RECENT DECISIONS OF THE SUPREME COURT AND THE PROPOSED CIVIL RIGHTS ACTS OF 1990 AND 1991

PENNSYLVANIA ADVISORY COMMITTEE

TO THE UNITED STATES

COMMISSION ON CIVIL RIGHTS

DELAWARE ADVISORY COMMITTEE

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This summary report of the Pennsylvania and Delaware Advisory Committees to the United States Commission on Civil Rights was prepared for the information and consideration of the Commission. Statements and viewpoints in the report should not be attributed to the Commission or to the Advisory Committees, but only to individual participants in the community forum where the information was gathered or to the other sources cited.

A SUMMARY REPORT **JULY 1991**

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THE UNITED STATES COMMISSION ON CIVIL RIGHTS

The United States Commission on Civil Rights, first created by the Civil Rights Act of 1957 and reestablished by the Civil Rights Commission Act of 1983, is an independent, bipartisan agency of the Federal Government. By the terms of the act, as amended, the Commission is charged with the following duties pertaining to discrimination or denials of equal protection based on race, color, religion, sex, age, handicap, or national origin, or in the administration of justice: the investigation of discriminatory denials of the right to vote; the study of legal developments with respect to discrimination or denials of equal protection; the appraisal of the laws and policies of the United States with respect to discrimination or denials of equal protection; the maintenance of a national clearinghouse for information respecting discrimination or denials of equal protection; and the investigation of patterns or practices of fraud or discrimination in the conduct of Federal elections. The Commission is also required to submit reports to the President and the Congress at such times as the Commission, the Congress, or the President shall deem desirable.

THE STATE ADVISORY COMMITTEES

An Advisory Committee to the United States Commission on Civil Rights has been established in each of the 50 States and the District of Columbia pursuant to section 105(c) of the Civil Rights Act of 1957 and section 6(c) of the Civil Rights Commission Act of 1983. The Advisory Committees are made up of responsible persons who serve without compensation. Their functions under their mandate from the Commission are to: advise the Commission of all relevant information concerning their respective States on matters within the jurisdiction of the Commission; advise the Commission on matters of mutual concern in the preparation of reports of the Commission to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public and private organizations, and public officials upon matters pertinent to inquiries conducted by the State Advisory Committee; initiate and forward advice and recommendations to the Commission upon matters in which the Commission shall request the assistance of the State Advisory Committee; and attend, as observers, any open hearing or conference which the Commission may hold within the State.

LETTER OF TRANSMITTAL

Pennsylvania & Delaware Advisory Committees
to the
U.S. Commission on Civil Rights

Members of the Commission

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For almost 2 years, the controversy over recent Supreme Court decisions affecting employment discrimination cases has generated keen public interest, as evident from the media's continuing coverage of developments but, most significantly, from the attention shown by Congress, the White House, national civil rights and women's organizations, and the business community. Last fall, after the Senate failed by one vote to override President Bush's veto of the proposed Civil Rights Act of 1990, the President reportedly told his top aides that he wanted a fresh proposal for 1991. Shortly thereafter, down Pennsylvania Avenue on Capitol Hill, the first bill entered into the congressional hopper was "H.R. 1," the Civil Rights Act of 1991, filed on January 4th of this year.

In the midst of accelerated negotiations and debate on anti-discrimination legislation for the 1990s, the Pennsylvania and Delaware Advisory Committees are transmitting this report on *Recent Decisions of the Supreme Court and the Proposed Civil Rights Acts of 1990 and 1991*. Based on a forum held by the two Committees in mid-May 1990, the report has been updated and clarified in footnote citations of more widely circulated documents, some of which appeared as recently as June 1991. The forum itself involved nine speakers including proponents and opponents of the bill that was then winding its way through Congress.

Among the nine were seven attorneys, three of them professors of law or government. Organizations that sent speakers included local affiliates of the ACLU and NAACP, Philadelphia's nonprofit Fellowship Commission, the Hispanic Bar Association, and United Minority Enterprise Associates. To ensure representation from both sides of the issue, staff had solicited suggestions from agencies and institutions in Delaware and Pennsylvania and from diverse Washington-based organizations. These included the Landmark Legal Foundation, the League of Women Voters, and the Minority Business Enterprise Legal Defense and Education Fund. Two local legislators known to hold

contrasting views were invited and appeared, but one declined to remain for his turn to speak.

The forum was opened by a law professor who had just completed a book-length study on the effects of law on social events. Some conclusions he reported were that: laws are relatively unable to change the course of social events; they follow social trends; and some social legislation may not only yield unintended effects but effects that have negative outcomes. A second law professor agreed that individuals may bear the stamp of the eras in which they came of age--including those who were children of the Reagan era who are in college today. But he also emphasized that the Congress and Supreme Court need to maintain high standards, upholding civil rights laws and programs offering faith in the future, especially to youths coming of age among the so-called "underclass."

Other attorneys described and analyzed the five 1989 Supreme Court decisions that prompted Congress to try to hammer out a law designed to restore antidiscrimination tools available to plaintiffs prior to 1989 and add provisions meant to improve damage awards, statutes of limitations, and the like. Most importantly, as was mentioned in the Commission meeting after the May 17, 1990, Rose Garden ceremony at which our Committees were represented, and as we wrote in our June 4, 1990, letter to Chairman Fletcher, serious attention was given to the possibility of working out compromises on the issues then at stalemate and still under debate this month.

At first, several speakers rejected the notion of seeking further compromises. However, a plaintiff-side attorney attempted to set in priority order those sections in the proposed 1990 Act on which she might compromise, but she did stand firm on the act's position addressing the *Wards Cove* decision. One employer-side attorney observed that more than cases from the Supreme Court's 1989 term are at issue and that the White House basically agrees with the Congress on reversing the 1989 *Patterson* and *Lorance* decisions. He also indicated that he might part company with the White House on *Martin* v. *Wilks*, but he characterized the remedies proposed to correct *Wards Cove* as "extremely difficult" and did not spell out any compromise he could envision there. A third attorney plus a professor of government agreed that, should a new Civil Rights Act become law, the Congress ought to address *Croson* and propose remedies that would better permit States and localities to implement set-aside programs for minority- and women-owned business enterprises.

As the negotiations move apace on this landmark legislation, we trust this report will prove useful in reminding the reader of the complex issues at stake, the need for the Congress and the White House to come to a meeting of minds in the next few weeks, and the importance of a 1991 Civil Rights Act to pave the way toward achieving equal opportunities *before* the 21st Century.

Susan M. Wachter, *Chairperson*
Pennsylvania Advisory Committee

Henry A. Heiman, *Chairman*
Delaware Advisory Committee

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Acknowledgements

The Pennsylvania and Delaware Advisory Committees wish to thank the staff of the Commission's Eastern Regional Office for its help in the preparation of this report. The forum and summary report were the principal assignment of Tino Calabia with support from Edna Y. Rogers and Michele D. Morgan. The project was carried out under the overall supervision of John I. Binkley, Director, Eastern Regional Office.

CONTENTS

> . . . [D]ifficulties in the workplace still exist for women and minorities. In addition, the accomplishments that have been made through decades of struggle were placed in jeopardy by the Supreme Court by a series of restrictive and damaging civil rights decisions in 1989.
>
> Jack Brooks, Chairman
> U.S. House Committee on the Judiciary
> January 3, 1991[1]

> Civil rights are also crucial to protecting equal opportunity. . . . We will continue our vigorous enforcement of existing statutes, and I will once again press the Congress to strengthen the laws against employment discrimination without resorting to the use of unfair preferences.
>
> President George Bush
> State of the Union Address
> January 29, 1991[2]

BACKGROUND

As happened in 1990,[3] the Congress and the White House have begun confronting one another this year with contrasting legislative proposals for 1991 intended to adjust the Federal Government's approach to litigating employment discrimination.[4] One difference this year is that, while bills lay in Congressional subcommittees, many large corporations represented by the Business Roundtable, began negotiating with major civil rights groups on issues that had led to the stalemate last year.[5] Though these unique efforts

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[1]Rep. Jack Brooks, Chairman, Committee on the Judiciary, U.S. House of Representatives, "News Release: Brooks Introduces Civil Rights Act of 1991 as H.R. 1," Jan. 3, 1991 (hereafter cited as "Brooks Introduces Civil Rights Act of 1991").

[2]George Bush, President, "Address Before a Joint Session of the Congress on the State of the Union," *Weekly Compilation of Presidential Documents*, Feb. 4, 1991, p. 93.

[3]Ruth Marcus, "Hill Coalition Aims to Counteract Court on Job Bias: Administration, in Reversal, Plans Alternative Legislation Addressing Civil Rights Issues," *Washington Post*, Feb. 8, 1990, p. A-10.

[4]President "Bush would veto . . . the Democratic version of civil rights legislation . . . .," according to Ann Devroy, "Veto May Remain Bush's Key Domestic Policy Tool," *Washington Post*, March 13, 1991, p. A-12 (hereafter cited as "Veto May Remain . . .").

[5]See, for example, Steven A. Holmes, "Rights and Business Groups Seek Pact on a Job Bias Bill," *New York Times*, March 16, 1991.

at working out a compromise were widely reported to have been eventually blocked by the White House at the urging of other sectors of the business community,[6] some elements of a compromise were adopted by the House majority for a revised bill.[7]

Adjustments are being sought because of changes wrought by recent U.S. Supreme Court decisions. Among the Court decisions at issue are *Patterson* v. *McLean Credit Union*, *Wards Cove Packing Co.* v. *Atonio*, *Martin* v. *Wilks*, *Lorance* v. *AT&T Technologies*, *Independent Federation of Flight Attendants* v. *Zipes*, *Price Waterhouse* v. *Hopkins* and, indirectly, *City of Richmond* v. *J.A. Croson Co.*[8]

One such decision reportedly prompted white males in many jurisdictions to sue, "contending that they were deprived of their rights as a result of affirmative action taken over the last two decades by local government . . . ."[9] Other decisions shifted the burden of proof or tended to foreclose the awarding of monetary damages.[10] To adjust for such developments, the Congress proposed and passed the Civil Rights Act of 1990 (S. 2104), which eventually was vetoed by the President,[11] a veto that the Senate failed by only one vote to override.[12]

With strong prospects for a continued debate on how best to formulate new civil rights law, the Pennsylvania and Delaware Advisory Committees to the U.S. Commission on Civil Rights are reporting on their joint May 16, 1990, forum held in Philadelphia and are updating the information received then by reference to more recently obtained materials. Hearing from nine invitees and also from Commissioner Russell G. Redenbaugh, the forum focused primarily on the aforementioned Supreme Court decisions and on the then-proposed "Civil Rights Act of 1990."

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[6]See, for example, Sharon LaFraniere, "Businesses Reject Talks on Rights Bill, Citing Bush Stance," *Washington Post*, May 3, 1991, p. 1.

