with those kinds of cases. It does not deal with the burden of proof in those kinds of cases. It deals with disparate impact, which is a concept not in the statute, but created by the Supreme Court in the Griggs case which said you could prove discrimination even as in proof of any intent to discriminate. That you could prove discrimination by showing that there was a substantial disparity, a statistical disparity, and by showing that there was a practice which caused that practice, and then by showing that there was not a business necessity, job relatedness, and the question is, what is the standard there for that practice.

The original case had to do with a high school degree requirement for Duke Power Company which had the effect of

precluding a greater percentage of Blacks from job opportunities and the inability of Duke Power Company to justify that high school degree requirement for the job in question.

So it deals in those kinds of areas.

DR. WACHTER: Okay. That clarifies a bit, but then, do you agree or disagree that the Wards Cove, let's call it remedy, in the Civil Rights legislation 1990 proposed, is of use in dealing with employment discrimination? You began by saying we do need ways to deal with employment discrimination.

MR. DICHTER: It's hard to answer that very quickly because there were several elements to the Wards Cove decision. One has to do with, and they're very technical, so you'll have to forgive me for a moment.

One has to do with who has the burden of proving whether or not the particular employment practice is job related or not. That's an issue. I think it would be fair to say that prior to the Wards Cove decision, it was generally thought that once the plaintiff showed a substantial disparity, the employer had the burden of proving the job relatedness. The Supreme Court said no, the employer only has the burden of coming forward and explaining it. The plaintiff has the burden of showing the absence of job relatedness.

But I think that's fair to say was a shift from prior law.

DR. WACHTER: Do you agree with that shift, or do you think the Civil Rights proposed legislation would be useful?

MR. DICHTER: I think that is certainly an area for compromise depending how we come out on the other elements of that, because I think far more crucial in that has to do with exactly what the standard is thereafter. Is it essential or is it job related, or is it something in between? And prior to Wards Cove you could find an array of decisions starting with Griggs which used a lot of different words for that test. Is it enough to show that there is some rational relationship between the requirement and the job that it's likely to be a better predictor of performance? Or do you have to show it's essential for the job?

DR. WACHTER: Let's move on to third because there is some compromise, I think, between even you and Ms. Sternlight in that she also seems to think --

MR. DICHTER: Well, let me just say I'm not sure you could show it's essential to have a college degree to teach college, or a Ph.D. to teach college, and if you had to justify having those degrees on the essential basis, I think you would lose. And you would lose just the way Duke

Power Company lost by not being able to show you need a high school for people to be in unskilled jobs. So that's I think one of the critical issues there.

Third, I think, has to do with what the attack is on. Is the attack on a specific employment practice, or is it on the overall employment practice. This again is where we get to the whole issue of whether they are going to create quotas or not; again, a very complicated issue.

Up until Wards Cove, as I said, I think virtually every case there was not a problem. That wasn't an issue. There was an attack on a specific requirement, and that's what was litigated. If you're going to litigate the overall employment practice, then you are in a very difficult process of defense because the employer, then, has to then go through every step along the way and try and prove how every step of that relates to the job when the plaintiff hasn't identified what step of that process they are challenging. Was it the interview or was it the test or was it the second interview? The plaintiff ought to be able to identify what they're challenging in that process. So that's, I think, another area of the Wards Cove area which is a fault.

Another even less significant --

DR. WACHTER: A clarifying point on that.

MR. DICHTER: Sure.

DR. WACHTER: The Wards Cove decision requires that the particular discriminatory practice be identified, and you agree with that?

MR. DICHTER: Yes. Yes. And I think while that was unclear, at best, in the law before it, clearly Wards Cove on that issue was not reversing prior precedence. I think, at best, one could say that issue was unresolved. Although I must say, I think it was unresolved because it was rarely raised as an issue. That simply wasn't the issue in those kinds of cases.

