Statement of Commissioners William B. Allen, Carl A. Anderson, Russell G. Redenbaugh

Summary

It is our considered judgment that the Commission's "Report on the 1990 Civil Rights Act" misstates the actual contents of the proposed legislation. We disagree with its implied policy conclusions and, moreover, find it sometimes shallow and incomplete. Accordingly we dissent from the Report.

Among our specific concerns we must highlight the following:

1. We have various and grave reservations regarding Section 4 and the entire issue of quotas, requirements for a *prima facie* case, the burden of proof allocation, and unjustified threats to innocent employers. The Commission "Report" undoubtedly gives too little consideration to the debate on this topic.
2. We also think it manifestly incorrect to imply that Congress can overturn constitutional rulings of the Supreme Court. The "Report" accepts too easily spurious arguments about this legislation as correcting Court "errors" and fails to pay due heed to questions of responsibility and accountability regarding legislation. That is the reason it unfortunately overlooks due process considerations in collateral challenges to consent decrees.
3. We endorse the correction of prior omissions in the law, as pointed out in *Lorance v. AT&T* and also in *Patterson v. McLean Credit Union.* Here we concur with the Commission's analysis that, in the first case, the statute of limitations should be tied to actual injuries, not theoretical injuries. And in the second case it is manifestly unjust that some employees should be protected from racial harassment while others are not.
4. We believe that a more effective argument could be made for extending compensatory and punitive damages to Title VII, but we are nevertheless appreciative of the "Report's" analysis of the fallacy in the "social cost" argument. We concur in the "Report's" support for this provision.

A Reason to Dissent

Quotas aren't everything! Accordingly, our dissent from the Commission's "Report on the 1990 Civil Rights Act (CRA)" must be recognized as evidencing no less concern for the overall presentation of the "Report" than for its overly sanguine expectations about the likelihood of quotas. To the end of preserving that broader context, we address the "Report" as a whole before turning to the specific issue of quotas, and starting with the most general question, Does the CRA *overturn* Supreme Court decisions?

Congress and the Court

The Congress of the United States possesses no power whatever *directly* to overturn a constitutional ruling of the United States Supreme Court. To recall that elementary civics lesson is a first step toward understanding the dimensions and significance of the 1990 Civil Rights Act. The power that Congress does possess, in company with the President, is to enact legislation designed to overcome limitations and omissions in previously existing statutes to the extent that such limitations and omissions may have been pointed out in rulings by the Supreme Court or by other means.

It is therefore fitting and proper that Congress, in response to the Court's decision in *Lorance v. A. T. & T. Technologies* (109 S. Ct._[1989]), should correct the statute of Limitations defect in Title VII of the

1964 Civil Rights Act that the Court had so clearly pointed out. Such a move does not "overturn" the Court so much as it corrects Congress' own prior error. In its statutory rulings, as opposed to its constitutional rulings, the Court is required to be guided by the nation's legislative will, and not to go beyond it. When that Legislative will is accordingly inadequate, *only* Congress can actually initiate a correction.

The same principle operates in the projected response to the Court's ruling in *Patterson v. McLean Credit Union* (109 S. Ct._[1989]), where only legislation, and not judicial interpretation, should remove the unfortunate disproportion between Title VII and Section 1981. When the day at length arrives that policy will support frank recognition that the separate titles meant to deal with employment and contract discrimination ought to be reduced to a single title, that too must be the work of Congress and the President, and not the Supreme Court.

It is therefore fundamentally misleading to describe the 1990 Civil Rights Act as overturning Court decisions. The purported reversals are actually corrections of, or attempts to correct, defects in previous legislation, the development of new initiatives previously unprovided, or modifications of judicial procedures.

Overturning Judicial Policies

In one area alone does it happen, therefore, that Congress might be said to overturn the Court—that is, the modification of judicial procedures (and even here Congress has ultimate responsibility). This applies to provisions to limit collateral challenges to consent decrees (as in the response to *Martin v. Wilks*, 109 S. Ct. __ [1989]) and to provisions to shift burden of proof requirements (as in the response to *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct.__ [1989]). It is further the case that, in each of these areas, the Court will ultimately decide whether these are mere policy questions or involve fundamental guarantees beyond legislative tinkering.

Insofar as the Commission "Report" fails to reflect this status of things, which it does to great extent, then it fails to provide an adequate foundation in defense of the proposed legislation. We dissented, therefore, from those aspects of the "Report" that mislead readers as to the actual content of the proposed 1990 Civil Rights Act.