[7]See, for example, Jeffrey H. Birnbaum and Timothy Noah, "Compromises to Be Proposed in Rights Bill," *Wall Street Journal*, May 16, 1991, p. A-3.

[8]These cases are discussed in: Alexis Moore, "Legislators Introduce Civil Rights Act of '90," *Philadelphia Inquirer*, Feb. 8, 1990, pp. 1-A and 12-A; Mary McElveen, "Risks for Firms in Civil-Rights Bill," *Nation's Business*, June 1990, pp. 28-31; five articles in a special edition of the *ILR Report*, New York State School of Industrial and Labor Relations, No. 2, Spring 1990, pp. 3-47; "The Supreme Court, 1988 Term: Civil Rights Law," *Harvard Law Review*, November 1989, pp. 320-61; and U.S. Commission on Civil Rights, *Report of the United States Commission on Civil Rights on the Civil Rights Act of 1990*, July 1990. For complete citations, see app. A.

[9]Robert Pear, "How '89 Ruling Spurs New Suits on Civil Rights," *New York Times*, Oct. 15, 1990, p. A-1 (hereafter cited as "How '89 Ruling Spurs New Suits. . . .").

[10]See "At the Heart of the Dispute," a sidebar appearing in Ann Devroy and Sharon La Franiere, "Bush Outlines Objections to Civil Rights Proposal," *Washington Post*, May 18, 1990, p. A-6 (hereafter cited as "Bush Outlines Objections. . . .")

[11]Ann Devroy, "Bush Vetoes Civil Rights Bill; Measure Said to Encourage Job Quotas; Women, Minorities Sharply Critical," *Washington Post*, Oct. 23, 1990, p. A-1, (hereafter cited as "Bush Vetoes Civil Rights Bill.")

[12]J. Jennings Moss, "Civil Rights Override 1 Short," *Washington Times*, Oct. 25, 1990, p A-1.

President Bush Informs Advisory Committees of His Opposition

The forum occurred only 2 days before all State Advisory Committee chairpersons or their representatives were invited by President Bush to join him and the eight commissioners in a Rose Garden ceremony at the White House to honor the newly reconstituted Commission. At the ceremony, the President expressed his views on the 1990 bill, stressing that "I want to sign a civil rights bill, . . . but I will not sign a quota bill." According to a *Washington Post* reporter covering the occasion, the President also "took issue with provisions that would allow victims of intentional discrimination on the basis of sex or religious affiliation to collect monetary damages" and "objected to provisions that would limit the filing of 'reverse discrimination' suits reopening cases in which courts ordered affirmative action plans."[13]

After the Rose Garden ceremony, the Pennsylvania and Delaware Advisory Committees, in a June 4, 1990, letter to Commission Chairman Arthur A. Fletcher, informed the Commission of areas of compromise perceived as possible by some of the forum speakers who included proponents and opponents of the 1990 bill (see appendix B.) On behalf of the Advisory Committees, Pennsylvania Advisory Committee Chairperson Susan M. Wachter wrote that the two Advisory Committees had asked whether any forum speaker could envision areas of compromise with his or her counterpart on the opposite side of the issue. At least three attorneys--two who are plaintiff-oriented and one who is employer-oriented--had assented to some forms of compromise that were alluded to in Dr. Wachter's letter and were reflected in excerpts from the transcript of the forum attached to her letter.

Commission Votes to Support Civil Rights Act of 1990

Some 2 weeks later, on June 21, 1990, the U.S. Commission on Civil Rights voted seven to one to endorse the 1990 bill.[14] The Commission urged "Congress to pass and the President to sign the proposed legislation with some modifications," pointing out that "more than 25 years after the enactment of the 1964 Civil Rights Act, employment discrimination . . . remains a serious national problem. . . . More, not less, needs to be done to provide redress to victims of employment discrimination and to reduce the amount of discrimination in employment."[15]

The Commission did express "serious concerns about a provision in section 4 of the proposed legislation which could lead to the use of illegal quotas by employers." It recommended that Congress ensure that the bill make clear that in the absence of a finding or order by a court of competent jurisdiction, section 4 would not promote employment quotas, "nor will the use of quotas

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[13]"Bush Outlines Objections. . . ."

[14]"U.S. Civil Rights Commission Endorses Pending Omnibus Bill," *Daily Labor Report*, Bureau of National Affairs, June 22, 1990.

[15]U.S. Commission on Civil Rights, "News Release: Civil Rights Commission Endorses Civil Rights Bill," June 28, 1990, pp. 1-2 (hereafter cited as "Commission Endorses Civil Rights Bill").

be condoned as a means of avoiding liability under this section."[16] Nonetheless, Commission Chairman Fletcher subsequently acknowledged that he had been "unable to convince President Bush that a proposed civil rights bill would not lead to racial hiring quotas."[17] Attempts at compromises had been made by Congressional legislators who included Senator Arlen Specter of Pennsylvania.[18] However, the President vetoed the bill, arguing that it "actually employs a maze of highly legalistic language to introduce the destructive force of quotas."[19]

1991 Bill Basically Unchanged; Compromise Talks Fail

This year, as announced by Representative Jack Brooks, chairman of the House Judiciary Committee, "the first bill introduced on the first day of the 102nd Congress" was the Civil Rights Act of 1991, more recently renamed the "Civil Rights and Women's Equity in Employment Act of 1991" (see appendix C). He explained that it "essentially embodies the language of the Civil Rights Act of 1990 as passed by the Judiciary Committee last year." At the same time, Representative Brooks

> noted that the previous bill specifically stated that it should not be construed to require the adoption of quotas on the basis of race, color, religion, sex, or national origin. The bill introduced today expands on this clear language by specifying that it shall not be construed to "require or *encourage*" the adoption of quotas.[20]

On March 13, 1991, White House Director of Communications Marlin Fitzwater reportedly indicated that the President would "veto the Democratic version of civil rights legislation. . . ." It was also said that the "White House has its own version of civil rights legislation" which was introduced by Senate Minority Leader Robert J. Dole on March 12, 1991.[21] (See appendix C.) As reported in the *Wall Street Journal*, however, some observers apparently found little difference between the Democratic version and the White House or Republican version.[22]

At any rate, less than a month later, it was reported that outside of both the White House and the Congress, "Executives of some of the country's biggest businesses have negotiated for months with civil rights leaders over a compro-

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[16]"Commission Endorses Civil Rights Bill," p. 1.

[17]"Rights Commission Head Fails to Persuade Bush to Sign Bill," *Philadelphia Inquirer*, June 25, 1990.

[18]Jack Torry, "Specter Seeks Compromise With Bush on Civil Rights Act," *Pittsburgh Post-Gazette*, Oct. 20, 1990.

[19]"Bush Vetoes Civil Rights Bill."

[20]"Brooks Introduces Civil Rights Act of 1991."

[21]"Veto May Remain . . . ," p. 12. See also, Sharon LaFraniere, "Job Anti-Discrimination Bill Proposed by the White House; Similar Offer Led to Bitter Fight With Hill Last Year," *Washington Post*, March 2, 1991, p. A-2.

[22]Timothy Noah, "Legal Scholars See Scant Difference Between the Competing Anti-Bias Bills," *Wall Street Journal*, Apr. 18, 1991, p. A-18.

mise rights bill . . . ."[23] But shortly afterwards, the public learned that "In the face of strong opposition from the White House and small businesses, an effort by major corporations and civil rights groups to draft a job discrimination bill collapsed today."[24]

Nevertheless, work continued on the bill in the House of Representatives, and this month, the House passed the bill, but by a vote indicating that the House may not be able to override a threatened Presidential veto.[25] The combined Pennsylvania and Delaware delegations in the House voted 13 in favor, 11 opposed.[26]

THE FORUM

Committee Representatives Invited to White House

Opening the forum, Chairperson Wachter noted that on the previous two days, May 14 and 15, 1990, the *Washington Post* published front page articles[27] on the proposed "Civil Rights Act of 1990" and a perceived narrowing in the different positions of the White House on one side and the Congress and many civil rights organizations on the other.[28] On the same day as the forum, representatives of labor, Hispanic, and women's organizations were meeting with the President at the White House to discuss the matter, Dr. Wachter added, and, on the morning after the forum, representatives of all Advisory Committees--including former Pennsylvania Advisory Committee Chairman Joseph Fisher and incumbent Delaware Advisory Committee Chairman Henry A. Heiman--would join Commissioner Redenbaugh, the other Commissioners, and staff at a Rose Garden ceremony with President Bush.

Consequently, the forum's review of the issue was occurring at the height

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[23]Gary Lee, "Behind Closed Doors, Civil Rights Compromise; Leaders, Business May Reach Deal on Bill," *Washington Post*, Apr. 10, 1991, p. A-16 (hereafter cited as "Behind Closed Doors, Civil Rights Compromise").

[24]Steven A. Holmes, "Business and Rights Groups Fail in Effort to Draft Bill on Job Bias," *New York Times*, Apr. 20, 1991, p. A-1.

[25]Tom Kenworthy, "House Approves Civil Rights Bill; 273-158 Vote Would Not Override Veto," *Washington Post*, June 6, 1991, p. A-1.

[26]"How House Members Voted on Rights Bill," *Washington Post*, June 6, 1991, p. A-14.

[27]Ann Devroy, "Bush Urged to Support Rights Act; Black Leaders Meet With President Today to Head Off Veto," *Washington Post*, May 14, 1990, p. A-1. Also, Ann Devroy, "White House Shifts on Civil Rights Act; Differences With Pending Legislation Described as 'Minimal,'" *Washington Post*, May 15, 1990, p. A-1.

[28]This statement is taken from the transcript of the Advisory Committees' May 16, 1990, forum in Philadelphia. Unless otherwise noted, all quotes and statements in this report are from the transcript, which is on file in the Commission's Eastern Regional Office in Washington, D.C. Statements and viewpoints in this report should not be attributed to the Commission or to the Committees, but only to the participants in the forum or to the other individuals or sources cited in the appropriate footnotes.

of discussions taking place in Washington, and "the fate of the Federal civil rights bill . . . seems dependent on compromises to be met in the near future," according to Dr. Wachter. Mr. Heiman then introduced five speakers and moderated the first panel discussion.

Laws Relatively Unable to Alter Course of Social Events

Dr. Larry D. Barnett, a professor of constitutional law at the Widener University Law School in Delaware, is an attorney who also earned a doctorate in the social sciences. He observed that in the past 10 years the social sciences generated a body of evidence that raises questions about the commonly held view of the law and the law's ability to accomplish its goals. The present literature suggests that "with regard to regulation, law is relatively unable to change the course of social events. . . . Its effects are . . . . short in duration or small in magnitude. There are some exceptions."

