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OA/ID Number:	29145
Folder ID Number:	29145-008

Folder Title:
Civil Rights (1 of 2) 1991 [2]

Stack:	Row:	Section:	Shelf:	Position:
G	15	24	7	4

From Boyden

Possible Compromise -- July 11, 1991
(Changes are to draft dated
June 27, 1991, 1:00 p.m.)

Civil Rights Restoration Act of 1991

1. Martin v. Wilks

Strike "implements and is within the scope of" and substitute "is specifically required by".

Strike "present objections to" wherever it appears, and substitute "challenge".

Strike "(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact."

Add the following as a new subsection:

> "No challenge to a litigated or consent judgment or order that resolves a claim of employment discrimination under this title shall be filed unless such challenge is well grounded in fact and warranted either by existing law or by a good faith argument for the extension, modification, or reversal of existing law. No such challenge shall be filed if it is frivolous or vexatious, or if it is filed for any improper purpose, such as to cause unnecessary delay or a needless increase in the cost of litigation or to harass. If a challenge to a litigated or consent judgment or order that resolves a claim of employment discrimination under this title is filed in violation of this provision, the court, upon motion or upon its own initiative, shall impose upon the complaining party, or his or her attorney, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing, including a reasonable attorney's fee."

2. Aramco

Strike in its entirety Section 11 ("Protection of Extraterritorial Employment").

3. Affirmative Action

In section 13, insert a comma after the word "agreements" and before the word "that".

Equal Employment Opportunity Act of 1991

1. Finding and Purposes

   Strike "(1) to overrule the proof burdens and meaning of business necessity in Wards Cove Packing Co. v. Atonio and to codify the proof burdens and the meaning of business necessity used in Griggs v. Duke Power Co., 401 U.S. 424 (1971); and".

2. Burden of Proof in Disparate Impact Cases

   Strike the phrases "or particular employment practices" and "or practices" wherever they appear (and change the accompanying verbs to singular form).

   Strike the phrase "in whole or in significant part" wherever it appears.

   Strike paragraph (k)(1)(C) and substitute the following:

   > "(C) An employment practice that causes a disparate impact and is demonstrated to be required by business necessity shall nevertheless be unlawful if the complaining party demonstrates the availability of an alternative employment practice, comparable in cost and equally effective in predicting job performance or serving he respondent's legitimate interests, and the respondent refuses to adopt such alternative employment practice."

3. Business Necessity

   Strike "as job qualifications" and substitute "to measure qualifications to do the job".

Civil Rights and Remedies Act of 1991

1. On p. 1, line 35, delete "intentionally". On line 36, insert after the word "unlawful" the words "and intentionally discriminatory".

   On p. 2, lines 19-20, strike "intentionally engaged in a practice that constitutes" and substitute "engaged in a practice that constitutes intentional". On line 21 and on lines 23-24, delete "or other than discrimination" and substitute "and specifically excluding all actions". On lines 24-25, delete "paragraph (6)" and substitute "paragraphs (6) and (7)".

2. On p. 2, lines 5 and 29, strike "recover the compensatory and punitive damages" and substitute "request an equitable monetary award". On line 49, strike "COMPENSATORY AND PUNITIVE DAMAGES" and substitute "EQUITABLE MONETARY AWARD".

On p. 2, line 51 through p. 3, line 22, strike subsections (1) and (2) and substitute:

> "(1) DETERMINATION OF EQUITABLE MONETARY AWARD.--A complaining party may be granted an equitable monetary award pursuant to subsection (a), in addition to back pay or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964, if the court determines that an additional remedy beyond those otherwise available is needed to deter the respondent from intentionally engaging in further unlawful employment practices described in subsection (a) and that such an award is otherwise justified by the equities."

On p. 3, strike lines 25-31 and substitute the following: "an equitable monetary award granted pursuant to this section shall not exceed --".

3. On p. 6, strike lines 30-32 and substitute the following:

"(1)(A) All issues in cases in which an equitable monetary award is sought under this section shall be heard and determined by a judge, except that when a party requests that a jury be empaneled to determine liability on one or more issues with respect to which such award is sought, then a jury may be empaneled to determine such liability issues and no others. In no case shall a jury consider, recommend, or determine the amount of any monetary award sought pursuant to this section."