An even more minor issue about, assuming you get through the first couple of phases of Wards Cove, who then has the burden of showing that there is another alternative which has accomplished the same objective with a lesser impact. And again, that was unclear of where that burden was before, and depending upon how you come out on the other issues, that might be something that one could define.

DR. WACHTER: Okay. I will ask for other questions if there are any. If there are none, then I do thank the panelists very much for their participation. It really has been a fruitful, informative session, and I ask that the members of both of our state advisory committees remain, and we will have a business meeting here, after.

(Whereupon, at 5:10 p.m., the hearing was concluded.)

REPORTER'S CERTIFICATE

DOCKET NO.:

CASE TITLE: Civil Rights Act of 1990

HEARING DATE: May 16, 1990

LOCATION: Philadelphia, Pennsylvania

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Commission on Civil Rights.

Date: 5/16/90

Official Reporter

Heritage Reporting Corporation

1220 L Street, N.W.

Washington, D.C. 20005

U. S. COMMISSION ON CIVIL RIGHTS

In the Matter of:)
)
CIVIL RIGHTS ACT OF 1990)

Wednesday,
May 16, 1990

I.L.G.W.U. Building
35 South Fourth Street
Conference Room
Philadelphia, Pennsylvania

BEFORE: DR. SUSAN M. WACHTER, Chairwoman
Pennsylvania Advisory Committee

HENRY A. HEIMAN, Esq., Chairman
Delaware Advisory Committee

U.S. COMMISSION ON CIVIL RIGHTS

In the Matter of:)
)
THE PENNSYLVANIA ADVISORY COMMITTEE,)
and)
THE DELAWARE ADVISORY COMMITTEE)

Wednesday,
May 16, 1990

I.L.G.W.U. Building
35 South Fourth Street
Conference Room
Philadelphia, Pennsylvania

BEFORE: HENRY A. HEIMAN, Esq., Chairman
Delaware Advisory Committe

DR. SUSAN M. WACHTER, Chairwoman
Pennsylvania Advisory Committee

Heritage Reporting Corporation
(202) 628-4888

NEW BUSINESS MEETING

5:10 p.m.

DR. WACHTER: Let's call the meeting to order. Quickly, two things. First of all, there is business for both our state advisory committees, and then there is a very small, short piece of business for our state advisory committee, and maybe we can do that first.

We need to accept, unfortunately, the resignations of two members. Mr. Stanley Lowe is unable, once again, to come to the meeting, and he has asked to resign from the state advisory committee given the fact that he cannot attend meetings. And secondly, Ms. LeGree Daniels, who, as you know, has attended meetings and was at our last meeting, has written a letter and has stated to Mr. Tino Calabia, that she will be moving on to U.S. Postal Commission, and because of that, would like to resign from this committee.

So, do we need to do this by motion, or? Well, then, I think we should accept these resignations with gratitude for the previous work of these two members.

Now let's move on to today. As you know, this will eventually be transcribed, and come out as a form report from both of our state advisory committees as has been done in the past extremely well under the supervision of Tino Calabia.

A question that has come up is, as in the past, to

expedite matters, whether we should ask, have a formal motion, in fact, for Mr. Calabia to put together a summary of what has happened today before we meet again, formally. The summary, then, could be done over the summer and be finished by the end of the summer so that we can, while this topic is still being debated, perhaps give the fruits of our afternoon discussions throw some light on to the national policy-making in this area. So I guess in that area we would need a motion that Mr. Calabia be asked to produce a summary report over the summer.

VOICE 1: I so move.

VOICE 2: Second.

DR. WACHTER: Do I need to restate that in any fashion? May I ask for a call of hands? Those in favor, please? Those opposed. It passes. Thank you very much.

There was a statement that I began this early afternoon with asking whether the sides that were represented here, and there's obviously a number of positions being represented here, whether there is any area of overlap - whether there is any area of compromise. And from the early discussion this afternoon, I certainly had a sense that there was practically no overlap. That there was a real sense of we want to hold fast.