By way of illustration, Dr. Barnett alluded to several articles. Two examined the effect on the birth rate in the South after *Brown* v. *Board of Education*. The research suggested, he said, that after the Supreme Court decision was made there was "a temporary small drop in the birth rate. . . . We are not sure why, but this was one of the unexpected side effects of *Brown* v. *Board of Education*." Other studies have concluded that "OSHA regulations have not improved the safety of work sites. . . . One recent study . . . suggests that OSHA regulations have harmed, have damaged economic productivity in the United States."

Dr. Barnett also mentioned a 1981 study that concluded that a 1971 statute banning cigarette advertising on television and radio actually increased tobacco consumption because the ban eliminated antismoking advertisement as well and also may have led to a fall in the price of cigarettes. "More companies were able to enter the market because they did not have to make a heavy investment in advertising," causing the drop in price and a rise in consumption.

Touching upon the phenomenon of the so-called "white flight" from public schools, Dr. Barnett characterized it as a negative side effect also demonstrating that regulations involving social issues do not appear to have a large or durable effect. Instead, they may have negative side effects. He then suggested that the legal system proves more efficacious in social change when it helps individuals do what they need to do or want to do, as when the social security law allowed people to retire in larger numbers than they otherwise would have been able to. He added that there remains one other important role for the law to play.

> It is a suspicion of mine . . . that law is important for its symbolic value. Law is the cement that helps to hold our society together, and when we pass laws against sex . . . discrimination or whatever, it has a symbolic impact that is important to the fabric of our society.

1866 Law Allows Employee to Be Racially Harassed Once Hired

Doreena Wong, staff counsel to the American Civil Liberties Union of Pennsylvania, charged that the Supreme Court's 1989 decisions reversed

long-standing judicial precedents under two of the most important equal employment opportunity laws that Congress enacted. The Supreme Court thereby 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 antidiscrimination statutes," and also reduced the plaintiff's chances of prevailing "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."[29]

Even if the plaintiff can prove that an intent to discriminate has occurred, continued Ms. Wong, the plaintiff may still lose because the employer needs only establish that the "discriminatory motive was only one factor in its decision not to hire or promote or discharge the plaintiff." Lastly, she said, the Supreme Court ruled that there is no deadline for filing reverse discrimination suits, thus allowing for challenges to court-approved affirmative action plans that had been intended to remedy discrimination.

1866 Civil Rights Act Now Allows Racial Harassment After Hiring

On the other hand, through the Civil Rights Act of 1990, the Congress has recognized the reality of discrimination in the work force, according to Ms. Wong, and the bill would restore the scope and effectiveness of the Federal civil rights laws, remedying "the Supreme Court's narrow interpretation of those laws." For example, the Supreme Court's decision in *Patterson* v. *McLean Credit Union* adversely affected the "modern vitality" of the Civil Rights Act of 1866 in that the right to make and enforce contracts, as it is safeguarded in the 1866 law, "is meaningless if that right is constricted through judicial interpretation to exclude the enjoyment of a workplace free of racial harassment."

Ms. Wong briefly described how the plaintiff in *Patterson* had been harassed by her employer at McLean Credit Union, and then said that the Supreme Court, nonetheless, concluded that section 1981 of the 1866 Act "does not prohibit an employer from racially harassing its employees or otherwise prohibit racial discrimination that arises after an employee is hired." She noted, too, that a study by the NAACP Legal Defense and Education Fund, found that approximately one case per day was dismissed between June 15, 1989, and November 1, 1989, or more than 100 cases, after the *Patterson* decision came down.

Wards Cove and "Quotas" Argument

In *Wards Cove Packing Co.* v. *Atonio*, the Supreme Court overturned its own 18-year-old landmark decision in *Griggs* v. *Duke Power Co.*, stated Ms. Wong, for in *Wards Cove* the Court ruled that:

> an employer no longer bears the burden of demonstrating the business

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[29]See also "Statement of Doreena Wong, Weinberg staff counsel, American Civil Liberties Union of Pennsylvania," submitted for the May 16, 1990 forum record. This statement, which is on file in the Commission's Eastern Regional Office, supplements the official transcript of Ms. Wong's remarks made at the forum.

> necessity of certain practices that tend 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 1974 suit had alleged employment practices that "created a patently racially stratified work environment . . . that targeted non-whites for lower paying jobs, while applicants for better jobs were sought from a predominantly white labor force." Thus, the Supreme Court's *Wards Cove* ruling "undermined the existence of the disparate impact theory as a message for challenging employment discrimination, thereby effectively overruling its landmark decision in *Griggs*," according to Ms. Wong, who added that "case law does not support the *Wards Cove* decision that a business necessity would encourage employers to adopt quota system."

Lorance v. AT&T Technologies and Price Waterhouse v. Hopkins

Ms. Wong then mentioned the Supreme Court's ruling in *Lorance* v. *AT&T Technologies* which requires employees to anticipate future adverse applications of a seniority system long before it might have an impact on its potential victims. She noted that the Civil Rights Act of 1990 would reverse *Lorance* in that it would reestablish the statute of limitations period for challenges to employment practices having adverse consequences; if passed, the act would indicate that the statute of limitations period would generally "not commence until the effects of the injury are felt by the charging party."

Regarding the Supreme Court's ruling in *Price Waterhouse* v. *Hopkins*, she said that the case involved discrimination on the basis of sex. The plaintiff was not named a Price Waterhouse partner after incumbent partners criticized her for being "macho" and suggested that she should enroll in charm school. Even though she established in court that sexism had tainted the partners' consideration of her nomination, at the Supreme Court level:

> a plurality of four judges adopted a new rule of causation in analyzing so-called "mixed motive" cases: once a plaintiff shows that discrimination is a motivating factor in an adverse employment decision, the employer can nonetheless escape liability by proving with a preponderance of evidence that the same decisions would have been made notwithstanding the discriminatory factor. The effect of this ruling is to insulate previously unlawful action and to foster the implication that Federal laws may, under some circumstances, tolerate intentional discrimination.

The proposed act, according to Ms. Wong, makes clear that actions for which discrimination is a motivating factor are violations of Title VII; it "sends a necessary message to the courts that a 'little bit' of discrimination is still wrong." Mr. Heiman added that on the morning of the forum the media reported that the Federal District Court in Washington, D.C. had just ruled

that the plaintiff must be hired as a partner and receive $350,000 in back wages.[30]

Martin v. Wilks and Fears of Reverse Discrimination Suits

The last Supreme Court ruling that the Civil Rights Act of 1990 addressed, said Ms. Wong, is *Martin* v. *Wilks*. As part of a lower court settlement, the city of Birmingham, Alabama, had agreed to remedy racial discrimination in its fire department by implementing a specific affirmative action plan. However, the Supreme Court has now permitted white male firefighters to challenge that plan even though these firefighters had previously benefitted from the earlier discrimination and subsequently failed to intervene in the case in a timely manner.

Under the Supreme Court's ruling, employers appear less likely to agree to antidiscrimination hiring or promotion plans to settle suits for fear that they will be "endlessly challenged in reverse discrimination suits years after the settlement is implemented," Ms. Wong stated. For such reasons, the proposed 1990 Act would facilitate the prompt, orderly resolution of challenges to court judgments or orders and would limit collateral attacks on such orders, which would be considered final and which could only be challenged under limited circumstances.

Court Went Beyond Reagan-Meese Goals

Ralph R. Smith, a University of Pennsylvania Law School faculty member, appeared as vice president of the nonprofit Fellowship Commission which he described as one of the country's oldest metropolitan human relations agencies. He brought greetings from Dr. Marjorie Duggan, the Fellowship Commission's executive director who was in the audience, and Fellowship Commission President Willard Rouse. Mr. Smith then stated that "the Nation's highest tribunal appears to have embarked on a search and destroy mission with respect to civil rights . . . . 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."[31]

In three decisions, *Wygant* v. *Jackson Board of Education*, *Memphis* v. *Stotts*, and *City of Richmond* v. *J.A. Croson Co.*, the Supreme Court "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," according to Mr. Smith. Through the cumulative effects of the series of decisions outlined by Ms. Wong, the Supreme Court went "beyond even what the Reagan-Meese administration wished," he asserted, prompting the Congress to respond with the

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[30]Albert B. Crenshaw, "Court: Firm Must Offer Partnership to Woman," *Philadelphia Inquirer*, May 17, 1990.

[31]See also, Linda Greenhouse, "The Court's Shift to the Right," *New York Times*, June 7, 1989, p. A-1, and "Conservatively Speaking, It's an Activist Supreme Court," *New York Times*, May 26, 1991, sec. 4, p. 1.

Civil Rights Act of 1990.[32]

U.S. Attorney General's Critique and Suggested Compromises

Mr. Smith characterized Congress' response as a "tempered effort to restore equilibrium to . . . equal employment opportunity law," and viewed Attorney General Dick Thornburgh's letter of early April 1990, threatening a veto, as incredible. The letter raised questions about every substantive provision of the [Civil Rights Act of 1990], 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 implementing litigated consent judgments or orders;
- Section VII dealing with the statute of limitations;
- Section VIII which provides damages in cases of intentional discrimination,
- 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.

Mr. Smith then addressed the Advisory Committee's request for suggestions about possible compromises between the congressional bill and the administration's objections. He said that the 1990 bill had gained broad support in both houses of Congress and thus already reflected compromise. Further compromise would be tantamount to acceding to the Supreme Court and leaving "civil rights plaintiffs at the mercy of employers," and he urged the Advisory Committee and the Commissioners, when they visit the White House after the forum, to "say to the President . . . that now is the time for him to put his action where his rhetoric has been . . . [thereby] sending a message to the Supreme Court that there is a consensus in the land and that the consensus will not be overturned."[33]

Implementing the Reagan Revolution

Philadelphia Council member-at-large Angel L. Ortiz, a representative of the Hispanic Bar Association, voiced "full concurrence" with Mr. Smith's statement that the 1990 bill was already a product of compromise, adding that five members of the Supreme Court have in effect been implementing "the Reagan

[32]See also Reginald Stuart, "New Civil Rights Bill Aims to Restore Bias Protections," *Philadelphia Daily News*, Feb. 8, 1990, p. 8.

[33]See also "Bush: Do the Rights Thing," *Pittsburgh Post-Gazette*, May 19, 1990, editorial page.

revolution."[34] However, even prior to the recent changes in the Court's interpretation of civil rights laws, the affirmative action policies in Philadelphia had not proven successful in remedying wrongs or "the lack of presence of the Latino community within city government. In the set-aside [contract program of the city] you find more or less the same picture."

Viewing the reversal of the Supreme Court's 1989 decisions on employment discrimination cases as the issue of the 1990s, Mr. Ortiz said that resolving the issue would determine "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. . . ." He mentioned that black students at Temple University were recently involved in a physical confrontation with white students, which was not shocking to him; what did shock him was that out of every ten black students there, only two graduate. He observed that affirmative action programs at law schools and medical schools across the U.S. once provided entry to minority students. Now, if one were to look at Columbia University Law School, his alma mater, one would see fewer Puerto Ricans there than when he attended the Law School 15 or 16 years ago. "Doors that were opened by a process of struggle are now being closed by a legal process and the imprimatur of the Supreme Court."