In yet other respects we concurred with the "Report." In particular, the "Report's" defense of extending punitive and compensatory damages into Title VII against the seriously flawed argument of social costs makes a valuable contribution to discussion of enforcement efforts. Further, the discussion of the relation between disparate impact analysis and disparate treatment analysis is useful though far from adequate.[1] Moreover, the discussion of "mixed motive" cases alerts us to pitfalls which, if not urgent or likely, ought nevertheless to command serious attention. Our reaction to the "Report" is therefore mixed, save that in one highly salient respect our dissent is unqualified.

Quotas Are Enough

The Commission's "Report" on the CRA, then, is a mixed production of pluses and minuses. There are elements in it worth approving no less than there are elements worth disapproving. Still, it would be fair to say, on balance, that we would not dissent, save for the disproportionate impact of its insouciance about quotas. The threat of quotas demands more caution in the consideration of the bill than it has received heretofore. The "Report" credits all too glibly a major premise of the legislation, namely that its alterations in section 4 of Title VII are nothing more than a restoration of the pre-*Wards Cove* status quo. This premise is simply wrong.

The landmark case on the issue in section 4, *Griggs v. Duke Power Co.*, said only that the employer had to "show" a "manifest relationship to the employment in question." This test applied only to objective practices and requirements. *Wards Cove* said that the employer must "produc[e] evidence" that the challenged practice "serves, in a significant way, the legitimate employment goals of the employer." Both of these phrasings, of which the latter was also used by the Supreme Court in *Beazer* 11 years before, are a far cry from those in the bill, under which the employer would have to prove—with the burden of persuasion—that the practice "bears a substantial and demonstrable relationship to effective job performance."

This test—even though it represents a compromise between backers and some opponents of S. 2104 (CRA)—is very different from any test employers have ever had to meet in Title VII cases. "Demonstrable relationship" may well mean the same thing as the "manifest relationship" required in *Griggs*, but the bill's words "substantial" and "effective" both represent an upward ratcheting of what the employer has to prove, far beyond the *Griggs/Wards Cove* doctrine.

The bill also transfers the burden of proof to defendants as soon as the plaintiff has made out a *prima facie* case. This, of course, upends the policy in *Wards Cove*, but it is not a "restoration" of *Griggs*. It would be an entirely new national civil rights policy.

Some of the federal circuit courts did interpret "show," as used in Griggs, to mean that the burden of persuasion shifted to the defendant; others did not. *Wards Cove* simply resolved this split in the circuits and in favor of the traditional and fair notion that the plaintiff, not the defendant, has the burden of persuasion in our legal system (just as the Court had done, through Justice Brennan, in the 1987 case, *Johnson v. Santa Clara County Transportation Agency* and in which a white male plaintiff had filed a *reverse* discrimination suit).

Of course, Congress has the power to resolve the split differently than did the Court (leaving the question of fairness aside). But we doubt much whether it were wise to do so. As the Commission "Report" itself states: "[L]ess discrimination and more redress for victims of discrimination may come at the expense of more innocent employers being found guilty of discrimination." In the opinion of the report, this is an acceptable trade-off; to us it is not possible to trade justice for injustice. That justice will occasionally miscarry is a risk inherent in any legal system. But the proper response, for legislators and judges alike, is to minimize such miscarriages—not to multiply one type of injustice in the hope of getting less of another kind.

Better protection for victims of discriminatory employment practices should be the goal of Congress no less than it is the goal of this Commission. But this goal should be pursued in ways that neither transgress fundamental principles of American jurisprudence nor violate the civil rights of those valuable citizens, employers who put together their workforces without discrimination.

In view of these changes which all come at the expense of the rights of defendants, the "Report's" assurances on the quota issue would persuade only if one believed that employers enjoyed losing Title VII suits.

To be sure, some assert that the use of quotas would lead to reverse discrimination suits by those excluded by the quotas. But this is surely no defense of the bill. Over and above the fact that such plaintiffs must play by different rules—under a double standard—the argument only serves the further to leave employers defenseless. Employers will be successfully sued by *someone*; unless, of course, the reverse discrimination at issue is insulated by a consent decree! Alternatively, hiring policies will be determined by which group can gain the reputation of being the quickest off the dime with a lawsuit. Either way, hiring will be driven not by the concern for equal opportunity that fuels productivity but by a concern to avoid litigation.