But as the afternoon went on, it seemed to me that some of that was perhaps a statement of desire as opposed to

political reality. Even Mr. Ralph Smith in the early afternoon panel, stated originally that no compromise, but then went on to say that there was some technical language suggested by the Attorney General which he would be quite willing to live with. Then in a later panel - I was trying to pay attention to this - if I heard correctly, there seemed to be some overlap between Mr. Dichter and Ms. Sternlight in particular, acknowledging, first of all, that the Bush administration was already committed to some portions of the civil rights legislation; in particular, in the case of the Patterson and Lorance decisions, and in addition, in the case of the Price Waterhouse and the Wilks, that that was not a highest priority from the point of view of Ms. Sternlight.

Therefore, leaving the Ward Cove decision which I then questioned, pushed a bit, questioning Mr. Dichter on, and he seemed to agree. I think that one would need to get the language carefully, but he seemed to agree that that was a case where there was some room for compromise.

In addition to that, I heard which in talking to several of you I hear that some of you have heard as well, some consensus on yes, there does need to be new legislation, and in addition, there does need, generally, to be no retreat from attempts to prevent discrimination employment cases. I think we heard that from all of our

panelists.

I would like to spend a few moments on asking whether you heard what I heard in this and whether you also have interest in perhaps getting this sense of the meeting in some form, and Tino Calabia, of course, is very good at this, and would have to put something together for all of our eyes before it went forward, whether there's any interest in using the fruits of our labor, and I thank you all for putting in so many hours, as well as our panelists. Any interest in getting the fruits of our labors quickly in some statement to the current debate?

MR. MILGRAM: In connection with this, I agree about the urgency in getting something together as soon as possible, but also, when you get the transcript, instead of mailing out the entire transcript to each person, that if somebody could at least send out quickly, the transcript of each person's remarks directly to that person so it's brief enough not to be put aside for six weeks until you get a chance to look at a volume.

This might be one way to speed up getting corrections of what people thought they said.

DR. WACHTER: Thank you for that suggestion and for your affirmative to my initial question.

Are there others who wish to express affirmative or negative to the suggestion? Yes, Mark.

MR. STOLARIK: Yes. It is my opinion, and I hope that everybody here shares it, that we all would like to see a 1990 Civil Rights Act passed.

Now I would personally like to see Congress and the President work together to pass this Act. I was a little shocked to find out that they haven't and that this apparently is only the first shot in what's going to happen.

Perhaps we could pass a resolution saying that these two state committees would like to urge Congress and the President to work together to pass a new 1990 Civil Rights Act without telling them specifically what they should do.

DR. WACHTER: I think that's an excellent idea. I asked the question whether we can incorporate that along with comments that had been made earlier by myself and informally to me, and also by Morris Milgram to not simply say we encourage them to work together, but also to incorporate some of the information that we have received from today's meeting, such as, there is certainly by all parties that there be no retreat dealing with employment discrimination, and secondly, that there are some issues in which compromise is possible.

Yes, Mr. Wolters?

DR. WOLTERS: Well, I suspect that there is consensus that there should be no retreat from employment discrimination. I suspect that Attorney General Thornburg

would agree that there should be no retreat from employment discrimination. And I suspect that each of the nine justices of the Supreme Court would agree that there should be no retreat from fighting discrimination.

What we have here is a highly technical, complicated matter that has been heard in days of hearings before both the House and in days of hearings before the Senate. I haven't seen the volumes of testimony that were taken before both those bodies, but I'm sure they're being printed right now if they're not available at the moment. Those hearing were held a month or so ago.

We're told today by Mr. Dichter, apparently a lawyer of some prominence, that an amazing amount of misinformation was pervade by another person who spoke earlier who's also a person of some prominence, a professor at the University of Pennsylvania Law School.

I find this very interesting and very educational and am inclined, frankly, to call up tomorrow to the Senate and the House judiciary committees and ask that they send me the volumes of the hearings that were held before those respective committees. I would like to know more about it. I think it would be interesting to summarize the testimony that was presented here, but I for one don't really feel in a position now to say whether Mr. Dichter is right in characterizing Mr. Smith's testimony as an amazing amount of

misinformation. One of them may be right. Maybe they're both wrong.