Blacks in Need of More Gains Rather Than Less

Gladys Reese, president of the North Philadelphia branch of the NAACP, said that hers is one of five branches serving Philadelphia. Those branches had already sent a letter to President Bush emphasizing the importance of the Civil Rights Act of 1990. Blacks had made few gains before, and are in need of more gains rather than less, as happens now, Ms. Reese continued.

Temple University, mentioned by council member Ortiz, lies in North Philadelphia, and Ms. Reese discussed the confrontation with the campus branch of the NAACP and with some of the white students. In her opinion, "as it came out, it was not so much that there was just black-white tension, it was an overall picture of just what direction we are headed in today." She explained that "we have a terrible time in the black community competing in the job market . . . . And when they talk about reversing the burden of proof that really struck a nerve." She agreed with the two previous speakers that "there may be compromise in many things, but in this instance there is no further compromise."

Reagan Heritage; Both Sides Sue Employers

During the Panel I discussion period, Advisory Committee member Morris Milgram asked how one can account for the change in direction taken by the

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[34]See also Phyllis A. Wallace, professor emerita, Sloan School of Management, Massachusetts Institute of Technology, "Affirmative Action From a Labor Market Perspective," *ILR Report*, New York State School of Industrial and Labor Relations, No. 2, Spring 1990, p. 42. Prof. Wallace writes that "The assault on the Federal civil rights agencies by the Reagan administration was unrelenting, and the Department of Justice reversed some of its earlier positions before the Federal courts."

Supreme Court. Ms. Wong responded that former President Reagan appointed well over half of the judges now on the Federal bench and replaced three on the Supreme Court so that there is "a solid conservative majority, at least five" presently on the Supreme Court and "a solid liberal wing of about three votes, and then there's one or two that swing in-between."

Mr. Smith added that in America there is a sense that some of the problems have been solved. For example, he noted that Philadelphia council member Thacher Longstreth, who was also invited to address the Advisory Committees, reportedly stated several weeks earlier that "We now are playing on a level playing field, and, therefore, there was no need for minority set-asides." Raised to the national level, such a belief leads some Supreme Court justices to adopt:

> a false sense as to what civil rights is about and, given the ideological orientation that they bring to the task, they're given far more reign and a far broader area within which to work than the Court has assumed in the past. . . . What you find [then is] a group of decisions which not only are ideologically suspect but which make no sense even from the standpoint of employers.

Employers had grown accustomed to one standard under which they developed elaborate mechanisms to essentially transform the way employees are hired and promoted, according to Mr. Smith. He believed that "the last thing much of corporate America wants right now is to have to go back through [this process] and be sued all over again by everybody, and that is essentially what the Court has done." In effect, employers have been told that whatever they do, the employers may be sued by the minority employees who believe that they have been unfairly treated. Then, even if the employers settle and establish an equal opportunity plan, they may be sued by any white employees who object to that plan--and be sued by them years afterwards.[35] Thus, said Mr. Smith, apart from the ideological merits of the controversy, the Supreme Court "has left the realm of reality" and is "now basically operating in a sphere that lacks coherence, either intellectual coherence or practical coherence in terms of implementing civil rights law, especially in the equal employment area."

Look Not at Individuals but Large-Scale Social Change

Mr. Heiman asked Dr. Barnett whether the Supreme Court is leading public opinion or following it into a new era. Dr. Barnett referred to a recent study that examined perhaps 18 or 20 Supreme Court decisions; the study found "that in almost every case, the Supreme Court follows public opinion." He added his belief that it "is unfortunate to blame the Supreme Court for a particular problem or a particular precedent, or particular justices on the Court."

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[35]The *New York Times* subsequently reported that "Lawyers for whites in many of the cases say they would not have sued without the June 1989 Supreme Court [*Martin* v. *Wilks*] decision. . . ." See "How '89 Ruling Spurs New Suits . . . .," p. A-1.

He asserted that law follows social trends, and that the 1960s and 1970s constituted a period of rapid social change. Just as his parents were captives of the depression era and World War II, he was "a captive of the era in which we got into the war in Vietnam," and the 1960s and 1970s which saw such rapid changes from the earlier period. Believing that the rapidity of change cannot be long sustained, Dr. Barnett noted that "The President of the United States is elected. He reflects the popular will. He appoints the judges. Legislators, members of Congress, members of State legislatures are elected, and they reflect social needs." What has been occurring more recently represents "a drift away from the situation that prevailed in the 1960s and the 1970s," continued Dr. Barnett, who further stated that "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. . . ."

Dr. Wachter pointed out that, if the direction adopted by the majority of Supreme Court justices is to be viewed as reflecting public opinion, does not the congressional majority supporting the proposed 1990 Act also reflect public opinion?[36] Dr. Barnett replied that it might not reflect public opinion, but, in either case, he stated that he was not familiar with any public opinion polls on the bill. Mr. Fisher commented that he believes that the Supreme Court does reflect public opinion and also that there is a growing opinion among many people that blacks and other minorities have gotten too much and are being favored at the expense of nonminorities. He further stated that the same perception is being translated into politics, resulting in the election of candidates and the appointment of Supreme Court justices who share that perception.

U.S. Moving Backwards, Supreme Court Following

Commissioner Redenbaugh observed that "I would be much more optimistic about the future of civil rights . . . 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. . . . [T]he Court may in fact be lagging, not leading." Alarmed by increased racism, violence and bigotry throughout the U.S., and tensions on college campuses, he said that he feared for the country if the social progress in civil rights over the last 25 years is not maintained and if the developments leading to the growth of the underclass are not halted. Economic opportunity, jobs, and promotions for the groups left behind in the prosperity of the 1980s must be the highest priority for the Commission and others involved in the struggle for civil rights.[37]

Dr. Wachter asked the panelists to what extent they believe that Supreme

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[36]The *Pittsburgh Post-Gazette* subsequently reported that the U.S. House of Representatives approved the proposed 1990 Act by a vote of 272-154, after the Senate had approved it 65-34, but also that "sponsors fell short of the two-thirds majority in each house to override a presidential veto." Jack Torry, "Civil Rights Bill Wins Big Majority," *Pittsburgh Post-Gazette*, Aug. 4, 1990.

[37]See also Murray Dubin, "U.S. Moving Backward, Says Rights Panelist," *Philadelphia Inquirer*, May 18, 1990, p. .

Court decisions and the Civil Rights Act of 1990 would affect the social climate of the U.S. and have a bearing on the growing underclass mentioned by Commissioner Redenbaugh. Ms. Wong acknowledged that it is difficult to evaluate how effective any legislation is; nonetheless, whatever decisions are arrived at by the Supreme Court or whatever legislation is passed by Congress, a tone for the rest of the country is set. If the tone suggests "intolerance for discrimination, then it would encourage more equal opportunities for people." Regarding the Civil Rights Act of 1990, "to combat the negative effects of the Supreme Court decisions, we have to propose and we have to enact legislation that will tell the public and tell the Supreme Court this is not the direction we want to go."

Also responding to Dr. Wachter's question, Dr. Barnett said that the 1990 Act may or may not have a positive effect on the social climate of the U.S.; "we just don't know how law behaves." But, with regard to the existence of an underclass, he doubted that regulations would have much of a beneficial effect. Government would proceed more effectively if it provided financial assistance to individuals that would enable them to accomplish their goals. As council member Ortiz mentioned, the graduation rates of blacks have declined, said Dr. Barnett, and "there is the suspicion that is because there is insufficient financial assistance available to blacks to cover the cost of higher education." A law meeting that need might prove very effective, Dr. Barnett speculated.

Mr. Smith viewed the situation differently, saying that "I am 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. . . . Paralysis in the area of public policies is an unacceptable option, and so we have to do something." He believed that the Supreme Court decisions and the proposed congressional act can affect the social climate of the U.S. and the life chances of the underclass.

Convincing College Youth to Have Faith in Future

As to the perceptions and behavior of individuals coming of age in different eras, Mr. Smith said that those who came of age in the Reagan decade differ in substantial respects from those who did so during the 1940s and the post-World War II era, the 1950s and the decade of *Brown* v. *Board of Education*, and the 1960s and the civil rights struggle and the movement to end the Vietnam war and pollution in the environment. "Colleges and universities are populated by the [children] of the Reagan decade, . . . students who came of age when people were attacking civil rights, not promoting civil rights." He observed that a President of the U.S. has an impact on the world, the Nation, and particularly on young people. At the same time, he stressed that issues of self-esteem are important as well and that in order to have a future one may need to have faith in the future. However, it is presently

> exceedingly difficult for us to say to young people in North Philadelphia, West Philadelphia, Northeast Philadelphia, and anyplace in this city that one has to work hard and . . . 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 those are the hallmarks of the emergent underclass.

Delaware Advisory Committee member Emily G. Morris observed that those "on the frontline of civil rights are trying to do what we can for the young people, trying to instill in them a sense of hope, and we find that we are failing." She added that the young have already begun to lose hope, and that the outcome may be different in the 1990s from what it was in the '60s and '70s. She pointed out that many young people are now armed and that "it appears that there's going to be some civil unrest in this country."[38]

Mr. Smith went on to say that he still believed that we do know how to answer the question posed by Dr. Wachter, but it will take imposing high standards for action upon the Supreme Court and the Congress of the U.S. With regard to the proposed 1990 Civil Rights Act and hammering out compromises acceptable to both the White House and the Congress, Mr. Heiman noted that "politics is the art of the possible." As moderator, he asked whether the panelists could identify compromises that might render the legislation acceptable to President Bush and the legislators who wrote the bill.

Mr. Smith replied that there are passages in the bill wherein "one could substitute the language of the administration for the language of the bill without doing grievous injury to the bill," for example, areas in the bill dealing with *Patterson* and *Lorance* "where the language submitted by the administration is substantially similar to the language submitted in Senate Bill 2104." Thus, technical adjustments could be made, he said, such as a substitution of the President's language for the language in the proposed bill. However, in view of the Attorney General's public position on the substantive provisions of the current bill, there appeared to be no room for compromise, according to Mr. Smith.

"Endangered Species"--Lawyers for the Plaintiffs

. Jean R. Sternlight, a partner in the law firm of Samuel and Ballard, described herself as a "member of an endangered species, . . . a plaintiff-side employment discrimination lawyer."[39] She explained that she receives daily calls from people who believe that they have been victims of discrimination through harassment, failure to be promoted, receipt of a negative performance review, or termination. Whether the alleged discrimination is on the basis of

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[38]The *Delaware State News* recently reported that the superintendent of the Delaware State Police anticipated that the police "may face 'a long, hot summer' and possible civil unrest." State police colonel Clifford M. Graviet said "'the time could be right' for civil unrest in the State, citing circumstances" on the national level, the recession, and lack of action by the president and the U.S. Congress to pass a civil rights bill. Thomas Peele, "Unrest May Be Coming, Says State's Top Lawman," *Delaware State News*, Apr. 12, 1991, p. 1.