UNITED STATES SENATE
WASHINGTON, D. C.

JOHN C. DANFORTH
MISSOURI

June 27, 1991

Honorable John Sununu
Chief of Staff to the President
The White House
Washington, D. C. 20500

Dear John:

I am enclosing a copy of the legislation that will be introduced today, together with a draft showing how it compares to the legislation as originally introduced.

I have enjoyed working with you on this and look forward to continuing to work with you in the future.

Sincerely,

Jack

Enclosures

JUNE 27, 1991 1:00 PM

102nd CONGRESS 1st SESSION

S. ____

To strengthen and improve Federal civil rights laws, and for other purposes.

IN THE SENATE OF THE UNITED STATES
JUNE __, 1991

A BILL

To strengthen and improve Federal civil rights laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Restoration Act of 1991".

SEC. 2. FINDING AND PURPOSE.

(a) FINDING.--Congress finds that legislation is necessary to provide additional protections against unlawful discrimination in employment.

(b) PURPOSE.--The purpose of this Act is to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

SEC. 3. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended--

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end the following new subsections:

"(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the ~~contracts~~ contractual relationship.

"(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.".

SEC. 4. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) IN GENERAL.--Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e--2) is amended by adding at the end the following new subsection:

"(k) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.".

(b) ENFORCEMENT PROVISIONS.--Section 706(g) of such Act (42 U.S.C. 2000e--5(g)) is amended--

(1) by designating the first through third sentences as paragraph (1);

(2) by designating the fourth sentence as paragraph (2)(A); and

(3) by adding at the end the following new subparagraph:

"(B) On a claim ~~In a case~~ where an individual proves a violation under section 703(k) and a respondent demonstrates that the respondent would have taken the same action in the absence of ~~any discrimination~~ the impermissible motivating factor, the court--

~~"(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), attorney's fees, and costs; and~~

"(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under this section; and

"(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).".

SEC. 5. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 4 of this Act) is further amended by adding at the end the following new subsection:

"(l)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (3), an employment practice that implements and is within the scope of a litigated or consent judgment or order that--

~~"(i) was entered earlier than the date of the enactment of this subsection; and~~

~~"(ii)~~ resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

"(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--

"(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--

"(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

"(II) a reasonable opportunity to present objections to such judgment or order; or

"(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order ~~prior to or after the entry of such judgment or order.~~ on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

"(2) ~~(A) Notwithstanding any other provision of law, and except as provided in paragraph (3), an employment practice that implements and is within the scope of a litigated or consent judgment or order that--~~

~~"(i) was entered not earlier than the date of enactment of this subsection; and~~

~~"(ii) resolves a claim of employment discrimination under the Constitution or Federal civil rights laws,~~

~~may not be challenged under the circumstances described in subparagraph (B).~~

~~"(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--~~

~~"(i) by a person who, during the period of notice regarding the judgment or order described in subparagraph (A)--~~

~~"(I) was an employee of, former employee of, or applicant to, the respondent; and~~

~~"(II) prior to the entry of such judgment or order, had actual notice of the proposed judgment or order in sufficient detail to apprise such person~~

~~"(aa) that such judgment or order might adversely affect the interests and legal rights of such person;~~

~~"(bb) of any numerical relief in the proposed judgment or order on the basis of race, color, religion, sex, or national origin for any job, position, or other employment opportunity;~~

~~"(cc) that an opportunity was available to present objections to such judgment or order by a future date certain; and~~

~~"(dd) that such person would likely be barred from challenging the proposed judgment or order after such date; or~~

~~"(ii) by a person whose interests were adequately and competently represented by a similarly situated person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.~~

~~"(3)~~ Nothing in this subsection shall be construed to--

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

"(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

"(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

~~"(4)~~ (3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) ~~or (2)~~ shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.''.

SEC. 6. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end the following new subsections:

"(l) The term `complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term `demonstrates' means to meets the burden of production and persuasion.