DR. WACHTER: Well I certainly would hope we wouldn't do that. It would seem to me that that would not be, and I agree with you entirely on that.

MR. FISHER: Well at least in my own opinion, I think Mr. Dichter characterized some of the prior testimony as incorrect based on the fact that he was under the assumption that we were talking about addressing the most recent Supreme Court rulings. And in that sense, I would agree with him, but the young lady on the end pointed it out very clearly that this Act that is before us not only addresses whatever happened in the most recent term in the Supreme Court, but any other terms and in that sense, I don't think that the earlier testimony was incorrect.

DR. WACHTER: Well, I think that obviously he was disagreeing with some element. That would not be part of what would be agreed to, obviously. Ms. Wilson?

MS. WILSON: I didn't hear him just refer to Professor Smith or Dr. Smith either. He referred to a number of the panelists.

DR. WACHTER: We certainly cannot say that they disagree with everything. It would be hard to paraphrase. Mr. Heiman:

MR. HEIMAN: I, unfortunately, did not hear what

you heard. I did not hear openings of compromise. I heard some lawyers talking about some technical terms and arguing about whether it was disparate impact which is a treatment type of case so that maybe it didn't go as far, or something like that. Secondly, I don't think Mr. Dichter speaks for anyone other than himself, and I think he rather clearly said that.

DR. WACHTER: I think that's right.

MR. HEIMAN: To suggest that his testimony alone counters at least eight of the panelists who said there is no compromise, is to suggest that because he said something means that there is room for compromise, I think would be a mis-characterization of what I heard today.

What I heard today were a lot of people who are very angry, a lot of people who believe that what we are seeing is a retreat from what may have been a high water mark or at least as bench mark, and they're very concerned that the gains that have been made are now potentially lost, and I don't see them saying, well, I'll give up some of this. I heard him saying we don't want to give up anything. Now that's what I heard, and maybe I'm wrong.

DR. WACHTER: I did hear that as well, and I agree with you. I think that there was those statements. And I thank you for bringing that out because it's absolutely true, and I would believe that in any statement that we made

-- and there is another point that you made which I also have to agree with which is that all need people speak for themselves. Mr. Dichter speaks for himself.

And in comment to your comment, Mr. Wolters, clearly, whatever has occurred here is what has occurred here, and my only hope is that we've added to the record of information.

I think that if this is the sense of the meeting, of course Mr. Calabia would have to be very careful in phrasing something which would recognize that there was disagreement among the panelists. That while there was agreement there was disagreement, and there were strong feelings. And I agree with you on that. However, I certainly don't think that all eight, but one, said that there was no compromise. I think that's certainly not true. Mr. Calabia?

MR. CALABIA: Can I just mention, too, that the committees would not be making a judgment about what any or all of them said. The committees would be reporting on those areas where there seems to be some agreement or, for example, in the case of Ms. Sternlight, she at least was willing to compromise on A, B, and C, and D. The committees would be reporting on that, and where maybe C and D of Ms. Sternlight might be something that Mr. Dichter would agree to, from the transcript we can identify that, then we would say that those two agreed. To that extent, it's not a question of our taking a stand, one against the other, but

of reporting what they themselves have said where they would be willing to have a little give and take.

DR. WACHTER: Do I have a motion on this, and then we can vote?

VOICE: What's the motion on?

DR. WACHTER: Well, that's what I'm asking.

MR. STOLARIK: If I remember correctly, I'd like to move that these two committees recommend I guess to the commission, because it's us to the commission, right? That the commission urge the Congress and the President to work together to pass the 1990 Civil Rights Act.

DR. WACHTER: Let me just say it doesn't have to be unanimous. We can have votes against. We can have votes for. And then we'll will take a vote, and --

MR. STOLARIK: I'm not even saying compromise. I'm just saying work together.