[39]See also, Sharon Walsh, "The Vanishing Job-Bias Lawyers; Attorneys, Law Firms Say They Can't Afford to Try Rights Cases," *Washington Post*, July 6, 1990, p. C-1 (hereafter cited as "The Vanishing Job-Bias Lawyers").

race, sex, handicap, or age, the callers have one question: "Do I have a case?" Increasingly Ms. Sternlight has been telling the callers:

> It really doesn't matter if you have a good case or a bad case on the merits. You should not bring this lawsuit [because] 1) money--you cannot afford to; and 2) the burden of proof is going to be very hard for you to meet. . . . With regard to money [many potential civil rights plaintiffs] can't afford to bring the litigation no matter how egregious was the discrimination . . . against them [because] the monetary relief currently available to civil rights plaintiffs is simply insufficient to offset the costs of civil rights litigation.

She explained that under Federal antidiscrimination law the only recovery typically allowed is compensation for lost wages, together with insufficient compensation for attorneys fees and costs; plaintiffs are not permitted to obtain "compensation for the pain and suffering they have endured, and they are not permitted to get punitive damages." Victims of race discrimination were once able to receive compensatory and punitive damages under Section 1981, a Civil War era statute, but that is the statute that the Supreme Court severely limited in *Patterson*. In only a few cases can blacks now win that kind of relief under section 1981.

Supreme Court Decisions Cutting Back on Fees and Awards

Regarding attorney's fees, Ms. Sternlight continued, Federal law theoretically provides plaintiffs with attorneys fees and court costs from the defendant, if the plaintiff prevails, through either settlement or litigation. It was to allow victims with good claims to go to court that Congress passed legislation providing fees for attorneys. "The problem is that in a series of decisions beginning in 1983, the Supreme Court has issued decision after decision . . . which eats away at the availability of attorneys fees and costs to prevailing civil rights plaintiffs." For Ms. Sternlight, it has now become "not a question of how much I'll get as a fee if I win one of these cases; it has almost become a question of how much I'll lose."[40]

She further noted that employment discrimination cases are very expensive since the defendants are often large companies that hire big law firms able to assign more than one lawyer to a case. They generally "send out many discovery requests, have lots of depositions, and file lots of motions." forcing the plaintiff's attorney to respond in kind. "The 'bottom line' is that even the simplest-seeming discrimination case ends up, if you look at the attorneys full hourly rate and the costs," totaling a minimum of around $50,000 to go to trial. "[V]ictims can't afford that kind of money or even a third of that kind of money as an up-front fee." Had they been working, they might have been able

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[40]Jean R. Sternlight, "The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs," *Review of Law & Social Change*, New York University, Vol. XVII, No. 3 (hereafter cited as "The Supreme Court's Denial of Reasonable Attorney's Fees"), see esp. pp. 582-592.

to afford litigation, but "most of the people who call up have just been fired."[41]

Consequently, Ms. Sternlight feels compelled to discourage "far more than nine out of ten" callers, and, thus, she and many of her colleagues represent only a small segment of the people who consider themselves to have been victimized by discrimination. A disproportionate number of those whom she continues to represent are age discrimination victims "who are white male managers who have lost their jobs . . . who can afford to pay me to go to court for them."

How a New Civil Rights Act Would Help

Regarding the then-pending 1990 Civil Rights Act, Ms. Sternlight said that it would not only reverse *Patterson*, the "decision limiting blacks' rights to get compensatory and punitive damages under the old civil rights statutes, but the proposed act would also make available compensatory and punitive damages to people who now cannot get them, that is, people who have other kinds of discrimination claims than race discrimination claims." Awards for such damages may increase the value of what otherwise would be a $20,000 case only in terms of wage loss to $120,000, perhaps even $1 million, thereby making it feasible for even low-salaried wage earners to bring suit, she continued.

Moreover, those awards would help victims who have endured discriminatory acts which do not have any direct impact on salary or benefits as, for example, claims of harassment on the job or poor performance reviews. According to Ms. Sternlight, under Federal law, such claims cannot yield back pay, frontpay, or any other monetary recovery because there is no immediate salary loss from harassment or from getting a bad performance review. The proposed 1990 Act would, in addition, reverse several of the Supreme Court decisions that have cut into attorneys fees and also permit plaintiffs to recover costs incurred for expert witnesses. About the latter, Ms. Sternlight pointed out that a recent Supreme Court decision ruled that a litigant cannot recover more than $20 a day for an expert witness. Although the Supreme Court has not applied it to civil rights cases,[42] many other courts have, despite the fact

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[41]The *Washington Post* more recently reported on a draft study by the American Bar Foundation that indicates that in periods of rising unemployment there is a "'dramatic shift to cases charging discrimination in firing from those charging discrimination in hiring.'" An EEOC official is also quoted as saying that "if you lost your job in a recession, you have no option but to fight for the one you had, no matter how long it takes." The same official suggests that "in a recession fewer cases are filed citing sexual harassment or discrimination in promotion and wages, because 'people who have jobs take more guff than usual.'" Carol Kleiman, "Workplace: Recession Helps Spawn a Surge in Job Discrimination Claims," *Washington Post*, Apr. 28, 1991, p. H-2.

[42]Subsequently, however, in *Air Line Pilots Association* v. *O'Neill*, the Supreme Court ruled on Mar. 19, 1991, that "winning parties in civil rights cases are not entitled to have the other side pay the costs of their expert witnesses. . . ." See Ruth Marcus, "Court Rules Civil Rights Litigants Must Pay Own Expert Witness Fees," *Washington Post*, Mar. 20, 1991, p. A-13. Civil rights attorneys are reported as estimating that "the cost of expert witnesses easily can exceed $100,000. . . ."

that the cost of experts in statistics, gender discrimination, and the like might total thousands of dollars. The attorney may have to pay such costs "up front," and, even if the discrimination victim prevails, the full cost of expert witness cannot be recovered from the defendant.[43]

Wards Cove and "Disparate Impact"

Ms. Sternlight commented that *Wards Cove* is not as harsh as it may have sounded from remarks by previous speakers, since it affects only one subcategory of job discrimination cases, the disparate impact case. One example would be that in which the plaintiff argues that a supposedly neutral written test or a requirement, like a height requirement, can be shown to have an adverse and disparate impact on blacks. In the past, under the Supreme Court's *Griggs* decision, once the plaintiff showed that the test or requirement had a disparate impact, the burden of proof shifted to the defendant who was then called upon to demonstrate that although the test or requirement was discriminatory, it was a business necessity. *Wards Cove* changed that by ruling that the plaintiff must bear the burden of proof at all times and that the employer only has to show that the test or requirement serves the business in a significant way rather than that the test or requirement is essential.

Wards Cove also now forces the plaintiff to pinpoint the specific practice that has the discriminatory impact, continued Ms. Sternlight, rather than simply to allow the plaintiff to point more generally to a group of discriminatory selection processes. For example, an employer may use a three-stage selection process in which at the outset one supervisor interviews the applicant. The applicant must then take a test, and thirdly, a second supervisor makes the final selection. It is now no longer sufficient for the applicant/plaintiff to argue that, although he or she cannot show at which stage the applicant was denied, ultimately no blacks have been hired and, therefore, blacks are being unfairly discriminated against. The Supreme Court now requires that the plaintiff point to the specific stage in the process that exerts a negative effect on the selection of blacks, and, according to Ms. Sternberg, "that is a very, very difficult thing to do, to get down to that level of specificity."

300 Cases Dismissed Due to Wards Cove

Ms. Sternlight added that, although some plaintiff-side attorneys are convinced that *Wards Cove* is "the biggest disaster ever to hit . . . others say it really does not make that much difference." She characterized her view as an intermediate view, and suspected that *Wards Cove* may result in a judge saying, "Looking at the evidence in the light most favorable to the plaintiff, I think it is still not enough to get beyond *Wards Cove*," and, thus, judges may be more likely to dismiss more cases before they are ever sent to a jury. Indeed,

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[43]The *Washington Post* subsequently reported on a case which has continued for 18 years and cost the plaintiffs' attorney "more than $100,000 in out-of-pocket expenses, forcing him to take out personal loans." See "The Vanishing Job-Bias Lawyers," p. C-2, and "The Supreme Court's Denial of Reasonable Attorney's Fees," pp. 571-572.

she noted that former U.S. Department of Transportation Secretary William Coleman, who chairs the NAACP Legal Defense and Education Fund board, recently testified that already more than 300 cases have been dismissed because Federal court judges ruled that the *Wards Cove* standard was not met.

Ms. Sternlight also touched upon the need to extend the statute of limitations governing discrimination suits. She explained that it is extremely short, much shorter than that for bringing an auto accident claim, a breach of contract claim, or virtually any other claim. A discrimination claim must be filed within 180 days or 300 days of the discriminatory act depending on what State has jurisdiction, or, if the claim is against the Federal Government, within 30 days. For most non-discrimination claims, at least 2 years is allowed.

On the other hand, the proposed 1990 Act would allow a 2-year statute of limitations against a private employer, believed to have discriminated, and 90 days against the Federal Government. These extensions are important, said Ms. Sternlight, because the current extremely short limitations do not give victims sufficient time to determine whether they have a case, to find a lawyer, or to ascertain whether they will be able to find another job or to make up for monetary damages by some other means. Victims may not realize that they have no choice but to sue until they have been unemployed for a substantial period of time.

Thus, Ms. Sternlight concluded, the proposed 1990 Act would, by increasing the damage awards and attorney fees available to plaintiffs, restoring an appropriate burden of proof, and restructuring the statute of limitations, rectify some of the problems that emerged in the wake of recent Supreme Court decisions.

Except for Wards Cove, Some Possible Compromises

Though convinced that the Civil Rights Act of 1990, as proposed by Congress, is necessary, Ms. Sternlight addressed the question of what compromises in the bill might permit the White House and the Congress to enact a bill acceptable to each side. Instead of simply laying out compromises, she offered priorities, identifying sections of the bill that she considered most important, and suggesting where she could yield "without perhaps losing too much."

She pointed to section IV of the bill dealing with *Wards Cove* as embodying a position to which she would hold fast in order to protect the right of plaintiffs in disparate impact cases. On the other hand, while it would be ideal to win full adoption of section V--addressing *Price Waterhouse* wherein the employer claimed the female plaintiff would have been terminated on the basis of her unsatisfactory performance--Ms. Sternlight acknowledged that she would be willing to yield somewhat. "I think we have been living with essentially what the Supreme Court did in *Price Waterhouse* for awhile, at least here in the third circuit. And we have been able to win on those cases anyway, [though] not all of them certainly."