"(n) The term `respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity ~~or head of a Federal entity~~ subject to section 717.".

SEC. 7. EXPANSION OF RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e--5(e)) is amended--

(1) by inserting "(1)" before "A charge under this section"; and

(2) by adding at the end the following new paragraph:

"(2) For purposes of this section, an ~~alleged~~ unlawful employment practice occurs when--

"(A) ~~when~~ a seniority system is adopted, ~~when~~ an individual becomes subject to a seniority system, or ~~when~~ a person aggrieved is injured by the application of a seniority system or provision of the system; and

"(B) ~~if~~ the system has ~~is alleged to have~~ been adopted for an intentionally discriminatory purpose, in violation of this title, whether or not that discriminatory purpose is apparent on the face of the seniority provision.".

SEC. 8. AUTHORIZING AWARD OF EXPERT FEES.

Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended by inserting "(including expert fees)" after "attorney's fee".

SEC. 9. PROVIDING FOR INTEREST AND EXTENDING THE STATUTE OF LIMITATIONS IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.

Section 717 of the Civil Rights Act of 1964 (42 12 U.S.C. 2000e-16) is amended--

(1) in subsection (c), by striking "thirty days" and inserting "90 days"; and

(2) in subsection (d), by inserting before the period ", and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.".

SEC. 10. NOTICE OF LIMITATIONS PERIOD UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

Section 7(e)(2) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)(2)) is amended to read as follows:

"(2) If a charge filed with the Commission is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the individual referred to in subsection (d). The individual may bring an action against the respondent named in the charge not earlier than 60 days after the date on which the charge was timely filed and not later than 90 days after the date of the receipt of the notice.".

SEC. 11. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

(a) DEFINITION OF EMPLOYEE.-- Section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f)) is amended by adding at the end the following: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.".

(b) EXEMPTION.-- Section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) is amended--

(1) by inserting "(a)" after "SEC. 702.", and

(2) by adding at the end the following:

"(b) It shall not be unlawful under Section 703 or 704 for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

"(c)(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by Section 703 or 704 engaged in by such corporation shall be presumed to be engaged in by such employer.

"(2) Section 703 and 704 shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on--

"(A) the interrelation of operations;

"(B) the common management;

"(C) the centralized control of labor relations; and
"(D) the common ownership or financial control;
of the employer of the corporation.".

(d) APPLICATION OF AMENDMENTS.-- The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

SEC. 12. EDUCATION AND OUTREACH.

Section 705(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4(h)) is amended--

(1) by inserting "(1)" after "(h)"; and

(2) by adding at the end the following new paragraph:

"(2) In exercising its powers under this title, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to--

"(A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and

"(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination;

concerning rights and obligations under this title or such law, as the case may be.

SEC. 13. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION, AND CONCILIATION AGREEMENTS NOT AFFECTED. Nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are in accordance with the law.

SEC. ~~11~~ 14. COVERAGE OF CONGRESS AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) COVERAGE OF THE SENATE.--

(1) APPLICATION TO SENATE EMPLOYMENT.-- The rights and protections provided pursuant to section 1977 of the Revised Statutes (42 U.S.C. 1981), and the amendments made by this Act, subject to paragraphs (2) through (5), apply with respect to any employee in an employment position in the Senate and any employing authority of the Senate.

(2) INVESTIGATION AND ADJUDICATION OF CLAIMS.--All claims raised by any individual with respect to Senate employment pursuant to the provisions described in paragraph (1) shall be investigated and adjudicated by the Select Committee on Ethics, pursuant to S. Res. 338, 88th Congress, as amended, or such other entity as the Senate may designate.

(3) RIGHTS OF EMPLOYEES.--The Committee on Rules and Administration shall ensure that Senate employees are informed of their rights under the provisions described in paragraph (1).

(4) APPLICABLE REMEDIES.--When assigning remedies to individuals found to have a valid claim under the provisions described in paragraph (1), the Select Committee on Ethics, or such

other entity as the Senate may designate, shall to the extent practicable apply the same remedies applicable to all other employees covered by the provisions described in paragraph (1). Such remedies shall apply exclusively.