Another flaw in the "Report's" analysis is that it uses the dubious theory that *Wards Cove* reversed previous law in order to argue that the bill would not lead to quotas. The argument goes: the bill

merely restores the *Griggs* rule that *Wards Cove* overturned; there were not many instances of quota hiring before *Wards Cove*; therefore, the bill will not cause many instances of quota hiring.

Even if the second premise were correct, the first premise is clearly wrong. Between *Griggs* and *Wards Cove*, courts were not *obliged* by statute to assign employers the burden of persuasion in suits brought by minority groups, as they will be under the CRA as it now stands. Nor could plaintiffs target the sum total of all of the employer's hiring practices, as they are encouraged to do by the CRA.

The fact is, nothing in our previous practice furnishes an adequate guide as to what would happen under this legislation. Thus the bill's quota threat comes from three separate danger sources, which have never before been faced in combination by employers on a nationwide basis and as a matter of statutory law:

(1) the ability of plaintiffs, under the bill, to challenge all of an employer's practices (both objective and subjective), thus making it very easy to mount a *prima facie* case based on a statistical disproportion while leaving it to the employer to mount a separate defense for each practice;
(2) the defendant's having a burden of persuasion following a successful *prima facie* case by the plaintiff;
(3) the standard for defining "business necessity," which the bill (even with its compromise language) would ratchet far beyond what it was either in *Griggs* or *Wards Cove*.

In sum, it is reasonable to think the Commission's "Report" on the 1990 CRA has too many flaws, of too serious a nature, to be adopted by this Commission.

Repealing the Illusion of Colorblindness

The only conceivable defense of the CRA as it now stands would be that offered by those who imagine that the candid imposition of quotas would serve to break the opinion and policy logjam in which the nation has now been locked for twenty-six years. Because the 1964 Civil Rights Act created a presupposition of race neutrality or non-discrimination, it has been argued that quotas are inconsistent with the intent of that legislation. Nevertheless, Justice William J. Brennan plausibly argued in *United Steelworkers of America v. Weber* (443 U. S. 193 [1979]) that Congress specifically intended Title VII to improve the economic conditions of black people. If his argument is correct, it would follow that the almost universal bows to race neutrality were merely devices to get the legislation past opponents. The quota bashing created only an illusion of color- blindness, an illusion that now deserves repeal.

The historical foundation of Brennan's view seems quite sound, since quotas pre-existed the 1964 Civil Rights Act and were primarily a source of contention only between the political parties, each of which seemed to wish to monopolize quotas as an instrument for managing relations betweens blacks and labor unions. Further, it is incontestably true that the existence of Title VII has in no way whatever slowed the imposition of quotas in various forms and whenever it suited policy throughout the society. Ironically, then, folk who fight against the *future* prospects of quotas unwittingly contribute to the legitimation of quotas as they exist in diverse and widespread form presently.

One may measure the reality of quotas as sponsored by the 1964 Civil Rights Act in the form of a table proudly submitted to the U.S. Commission on Civil Rights by the Kentucky State Commission on Human Rights in evidence of the success of Kentucky's recently imposed affirmative action plan. Inspecting the highlighted fourth row in the Table (found at the end of this statement), the reader will perceive at once that the population ratio for black people in the state operates as an ironclad quota (four years running), meaning that neither more nor fewer blacks will be retained in the State government's workforce than called for by the quota! A figure that grew from 5.8% to 7.2% in just six years, remained throughout the succeeding three years firmly fixed at 7.3%. What is the probability against something like

that happening randomly, out of a workforce of nearly 40,000 people? Something greater by several times than the odds against intelligent life elsewhere in the universe!

That the Kentucky State Commission on Human Rights might proudly proclaim these results as evidence of their compliance with Title VII, and that the U.S. Commission on Civil Rights might approvingly receive it, is more than sufficient evidence that quotas enjoy a high level of approval under the 1964 Civil Rights Act. It is likely, however, that that approval depends utterly on the false impression created by the almost universal testimony against quotas. Accordingly, it would be of great utility to the society if the 1990 Civil Rights Act were to pass in such form as to eliminate the illusion of color-blindness and to repeal the 1964 Civil Rights Act to that extent.