Settlements Threatened by Reverse Discrimination Suits

Regarding section VI, *Martin* v. *Wilks*, in which white firefighters attacked a consent decree that had been agreed upon 20 years earlier, she thought that:

> it is important to keep something like the language of section VI in the statute. . . . [T]he problem of whites or any other group coming in as interveners after the fact to attack consent and settlement decrees is a very problematic issue. If employers know that any group can come in indefinitely into the future and bring another discrimination suit against them, a reverse discrimination suit, it's going to be very hard to get these cases settled.

Section A-1 of section VII proposes statutes of limitations that would change the 180- or 300-day period to 2 years. Ms. Sternlight felt it would be "a great thing to have a 2-year statute of limitation, but we have been living with the 180- and 300-day limit for awhile. . . . That's something we could give on, if necessary." On the other hand, no compromise should be made on section A-2. That section addresses *Lorance* in which the plaintiffs were told that "it did not matter that they never knew that the employer's practice would impact them way back when. Nonetheless, they should have brought the lawsuit before they even knew about the effect of the practice," she noted with a touch of irony. In fact, the White House has agreed with the Congress on the need to reverse *Lorance*.

Damages Important, Attorneys Fees More Important

Section VIII would provide for both compensatory and punitive damages, features that Ms. Sternlight had said earlier she hoped would be approved. She considered compensatory damages to be more important than punitive damages, "and if we could not get either one, I would be very unhappy. But I don't think they're the most important part of this legislation." She pointed out that it is often possible to obtain both kinds of damages under State law, and in Pennsylvania at least compensatory damages are available.

Section IX deals with provisions for attorneys fees. Admitting to some self-interest in the matter, she, at the same time emphasized the likelihood that if a victim is unable to interest a lawyer into accepting his or her case, the victim cannot take even the first step toward the courtroom. By that logic, she believed that it is even more important to ensure that victims can enlist lawyers in their cases than it is to remedy the burden of proof issue "because you can work around the burden of proof." For:

> As long as you can get halfway toward the jury, you can start to present your case. You can do settlement negotiations. You can try to get some kind of money for our your client. But, if the client cannot get an attorney because an attorney knows they cannot get any fees, then there will never be any cases that can be won. So . . . the attorneys fees legislation [is] among the most important aspects of the act.

Extending Statute of Limitations, Gaining Interest

Section X proposes changing the statute of limitations in suits against the Federal Government from 30 to 90 days, said Ms. Sternlight, who believed that it represented a more important change than extending the limitations in the private sector from 180 days or 300 days to 2 years. "[T]hat'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 has already run out." Many Federal Government employees have called her about charging discrimination, but she has had to tell them that the statute of limitations had already expired.

Also included in section X is a provision that would provide interest if the plaintiff prevailed in a suit against the Federal Government. She noted that a plaintiff may obtain interest if he or she prevails against a private employer, and Ms. Sternlight maintained that there is no reason that a plaintiff should not receive interest from the Federal Government, except for the fact that the Supreme Court has ruled against it. Any yet some cases against the Federal Government drag on for 10 or 15 years, she said.

Lastly, Ms. Sternlight mentioned that section XII addresses the *Patterson* decision that the White House in essence has agreed ought to be reversed. Consequently there is no need to compromise in section XII.

Lawyers as Private Attorney Generals

Robert Vance, counsel for United Minority Enterprise Associates, described that agency as serving both minority-owned business enterprises and women-owned business enterprises in greater Philadelphia. Part of his practice deals with employment discrimination, and he expressed support for some of Ms. Sternlight's comments; he, too, has felt the same conflicts and pressures as Ms. Sternlight with regard to accepting job discrimination cases.

However, Mr. Vance said that concerning compromises related to the proposed 1990 Act he views the issue somewhat differently. He maintained that only in the area of the statute of limitations--lengthening the period from 180 days to 2 years--is there room for compromise. Otherwise, holding fast to compensatory and punitive damages in the proposed Federal statute remains important despite the possibility of obtaining such damages under laws in some States. He firmly agreed with Ms. Sternlight that the attorneys fees section of the proposed 1990 Act should also not be compromised. He recalled hearing *ad nauseam* in law school about the role of the lawyer as a private attorney general. Nonetheless, that role is important because victims look to lawyers

> to vindicate their rights particularly with regard to discrimination in employment. And to the extent that you are 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, and it is going to cost you this amount of money for me to prosecute your action, their only alternative is the Federal Government. I don't mean to bash the EEOC, but it is not the most effective agency out there. So ultimately, these people are left with no remedy. . . .

Perspective From an Employer-side Attorney

Mark Dichter is a partner in Morgan, Lewis, and Bockius, an international law firm headquartered in Philadelphia. He stated that he represents employers in terms of counseling and litigation in employment matters and that he was the immediate past management cochairman of the American Bar Association's labor sections committee on equal employment opportunity law. However, he was addressing the Advisory Committees as an individual and not on behalf of his law firm, the ABA, or any of his firm's clients. He stressed that he knew of no responsible attorney representing management in the employment context who favors a retreat from the Nation's commitment to eliminating job discrimination.

According to Mr. Dichter, what "we've heard over the last year or so, and particularly again from the first panel . . . is an amazing amount of disinformation about what the Supreme Court did and about what the proposed legislation is doing in response to that." He maintained that the 1990 Act would significantly expand present law with respect to remedies and jury trials for employment discrimination cases.

> 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 trials. Some provide for nonjury trials.

1866 Act Not Originally Applied to Private Employment

Mr. Dichter added that:

> 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, or perceived to be, existing legislation that covered private acts of employment discrimination.[44]

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[44]The *Butler Eagle* subsequently noted that "Civil rights lawyers began using [section 1981 of] that 1866 law vigorously after the Supreme Court ruled in 1976 that section 1981 applied to private business." See "Job-Bias Remedies Binding Bush," *Butler Eagle* (Butler, Pa.), June 13, 1990.

Mr. Dichter then asserted that the one group to benefit from the proposed 1990 Act would be the group to which both Ms. Sternlight and he belonged--the attorneys who litigate job discrimination claims.[45] "Every new plaintiff she decides to bring, there's going to be a defense attorney on the other side. . . . I don't think that's in the best interest of dealing with the problems in this country of opportunities for minorities and women. . . . I think the focus needs to be on those kinds of job opportunities."

The concept of promptly bringing a discrimination claim under Title VII was due to the fact that it had been a matter of winning a plaintiff's job back for the plaintiff, said Mr. Dichter. A person may choose to wait 2 years to sue for damages in an automobile accident case, but a person does not "sit around and wait 2 years to decide whether or not [he or she] wants the job back" or wants the desired promotion of 2 years ago.

Proposed 1990 Act Addresses Decisions Earlier Than 1989

With the principal focus on job opportunities, an agency was set up to provide for prompt investigation, conciliation, and litigation, he continued, and, if that agency is not working as well as it should, efforts ought to be made to correct that problem. But the proposed 1990 Act goes far beyond that problem and in many ways is unrelated to the Supreme Court's decisions of the previous term, Mr. Dichter pointed out. "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 . . . are related to reversing recent Supreme Court decisions."

Mr. Dichter continued that one deals with shifting the burden of proof in *Wards Cove*. One has to do with the application of Section 1981, as in *Patterson*. A third addresses *Martin* v. *Wilks* and attacks on consent decrees; this actually involved a case in which the employer lost, since it was the employer who was trying to protect a consent decree against a later challenge by white male employees. And finally, a fourth has to do with attorneys fees in another case involving an antiemployer decision by the Supreme Court.

Misleading Information on Wards Cove

Mr. Dichter also charged that there is misleading information about *Wards Cove*, such as when an earlier panelist alleged discrimination on the part of the defendant in the case, which Mr. Dichter likened to ascribing criminal activities to someone who has, in fact, been found not guilty. He also pointed out that, while the Supreme Court did act upon the burden of proof issue in *Wards Cove*, the Supreme Court also looked at whether the plaintiffs had even made a *prima facie* case out of showing disparity in the workplace and ruled that the plaintiffs had failed to do so.

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[45]Mr. Dichter was subsequently quoted to the same effect by the *New York Times* which also reported that "Industry lobbyists and lawyers who defend employers in job discrimination suits say they fear the legislation would lead to a flood of litigation and huge damage awards by juries against companies." See Steven A. Holmes, "Critics of Rights Law Fear a Flood of Suits Over Jobs," *New York Times*, May 28, 1990.

Mr. Dichter mentioned another aspect of *Wards Cove* that raises the question whether the plaintiff must attack a specific employment practice or need only attack the employer's practices more generally or as a group. In contrast to what may have been implied by earlier speakers, in

> 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 was not an attack on the overall employment practice. Pre-*Wards Cove*, the kinds of cases we saw in the disparate impact area were attacked--almost all of them--on individual employment practices.

He noted, too, that most employer-side attorneys consider *Price Waterhouse* to have been a plaintiff victory. As confirmed by the lower court the day before the forum, "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."

Patchwork of Laws Needs to Be Rationalized

This suggests, said Mr. Dichter, that the totality of employment discrimination law in the U.S. needs to be rationalized, and "the patchwork approach taken by the legislation of the Civil Rights Act is not the right way. . . ." Moreover, to suggest that the proposed 1990 Act is the result of compromise "is a somewhat amazing comment." Rather than including any provisions that were the result of compromise, the legislation is "clearly a wish list of things both to reverse Supreme Court decisions and accomplish new and expanded elements of discrimination law."

He did acknowledge that many of the provisions may be justified, for example, the situation involving attorney fees seems to present a problem. Remedies for harassment also need to be addressed, but, to propose "such drastic legislation which goes beyond any of the Supreme Court decision of past terms is simply not warranted," he concluded.

Responding to a question from Mr. Heiman about any proposals by the ABA committee he previously served as management cochairman, Mr. Dichter said that over the past years the committee has been very active and instrumental in resisting attacks aimed at dismantling the affirmative action program and in retaining Executive Order 11246 against the attacks launched by former Attorney General Edwin Meese and former Assistant Attorney General for Civil Rights, William Bradford Reynolds,[46] during the 8 years of the Reagan administration. Extensive proposals by the committee have been exchanged with the staffs of the House and Senate committees addressing many of the aforementioned issues over the past year.

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[46]Mr. Reynolds, a former Delawarean, continues to speak out on civil rights controversies. See, for example, Carmen J. Lee, "Brown Defends, Reynolds Assails Race Hiring Quotas," *Pittsburgh Post-Gazette*, Mar. 21, 1991.