(5) EXERCISE OF RULEMAKING POWER.--Notwithstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in paragraph (1) shall be within the exclusive jurisdiction of the United States Senate. The provisions of paragraphs (2), (3), and (4) are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

(b) COVERAGE OF THE HOUSE OF REPRESENTATIVES.--

(1) IN GENERAL.--Notwithstanding any other provision of law, the purposes of this Act shall, subject to paragraph (2), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(2) EMPLOYMENT IN THE HOUSE.--

(A) APPLICATION.--The rights and protections under title VII of the Civil Rights Act of 1964 (42 U.S.C; 2000e et seq.), the Age Discrimination in Employment Act of 1967 (42 U.S.C. 621 et seq.), section 1977 of the Revised Statutes, this Act, and the amendments made by this Act shall, subject to subparagraph (D), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) ADMINISTRATION.--

(i) IN GENERAL.--In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii). RESOLUTION.--The resolution referred to in clause (i) is House Resolution 15 of the One Hundred First Congress, as agreed to January 3, 1989, or any other provision that continues in effect the provisions of, or is a successor to, the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988).

(C) EXERCISE OF RULEMAKING POWER.--The provisions of subparagraph (B) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

(c) INSTRUMENTALITIES OF CONGRESS.--

(1) IN GENERAL.--The rights and protections under title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, section 1977 of the Revised Statutes, this Act, and the amendments made by this Act, shall, subject to paragraphs (2) and (5) apply with respect to any employee in an employment position in an instrumentality of the Congress and any chief official of such an instrumentality.

(2) ESTABLISHMENT OF REMEDIES AND PROCEDURES BY INSTRUMENTALITIES.--The chief official of each instrumentality of

the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively.

(3) REPORT TO CONGRESS.--The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) DEFINITION OF INSTRUMENTALITIES.--For purposes of this section, instrumentalities of the Congress include the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Office of Technology Assessment, and the United States Botanic Garden.

(5) CONSTRUCTION.-Nothing in this section shall alter the enforcement procedures for individuals protected under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) or section 15 of the Age Discrimination in Employment Act of 1967 (42 U.S.C. 633a).

SEC. ~~12~~ 15. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials, and arbitration, is encouraged to resolve disputes arising under the Acts amended by this Act.

SEC. ~~13~~ 16. EFFECTIVE DATE.

~~(a)~~ IN GENERAL.--~~Except as provided in subsection (b), this~~ This Act and the amendments made by this Act shall take effect upon enactment.

~~(b) CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.--The amendments made by section 5 shall apply to all proceedings pending on or commenced after June 12, 1989.~~

SEC. ~~14~~ 17. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected.

JUNE 27, 1991 1:00 PM

102D CONGRESS 1st SESSION

S.____

To amend the Civil Rights Act of 1964 to clarify provisions regarding disparate impact actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES
JUNE __, 1991

A BILL

To amend the Civil Rights Act of 1964 to clarify provisions regarding disparate impact actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Equal Employment Opportunity Act of 1991".

SEC. 2. FINDING AND PURPOSES.

(a) FINDING.-Congress finds that the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) has weakened the scope and effectiveness of Federal civil rights protections.

(b) PURPOSES.-The purposes of this Act are--

~~(1) to overrule the treatment of business necessity as defense in Wards Cove Packing Co. v. Atonio and to codify the meaning of business necessity used in Griggs v. Duke Power Co., 401 U.S. 424 (1971); and~~

(1) to overrule the proof burdens and meaning of business necessity in Wards Cove Packing Co. v. Atonio and to codify the proof burdens and the meaning of business necessity used in Griggs v. Duke Power Co., 401 U.S. 424 (1971); and

(2) to confirm ~~provide~~ statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.).