DR. WACHTER: -- and we would all have a chance, obviously, to see what Mr. Calabia has put together. Are there more comments on this motion?

MR. FISHER: I have a question. In other words, would it be that this body is saying that we want them to work together irrespective of what the outcome of that bill is going to be?

DR. WACHTER: No. I didn't hear that.

MR. FISHER: I mean we have to look at what's not

said. My feeling is as one of the committee persons, I'm not saying to them work it out no matter what you come up with. I want to say we encourage you to work it out, but there has to be whatever else we want in there.

DR. WACHTER: What I heard everyone say is that there ought not to be any retreat from fighting discrimination.

MR. FISHER: Yeah, but it's even more than that, and I'll just take another half a minute and then I'll be quiet. The young lady raised what I think is a very very critical part of this bill; that many people do not have access, do not have access to the lawyers or whatever, and I think that that is one key element of that bill that we, if we all feel that same way, we ought to specify that this is something we want to make sure is not taken out.

DR. WACHTER: May I suggest, Mr. Fisher, that we vote on this and then vote on that as a second motion?

MR. FISHER: Fine.

DR. WACHTER: Mr. Heiman?

MR. HEIMAN: The problem I have with that motion is that I feel it does nothing. It take some of what we can do, which is to convey something to somebody, and make it nothing. If I were to suggest a motion, I would like the commission to know that there are people who feel strongly about the civil rights bill and feel strongly that something

must be done to rectify what they believe to be the problems that have been created. And if I were to pass a motion, that's what I would want to hear.

To merely suggest that the President and the Congress should get together is like saying I'm for apple pie and motherhood and I could not support that.

DR. WACHTER: Well, I didn't hear that as being the only part of the motion, but in any case, you also could offer that as a third motion. Is there a call for the question? Then let's go to the motion. All in favor say aye.

(Chorus of ayes.)

DR. WACHTER: All opposed?

(Chorus of noes.)

DR. WACHTER: Well then let's take a vote. How many people are in favor of the first motion that we, in fact, report some elements of compromise and asked Mr. Calabia to do this for us in writing, which we will all have a chance to see. How many people are in favor of doing that?

MR. CALABIA: And that would be based on what agreements seem to be evident from the transcript of what they said.

DR. WACHTER: All right. The first motion has the following elements to it, and we'd have to have it drafted,

obviously, but for no retreat. That they work together for no retreat and language such as that. And what elements of compromise we heard today?

MR. FISHER: When you say the "elements of compromise", you're talking about the ones that were related by the young lady here today?

MR. CALABIA: Any of the speakers who said that they would be willing to give on this.

DR. WACHTER: For example, Mr. Ralph Smith earlier said that there was some language that would be fine from the transcript.

MR. FISHER: The problem is compromising on language may end up meaning nothing. I think we need to be concerned about the substantive parts of this bill.

MR. CALABIA: Let me explain. We're not endorsing any of what was said. We're only reporting as quickly as we can what some of the people who have been involved in discussion feel are areas of compromise that might further --

DR. WACHTER: And let me say why I think this is useful. It is not that we are in support or against. That's not what we are doing. We are reporting on what happened here which to me confirms the usefulness of this process, and confirms usefulness of the Pennsylvania Advisory Committee and the Delaware Advisory Committee

having done this. And there is support for us doing it again because we can, in fact, add to what we've done to the debate.

MR. HEIMAN: Is the purpose of this motion merely to permit Tino to adopt a summary report to be able to be presented --

DR. WACHTER: No. That was already done.

MR. HEIMAN: Well then, what are we talking about now because I don't understand.

MR. CALABIA: What we're talking about, I think, trying to stay on top of a timely issue, apparently people are working on adjusting the language or other aspects of the 1990 Civil Rights Act by both sides of the issue getting together. You've seen in the articles attorneys are being assigned by the civil rights community, and attorneys are being assigned by The White House and the Attorney General to work together to try and advance the passage of some sort of civil rights act.