Let repeal unveil the reality. It is black folk, not white males, who bear the burden of quotas—no surprise to people of modest historical sensitivity. Beginning in slavery and continuing long thereafter, black folk participated in the labor pool at rates far exceeding other sub-populations. Thus, where a rate of 500 or 600 per 1,000 population would have been high for the average group, a rate approaching 90% or 900 per thousand population would have been normal for black folk. In recent years the spread between black folk and others diminished, but it is unlikely that parity has been reached. Accordingly, a quota based on general population ratios, as in Kentucky, actually represents a net loss of jobs for black folk! This job loss is principally in unskilled and blue collar fields, and that helps explain persistent high unemployment in those areas (and the corollary of welfare subsistence). That was the original protection for labor unions. It also explains the *general* impression of a displacement of white workers, for that does occur in white collar fields where blacks had been minimally employed. Thus, hiring to a general population level in blue and white collar jobs, while still falling short of historical labor patterns, explains both apparent improvements and high unemployment resulting from discrimination. Reinforce the effect by means of black competition with white women, hispanics, and others, and one has the real picture of the quota regime sponsored by the 1964 Civil Rights Act.

Diversity in Dissent

With so much said it will perhaps appear evident why one of the dissenters specifically refuses to endorse the CRA because of the threat of quotas. A second of us endorses it only under the strict proviso that Congress must cure it of the defect of quotas.[2] And the third dissenter, no less avid an opponent of quotas, supports the bill precisely *because* it is a quota bill.[3] In each case it is necessary to disagree with the Commission's "Report."

Further, our concern with quotas extends beyond the language of the bill itself. We note with concern how heavily weighted toward quotas the initial and subsequent testimony regarding the bill has been. Prevalent throughout, including in the official legislative summaries, one witnesses uniform reference to "women and minorities," the language of "protected groups" that excludes so-called non-protected Americans and that has formed the central or organizing principle of the quota regime. That legislative history speaks far more volubly of the intent of this legislation than any analysis of its mere words could ever do. And so we expect the courts to reason regarding it.

Therefore, however differently affected we may stand individually towards the Commission's endorsement of this legislation, concerning this "Report" we equally dissent from its unfortunate depreciation of the danger of quotas. We join in requesting a fuller, unbiased airing of that question for the benefit of the entire society.

TABLE I

Number and Percent of Black Full-Time Employment
in Kentucky State Government
1967-1987

	Nov. 1967	Nov. 1971	Nov. 1975	Nov. 1977	Nov. 1979	Nov. 1981	Nov. 1983	Nov. 1985	Nov. 1987
Total Full-time Employees	26,708	31,263	34,924	35,388	40,927	35,832	34,715	36,446	37,504
Black Full-time Employees	1,408	1,540	2,023	2,125	2,707	2,567	2,520	2,667	2,751
Absolute Change in Black Employment	--	+ 132	+ 483	+ 102	+ 582	- 140	- 47	+ 85	+ 84
Percent Black Employment	5.3%	4.9%	5.8%	6.0%	6.6%	7.2%	7.3%	7.3%	7.3%
Change in Black Share of Employment	--	+ 0.4%	+ 0.9%	+ 0.2%	+ 0.6%	+ 0.6%	+ 0.1%	--	--

[1] Among other things, it fails to emphasize that litigants could file claims not only in the context of hiring but also in other contexts where Title VII applies, such as compensation, terms, conditions, or privileges of employment. Thus, a disproportionate impact would be open to challenge based upon race, color, religion, gender, or national origin whenever resulting from employment practices, subjective or objective, and whether within employer's workforce alone or in relation to a qualified external population.

[2] In the Commission's separate action to endorse the CRA, Commissioner Redenbaugh desired and moved language to "endorse it provided that the legislation include upon approval modifications to the effect of those listed" by the Commission. The reported form of the Commission's action differs on account of some parliamentary ambiguities.

[3] Commissioner Allen, in only his second Commission meeting on May 15, 1987, had declared his understanding that the country suffered from widely shared, official pretenses to discountenance quotas (as in the original Title VII), while the country nevertheless moved irresistibly toward implementing them under various disguises (disguises that seem completely to have deceived the Commission majority!). The pretenses had two consequences: first, to deceive and mollify the public; then, second, to facilitate spurious efforts at compliance which neither hit upon the end aimed at nor avoided the ill of polarizing the community over apparent preferences (*vide*, the case of the suspended university student at Michigan State University who offended by means of publicly displaying a cartoon censoring racial preferences). In that sense, the 1964 Civil Rights Act spawned efforts at quotas while denying it, and the job of the 1990 Civil Rights Act is to make the law explicit, effectively repealing, not the law of the 1964 Civil Rights Act but its pretenses. Once that process is consummated the country will enjoy its first real test of the adequacy of recent theories about civil rights laws.