SEC. 3. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

~~(a)~~ IN GENERAL.--Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e--2) is amended by adding at the end the following new subsection:

"(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if--

~~"(i) a complaining party demonstrates that a particular employment practice or group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or~~

~~national origin; and~~

~~"(ii)(I) the respondent fails to demonstrate that the practice or groups of practices is required by business necessity; or~~

~~"(II) the complaining party makes the demonstration described in subparagraph (C) with respect to a different employment practice or group of employment practices.~~

"(i) a complaining party demonstrates that a particular employment practice or particular employment practices (or decision-making process as described in (B)(i)) cause a disparate impact on the basis of race, color, religion, sex, or national origin; and

"(ii)(I) the respondent fails to demonstrate that the practice or practices are required by business necessity; or

"(II) the complaining party makes the demonstration described in subparagraph (C) with respect to a different employment practice and the respondent refuses to adopt such alternative employment practice.

~~"(B)(i) With respect to an unlawful employment practice based on disparate impact as described subsection (A), the complaining party shall identify with particularity each employment practice that is responsible in whole or in significant part for the disparate impact, except that if the complaining party can demonstrate to the court, after discovery, that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the group of employment practices as a whole may be analyzed as one employment practice.~~

~~"(ii) If the elements of a decisionmaking process are capable of separation for analysis, the complaining party must identify each element with particularity, and respondent must demonstrate that the element or elements identified that are responsible in whole or in significant part for the disparate impact are required by business necessity. If the respondent demonstrates that a specific employment practice within a group of practices is not responsible in whole or in significant part for the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.~~

"(B)(i) With respect to demonstrating that a particular employment practice or particular employment practices cause a disparate impact as described in subsection (A)(i), the complaining party shall demonstrate that the particular employment practice causes in whole or in significant part the disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.

"(ii) If the respondent demonstrates that a specific employment practice is not responsible in whole or in significant part for the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

~~"(C) An employment practice responsible in whole or in significant part for a disparate impact that is demonstrated to be~~

~~required by business necessity shall be lawful unless the complaining party demonstrates that a different available employment practice or group of employment practices, which would have less disparate impact and make a difference in the disparate impact that is more than merely negligible, would serve the respondent as well.~~

"(C) An employment practice which causes in whole or in significant part a disparate impact that is demonstrated to be required by business necessity shall be unlawful if the complaining party demonstrates that a different available employment practice, which would have less disparate impact and make a difference in the disparate impact that is more than negligible, would serve the respondent's legitimate interests as well and the respondent refuses to adopt such alternative employment practice.

"(2) ~~In deciding whether a respondent has met the standards described in paragraph (1) for business necessity, the court may receive evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to the evidence as is appropriate.~~

~~"(3)~~ A demonstration that an employment practice ~~or group of employment practices~~ is required by business necessity may not be used as a defense ~~only~~ against a claim ~~under this subsection~~ of intentional discrimination under this title.

"~~(4)~~ (3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses an illegal drug as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

~~"(5) The mere existence of a statistical imbalance in the work force of an employer on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation.~~

~~"(b) CONSTRUCTION. Nothing in the amendment made by subsection (a) shall be construed to overrule any existing case concerning whether recovery is available under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) under a comparable worth theory.~~

SEC. 4. PROHIBITION AGAINST DISCRIMINATORY USE OF TEST SCORES. Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 3) is further amended by adding at the end the following new subsection:

"(l)~~(1)~~ It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex or national origin.

~~"(2) Paragraph (1) shall not apply to a respondent seeking to comply with a court order aimed at remedying past discrimination.".~~

SEC. 5. DEFINITIONS.

~~(a)~~ IN GENERAL.-- Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end the following new subsections:

"(l) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) ~~The term 'group of employment practices' means a combination of particular employment practices in which each practice is responsible in whole or in significant part for an employment decision.~~

~~"(o)~~ The term 'required by business necessity' means--

~~"(1) in the case of employment practices involving selection, that the practice or groups of practices bears a manifest relationship to requirements for effective job performance; and~~

~~"(2) in the case of other employment decisions not involving employment selection as described in paragraph (1), the practice of group of practices bears a manifest relationship to a legitimate business objective of the employer.~~

"(1) in the case of employment practices that are used as job qualifications or used to measure the ability to perform the job, the challenged practice must bear a manifest relationship to the employment in question.