And to the same degree, we are trying to identify where these people, with their different views, have thought that perhaps some give and take could be allowed. And what we're trying to do is share what we heard from these people who have differing views on this, we're trying to communicate that to the commissioners in Washington.

The draft summary takes much longer.

DR. WACHTER: And the fact that I said we have precedence for this because in the last implement in the 1980 Fair Housing Act, our Pennsylvania State Advisory Committee asked him to do the same thing. What it is simply is to summarize very quickly some of the highlights of what we heard.

MS. MORRIS: May I have the floor, Madam Chairman?

DR. WACHTER: Yes.

MS. MORRIS: In as much as we have spent the time that we have spent in a worthwhile way, would it not be advantageous to caucus, or rather to appoint, several persons and caucus for at least two or three or five minutes and have those persons prepare a statement that we can act upon. I feel uncomfortable listening to several people suggest what type of statement should go forth from this particular group.

DR. WACHTER: I see that as a separate statement, if I am not wrong - correct me if I am, stating the position of this group. Rather what I hear in the motion before us is not the position of this group, but a summary that could be prepared very quickly, and that's a separate motion I think from yours.

MR. CALABIA: Not of what we believe. Not of what we feel, but of what was said.

MS. MORRIS: I understand all of that, but the

first motion that I heard coming from the gentleman stated that we recommend to the commission that the President and Congress work together. That's what I heard initially. Then I heard other folks add in pieces, and it's all of the pieces that I don't have clarity on. So maybe the firs motion ought to deal with agreeing to present something and get that out of the way. What we present, then, could be done in a caucus with the appointment of persons on this committee who have that kind of expertise to put that statement together and then come back to us, and have us to pass it.

MR. HEIMAN: Two things. You've got to remember that the summary that he's talking about in the first motion is this laborious thing that they put forward that goes through the mills of justice. What we're talking about now is a summary, same words, different meaning, which is the impressions on a quick down and dirty basis of what he heard today that he wants to get to the people soon in order to have an impact. So what we're doing effectively is, if I understand it correctly, is delegating to Tino our abilities to tell him that we trust his distillation on a quick basis to get it to somebody. That's what I understand the motion is about. Am I correct?

VOICE: I thought we wanted to send a message now.

DR. WACHTER: Then, I'm sorry. It is a separate

motion. Is there someone who would be willing to make that separate motion because it sounds like there are two different motions that we're talking about here.

MR. STOLARIK: I wanted to convey a sense of the meeting. In other words, what do we agree that we learned today that we want to pass on to the commission which they, then, can send on to the Congress and the President? Do we want to want to encourage Congress and the President now because this is being debated right now.

DR. WACHTER: Well, let me then ask, is there anyone who wishes to put forth a motion to distill so that it can get into the record? Now my understanding of the rules of order that, as a substitute motion, comes before.

Are we ready to vote on the substitute motion of the distillation? How many are in favor?

MR. HEIMAN: I move that we delegate to Tino Calabia the ability to distill the testimony that he heard today in order to present it to the Commission in the manner that he deems most expeditious, as quickly as possible to achieve the best result.

DR. WACHTER: Is there a second to that? Okay, we'll do it that way. All in favor?

MR. FISHER: Is this going to include any recommendations?

DR. WACHTER: No. All in favor, please hands up?

(A show of hands.)

DR. WACHTER: All opposed?

(A show of hands.)

DR. WACHTER: That passes. And one abstention, one against. All other in favor. Now is there a second motion?

MR. MILGRAM: I don't really think there's a need for anymore motions today. I think all we want is this distillation and present that and let it go at that. I don't think we have the time or the patience to do a real motion, nor do we even know enough about the whole problem. Congress is going to work it out regardless of any additional motions we do. All we have to get is the facts about what was said today, in general.

DR. WACHTER: Well, I thank you all, then. And I think next is a motion to adjourn. And I thank you very much.

(Whereupon, at 5:45 p.m., the meeting was concluded.)

REPORTER'S CERTIFICATE

DOCKET NO.:

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