After Mr. Heiman inquired about any substitute bill or counter-proposal from the ABA management subcommittee, Mr. Dichter replied that "[T]he reason there is no proposed bill is that . . . the proponents of this legislation . . . are unwilling to talk of any compromise. There has been no willingness until this week. . . ." Prior to the day of the forum, as the Advisory Committees heard from some earlier panelists, the proponents have been saying "No compromise," said Mr. Dichter, and, if that is the attitude, there remains no basis for negotiation.[47]

Administration's Alternate Legislation

Delaware Advisory Committee member Raymond Wolters observed that the Attorney General has already recommended that President Bush veto the proposed 1990 Act and that the administration has prepared a substitute bill. Ms. Sternlight recalled that the administration's bill is only two pages long--as compared with the 24 pages of the congressional bill--and addresses only two of many issues contained in the congressional bill. The Administration's bill addresses *Patterson*, seeking to "broaden blacks' rights to bring civil rights claims under the old statute" and also seeking to reverse *Lorance*, the decision whose ruling she characterized as virtually telling a victim that "your claim can be time barred even if you had no idea that you had ever been discriminated against." Ms. Sternlight agreed with Mr. Dichter's comment that the proposed 1990 Act deals with some Supreme Court decisions made before the 1989 term, but pointed out that "It's not really significant to me which term they are in."

Mr. Dichter repeated that most people who refer to the recent Supreme Court cases are speaking of five cases of the 1989 term, two of which, *Patterson* and *Lorance*, the administration proposes to directly reverse. Of the other three, Mr. Dichter saw no major issue in *Price Waterhouse*. He added that he knew many who would be "delighted to see *Martin* v. *Wilks* reversed. I think, in fact, that may be where we part company with the administration."

Of the fifth case, *Wards Cove*, he believed that it "presents some very, very difficult issues," dealing with "disparate impact," a concept that was not in a statute but that was created by the Supreme Court in *Griggs*. In contrast:

> 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--[these] are typically viewed as disparate treatment cases. . . . *Wards Cove* has nothing to do with those kinds of cases.
>
> Prior to *Wards Cove*, that is, under *Griggs*, job discrimination could be

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[47]Actually, two days after the forum, the *Philadelphia Inquirer* and the Associated Press reported that U.S. Senators John Heinz and John C. Danforth joined Senator Edward M. Kennedy "in announcing a compromise that Danforth said would 'remove any possibility' that employers would be forced to adopt hiring quotas to comply with fair employment standards. 'After weeks of negotiating,' Danforth said, 'I believe that quotas will not be the unintended result of this bill.'" See, for example, David Hess, "Progress Reported on Civil Rights Bill," *Philadelphia Inquirer*, May 18, 1990.

proved, even absent proving an intent to discriminate. Under *Griggs*, one could prove discrimination by showing that there was a substantial disparate impact on different racial groups, a statistical disparity, and then showing that some hiring practice resulting in the disparate impact was not job-related or a business necessity. In *Wards Cove*, the Supreme Court departed from *Griggs* in terms of burden of proof and the like.

Speaking of the proposed 1990 Act, he added that "I am 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."

Deciding on a Constitutional Basis, Not a Statutory Basis

Professor Wolters posed a followup question, conjecturing that, if the Civil Rights Act ultimately became law even over a Presidential veto, the Supreme Court would thus be reversed by congressional action. He wondered whether there remained a possibility that the Supreme Court could then "simply reassert its decisions on the constitutional basis rather than on a statutory basis." Mr. Vance replied that "The Supreme Court doesn't like to make constitutional decisions if they do not have to because those are harder to change down the line. If they are just interpreting a statute, that is fine because statutes come and go, and Congress changes them. So to the extent that [the Supreme Court] can find a ground other than a constitutional ground to make a decision on, they will find it."

Dr. Wachter returned to Mr. Dichter's discussion of *Wards Cove*, asking if he considered the remedy contained in the proposed 1990 Act to be useful. Mr. Dichter replied that *Wards Cove* led to the Supreme Court's shifting the burden of proving job-relatedness from the employer to the plaintiff. He could envision some compromise here depending upon how other aspects are worked out for a standard on determining whether a test or requirement is essential or job-related.

> Is it enough to show that there is some rational relationship between the requirement and the job and that it is likely to be a better predictor of performance? Or do you have to show it is essential for the job? . . . 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. 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 [in *Griggs*] by not being able to show you need a high school [education] for people to be in unskilled jobs.

At the same time, Mr. Dichter said he agreed with the *Wards Cove* ruling requiring that a specific discriminatory practice be identified. He argued, as he had earlier, that *Wards Cove* was on this score "not reversing prior precedents. I think, at best, one could say that the issue was unresolved . . . because it was rarely raised as an issue."

Croson, a Constitutional Decision by the Supreme Court

D. Grier Stephenson, Jr., professor of government at Franklin and Marshall

College, reviewed a 1989 Supreme Court decision, *City of Richmond* v. *J.A. Croson Co.*, a case not discussed in detail thus far. Unlike the other decisions examined earlier, *Croson* represents a constitutional decision, one involving an interpretation of the Constitution and not involving an interpretation of a statute, said Dr. Stephenson. Cases such as *Croson* are:

> noteworthy because they set the bounds within which the Constitution or the political system functions . . . . 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.

He pointed out that only four of the 26 amendments to the Constitution "were driven, at least in part, by a desire to overturn a specific judicial decision." On the other hand, Congress has the authority to overturn the Court's interpretation of its statutes, and has periodically done so. Thus, constitutional decisions by the Court "have a certain finality that statutory decisions lack."

According to Dr. Stephenson, *Croson* is controversial not only because of the policy underlying set-aside programs that it invalidated, but also because it imposed a restriction on the reach of an earlier Supreme Court ruling, *Fullilove* v. *Klutznick*, that the Court decided in 1980. In the latter case, the Court upheld a congressionally mandated 10 percent set-aside of contracts for minority-owned businesses involved in construction projects under the Public Works Employment Act of 1977.

Fullilove Combined With Croson Yields Surprises

Dr. Stephenson said that taken together, *Fullilove* and *Croson* lead to some surprising results. On the one hand, the Federal set-aside program only barely passed constitutional scrutiny by the Supreme Court in 1980, though by a vote of six to three. This is because only three members of the six-justice majority gave the congressional plan practically unqualified approval. The remaining three justices on the majority gave the plan only a very qualified approval. And in 1989, Croson was also decided by a vote of six to three. On the other hand, Federally mandated set-asides are now more firmly grounded in the Constitution after *Croson* than before.

For example, in *Croson*, eight Supreme Court justices accepted the constitutional basis of *Fullilove*, that is, that Congress has special powers under the 14th amendment to allow limited distribution of Federal funds on the basis of race even under circumstances in which the Federal government had not been guilty of discrimination in the awarding of contracts. Dr. Stephenson pointed out that even Justice Scalia, who generally took the "most restrictive position," recognized Congress' powers in *Fullilove*. "From this perspective," he added, the victory of nonminority contractors in *Croson* may have been pyrrhic, for "the *Fullilove* position picked up two votes it lacked in 1980--the votes of [Justices] Stevens and Rehnquist."

State, Local Governments Need to Adopt Higher Standards

Thus, *Croson* does not mean that State and local governments are powerless to enact their own set-aside programs, Dr. Stephenson said. "What must be understood, however, is that the Court in the *Croson* case indicated it will apply high standards when they do," according to Dr. Stephenson. That is, a State or locality must justify its program by demonstrating a specific pattern of discrimination in its jurisdiction, the effects of which are intended to be overcome by its program. It "may not extrapolate a pattern of discrimination from findings made by Congress for the Nation as a whole." Furthermore, a local set-aside must be narrowly tailored. Richmond's set-aside program had included Hispanics, Asian Americans, and Native Americans in addition to blacks, but without reference to any prior discrimination. Similar questions were raised about the 30 percent figure in Richmond's program, whereas the Court had deferred to Congress in the 10 percent figure calculated for the national public works program. In the case of the latter, the congressional explanation of how it arrived at 10 percent appeared plausible to the Court, and the figure was low. *Croson*, however, "suggests that no such deference is due the States."

At the same time, Dr. Stephenson noted that:

> there are at least six votes in *Croson* [indicating] 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 inference of discriminatory exclusions.

In short, *Croson*, properly understood, should not be viewed as having ended racial set-asides. "It has 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."

Contrasting View on Croson

Speaking from his local courtroom experience, Mr. Vance took issue with any implication that *Croson* has not meant the end of set-aside programs under State and local governments. On the contrary, Mr. Vance believed that *Croson* was "a very significant negative decision of the Supreme Court, specifically with regard to Philadelphia." In April 1990, Philadelphia's set-aside legislation which covered blacks, other minorities, and women was struck down in a Federal district court, and such laws have been struck down elsewhere in the U.S. Through his close involvement in the issue, he was convinced 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."

The brief to be filed by United Minority Enterprise Associates in mid-June 1990 points out that *Croson* established "an extremely high standard for race-conscious set-aside programs" but does not "particularly address questions relating to the standard of review for set-aside legislation that addresses women-owned business enterprises, that addresses handicapped-owned business enterprises." His association had previously believed that of all the set-aside legislation in the U.S., Philadelphia's stood a good chance of withstanding the *Croson* test because "the record that was developed by the 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."

The association's hope was that the records issue--regarding whether the record would be restricted to the testimony presented to the city council or whether more would be expected--had not been definitively addressed by the Supreme Court. The record in Philadelphia had been based on specific testimony of individuals about discrimination that they had experienced in the contracting industry and in terms of city contracting opportunities. There were also affidavits submitted by city council members.[48] All this was ignored by the judge, who then ruled that Philadelphia's legislation failed the *Croson* standard and was unconstitutional.

Croson Pits Minorities Against Each Other

Since that ruling, there have been efforts on the part of the city government[49] and the contracting community to try to come up with some alternative, continued Mr. Vance. Efforts have also been underway to craft a mayoral executive order to remedy the problem and to develop race neutral programs that the city council might consider, "but it is not easy to meet the burden that *Croson* apparently imposes on us."[50] He added that *Croson* is "mean-sprited" in that the Supreme Court questioned not only the percentage

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[48]According to a *Philadelphia Inquirer* report, then-U.S.Representative Parren Mitchell and U.S. Representative William H. Gray also gave testimony during 2 days of hearings held by Philadelphia City Council members. The representatives were joined by the Philadelphia Chapter of the National Conference of Black Lawyers "who had documented successful discrimination cases that had been brought against Philadelphia city agencies, companies, and unions." See Idris M. Diaz and Thomas Turcol, "City Set-Aside Program in Doubt After Ruling," *Philadelphia Inquirer*, Jan. 29, 1989, p. A-1 and p. A-19.

[49]The *Philadelphia Daily News* subsequently reported that "As a first step toward establishing a new minority contracting program, the city plans to commission a study to learn whether companies in Philadelphia have discriminated against minorities and women." See Anthony S. Twyman, "City Wants Proof of Contract Bias," *Philadelphia Daily News*, Oct. 1, 1990.

[50]In July 1990, Philadelphia Mayor W. Wilson Goode signed an executive order framed as an antidiscrimination measure intended to increase the participation of minority-owned and female-owned business enterprises in municipal contracting. See Tommie S. Hill, "City's New Set-Aside Law Targets Racial Bias," *Philadelphia Tribune*, July 17, 1990, p. A-1.

that the city council in Richmond had established for minority-owned businesses, but also raised questions about the inclusion of the other minorities within that 30 percent goal. And essentially what that does is

> pits blacks against Hispanics against Asian Americans against women against handicapped people to try to justify a percentage that I am entitled to as a minority-owned business and that you are not entitled to as a Hispanic-owned business or you are not entitled to as a women-owned business.

Reminding the Advisory Committees that Congress did not address *Croson* in the proposed 1990 Act, Mr. Vance agreed with Dr. Stephenson that Congress, after a Civil Rights Act is made law, should go on to enact legislation requiring or empowering local governments to seek to remedy discrimination, utilizing the unique powers that are granted to Congress under the 14th Amendment. Though the main focus of the forum was on employment discrimination law, Mr. Vance observed that addressing *Croson* is important "to the minority contracting community which would help remedy some of the employment discrimination . . . [because] minority-owned businesses tend to hire minorities, women-owned businesses tend to hire women, etc."

CONCLUSION

Nine speakers addressed the Pennsylvania and Delaware Advisory Committees during their joint May 16, 1991 forum, in Philadelphia. Among the nine were seven attorneys, three professors of law or government, representatives of several organizations active in greater Philadelphia, and opponents as well as proponents of the proposed Civil Rights Act of 1990 that was at that time still winding its way through Congress.

The forum, entitled "Recent Supreme Court Decisions and the Proposed Civil Rights Act of 1990," was opened by a law professor who had just completed a study on the effects of law on social events. Some conclusions he highlighted were that: laws are relatively unable to change the course of social events; they follow social trends; and some social legislation may not only yield unintended effects but also effects that have negative outcomes. A second law professor agreed that individuals may bear the stamp of the eras in which they came of age--including those who were children of the Reagan era who are in college today. But he also maintained that the Congress and Supreme Court need to maintain high standards, upholding civil rights laws and programs offering faith in the future, especially to youths coming of age among the so-called "underclass."

Other attorneys described and analyzed five 1989 Supreme Court decisions that prompted Congress to try to hammer out a law restoring the antidiscrimination tools available to plaintiffs prior to 1989 and add provisions meant to

improve damage awards, statutes of limitations, and the like. Most importantly, serious attention was given by several speakers to the possibility of working out compromises on the issues then at stalemate.

At first, a few speakers rejected the notion of seeking further compromises. However, a plaintiff-side attorney offered to set in priority order those sections in the proposed 1990 Act on which she might compromise, while still standing firm on the act's section addressing the *Wards Cove* decision. One employer-side attorney observed that more than cases from the Supreme Court's 1989 term are at issue, and that the White House basically agrees with the Congress on reversing the 1989 *Patterson* and *Lorance* decisions. He also indicated that he might part company with the White House on *Martin* v. *Wilks*, but he characterized the remedies proposed to correct *Wards Cove*, the ruling dealing with disparate impact cases, as "extremely difficult," and he did not spell out any compromise he could envision there. A third attorney plus a professor of government agreed that, should a new civil rights act become law, the Congress ought to address *Croson* by proposing remedies that would better permit States and localities to implement set-aside programs for minority- and women-owned business enterprises.

On June 14, 1991, the members of both Advisory Committees met in Philadelphia and voted unanimously to approve this report and to submit it to the Commission.

APPENDIX A

These cases are cited and frequently short-titled in this report.

Brown v. *Board of Education*, 347 U.S. 483 (1954).

City of Richmond v. *J.A. Croson Co.*, 109 S.Ct. 707 (1989).

Fullilove v. *Klutznik*, 488 U.S. 448 (1980).

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971).

Lorance v. *AT&T Technologies*, 109 S.Ct. 2261 (1989).

Martin v. *Wilks*, 109 S.Ct. 2180 (1989).

Patterson v. *McLean Credit Union*, 109 S.Ct. 2643 (1989).

Prince Waterhouse v. *Hopkins*, 109 S.Ct. 1775 (1989).

Wards Cove Packing Co. v. *Atonio*, 109 S.Ct. 2115 (1989).

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

Eastern Regional Division
1121 Vermont Avenue, N.W. Rm. 710
Washington, D.C. 20425

June 4, 1990

Mr. Arthur A. Fletcher, Chairman
U.S. Commission on Civil Rights
1121 Vermont Avenue, N.W.
Washington, D.C. 20425

Dear Mr. Fletcher:

As Joseph Fisher, member and former chairman of the Pennsylvania Advisory Committee, and Henry A. Heiman, chairman of the Delaware Advisory Committee, reported during the State Advisory Committee chairs' meeting in Washington on May 17, 1990, the neighboring Committees had met in joint session in Philadelphia only the preceding day. Also attended by Commissioner Russell G. Redenbaugh, our meeting was addressed by nine speakers who focussed on recent U.S. Supreme Court decisions and the proposed 1990 Civil Rights Act.

Seven were lawyers from black, white, Hispanic, and Asian American communities, some of whom represent either plaintiffs or defendants in discrimination cases, or who speak for organizations such as the ACLU of Pennsylvania, Philadelphia's Fellowship Commission, or the local Hispanic Bar Association. One teaches at Delaware's Widener University Law School, another at the University of Pennsylvania Law School. Two were laypersons--one heading a Philadelphia branch of the NAACP, the second being a government professor from Franklin and Marshall College.

Since the 1990 Civil Rights Act proposed in Congress was in a state of flux and compromise at the time of our joint meeting, we asked whether any speaker could envision areas of compromise with his or her counterpart on the opposite side of the issue. The initial reaction among plaintiff-oriented speakers on the first panel was to urge against compromise on the grounds that the Congressional bill was already the product of sufficient compromises. However, one did subsequently note that an alternative bill is acceptable to the White House and that he could envision a compromise based on some substitution of the language in the bill favored by the White House for the language in the Congressional bill.

A practicing attorney on the second panel, who had earlier explained how she was forced to discourage potential clients from filing discrimination suits because of the enormous costs, responded by

setting priorities on sections of the Congressional bill, thereby indicating what sections she may ultimately be willing to sacrifice. Attached are the pages of the transcript which cover her discussion (pp. 87-93), as well as those reporting on a possible compromise discussed by another plaintiff-oriented attorney (pp. 93-95.) This second attorney also serves as counsel to United Minority Enterprise Associates, and he argued that a section should be added to reverse Richmond v. J.A. Croson Co., a 1989 Supreme Court decision which had the effect of eliminating some municipal set-aside programs including that of the City of Philadelphia.

A third practicing attorney described himself as representing employers and as a past management co-chairperson of the American Bar Association's labor sections committee on equal employment opportunity law. He disputed the earlier claim that the Congressional bill had been the product of compromise and asserted that until the week of our forum there had been no proponent of the Congressional bill who was willing to entertain compromise. He characterized the bill as "a wish list of things both to reverse Supreme Court decisions and accomplish new and expanded elements of discrimination law." Nevertheless, he agreed that the issue of attorney fees may pose a problem and that remedies in the harrassment area may also need to be addressed (pp. 109-110) and then added his observations on five of the Supreme Court decisions in terms of their susceptibility to any compromise (p. 113-114.)

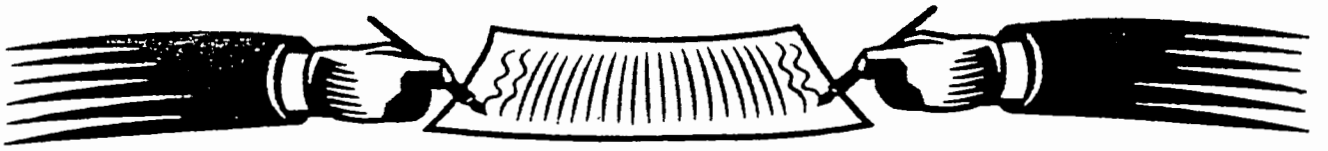
Obviously, this two-page letter cannot do justice to the detailed discussion of the issues that took place during our forum. But, because the transcript only became available late last week, we have been limited to sharing this hurried synopsis before your own deliberations on the issues this week in Washington. As brief as this communication must be today, I write on behalf of both Committees, and hope that our communication will shed some light on what a few experts and practitioners in Pennsylvania and Delaware think about the possibility of arriving at an acceptable middle ground on the matter at hand. At a future date, we shall provide you with the standard summary report of our forum.

Sincerely,

SUSAN M. WACHTER, Chairperson
Pennsylvania Advisory Committee

cc: Delaware Advisory Committee Members
Pennsylvania Advisory Committee Members
John I. Binkley, Director
Eastern Regional Division

THE CIVIL RIGHTS BILL: COMPARING DIFFERENT VERSIONS



	Original Democratic Bill	Bush Administration Bill	Revised Democratic Bill
On quotas			
	The bill shall not be construed "to require or encourage an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex or national origin." The bill does not affect affirmative action agreements that have been deemed legal.	Not addressed.	The bill shall not be construed "to require, encourage or permit an employer to adopt hiring or promotion quotas." Declares quotas are an unlawful employment practice.
On unintentional discrimination			
● *The Supreme Court has ruled that in cases where a company's apparently neutral hiring or promotion practices have a "disparate" impact on minorities, it is up to the worker to prove that such practices are not a business necessity.*	Burden of proving business necessity reverts to the employer. It would be up to the employer to show that a hiring practice under challenge has a "significant relationship to successful performance of the job." Promotion and other non-hiring practices "must bear a significant relationship to a manifest business objective of the employer."	Burden of proving business necessity reverts to the employer. Employment practices must have a "manifest relationship to the employment in question" or the employer's "legitimate employment goals" must be "significantly served by, even if they do not require, the challenged practice."	Burden of proving business necessity reverts to the employer. Employment practices must bear a "significant and manifest relationship to the requirements for effective job performance."
Penalties for intentional discrimination			
● *Racial minorities can collect monetary damages under a Civil War-era law. Others are limited to back pay and attorneys' fees.*	Unlimited compensatory and punitive damages for intentional discrimination based on race, religion, sex, disability or national origin. Punitive damages awarded only in cases where employers acted with malice or reckless indifference.	Allows monetary payments of up to $150,000 only in cases in which harassment occurred.	Same standards as original bill, but caps punitive damages at $150,000 or the sum of back pay and compensatory damages, whichever is greater.
Job tests			
	Not addressed.	Prohibits so-called race norming, the adjustment of test scores based on race, color, religion, sex or national origin.	Prohibits so-called race norming.

BY PETER HOEY—THE WASHINGTON POST