"(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

"(o) ~~"(p) The term 'requirements for effective job performance' includes,--~~

~~"(1) the ability to perform competently the actual work activities lawfully required by the employer for an employment position; and~~

~~"(2) any other lawful requirement that is important to the performance of the job, including, but not limited to, factors such punctuality, attendance, a willingness to avoid engaging in misconduct or insubordination, not having a work history demonstrating unreasonable job turnover, and not engaging in conduct or activity that improperly interferes with the performance of work by others.~~

The term 'employment in question' means--

"(1) the performance of actual work activities required by the employer for a job or class of jobs; or

"(2) any requirement related to behavior that is important to the job, but may not comprise actual work activities.

"~~(q)~~ (p) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity ~~of head of a Federal entity~~ subject to section 717.".

~~(b) INTERPRETATION. It is the intent of Congress in enacting sections 701(o) and 703(k) of the Civil Rights Act of 1964 (as added by subsection (a) of this section and subsection (a) of section (3) respectively) that the sections codify the meaning of business necessity used in Griggs v. Duke Power Co., 401 U.S. 424 (1971) and overrule the treatment of business necessity as a defense in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), with respect to an employment practice or group of employment practices.~~

SEC. 6. COVERAGE OF CONGRESS AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) COVERAGE OF THE SENATE.

(1) APPLICATION TO SENATE EMPLOYMENT.
The rights and protections provided pursuant to the amendments made by this Act shall, subject to paragraphs (2) through (5), apply with respect to any employee in an employment position in the Senate and any employing authority of the Senate.

(2) INVESTIGATION AND ADJUDICATION OF CLAIMS.--All claims raised by any individual with respect to Senate employment pursuant to the provisions described in paragraph (1) shall be investigated and adjudicated by the Select Committee on Ethics, pursuant to S. Res. 338, 88th Congress, as amended, or such other entity as the Senate may designate.

(3) RIGHTS OF EMPLOYEES.--The Committee on Rules and Administration shall ensure that Senate employee are informed of their rights under the provisions described in Paragraph (1).

(4) APPLICABLE REMEDIES.--When assigning remedies to individuals found to have a valid claim under the provisions described in paragraph (1), the Select Committee on Ethics, or such other entity as the Senate may designate, shall to the extent practicable apply the same remedies applicable to all other employees covered by the provisions described in paragraph (1). Such remedies shall apply exclusively.

(5) EXERCISE OF RULEMAKING POWER--Not withstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in paragraph (1) shall be within the exclusive jurisdiction of the United States Senate. The provisions of paragraphs (2), (3), and (4) are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

(b) COVERAGE OF THE HOUSE OF REPRESENTATIVES--

(1) IN GENERAL--Notwithstanding any other provision of law, the purposes of this Act shall, subject to paragraph (2), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(2) EMPLOYMENT IN THE HOUSE.--

(A) APPLICATION.--The rights and protections under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) and the amendments made by this Act shall, subject to subparagraph (B), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) ADMINISTRATION.--

(i) IN GENERAL.--In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii) RESOLUTION.--The resolution referred to in clause (i) is House Resolution 15 of the One Hundred First Congress, as agreed to January 3, 1989, or any other provision that continues in effect the provisions of, or is a successor to, the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988).

(C) EXERCISE OF RULEMAKING POWER.-- The provisions of subparagraph (B) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

(c) INSTRUMENTALITIES OF CONGRESS.--

(1) IN GENERAL--The rights and protections under title VII of the Civil Rights Act of 1964 and the amendments made by this Act shall, subject to paragraphs (2) and (5), apply with respect to any employee in an employment position in an instrumentality of the Congress and any chief official of such an instrumentality.

(2) ESTABLISHMENT OF REMEDIES AND PROCEDURES BY INSTRUMENTALITIES.--The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively.

(3) REPORT TO CONGRESS.--The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) DEFINITION OF INSTRUMENTALITIES.--For purposes of this section, instrumentalities of the Congress include the Congressional Budget Office, the General Accounting Office, and the Office of Technology Assessment.

(5) CONSTRUCTION.--Nothing in this section shall alter the enforcement procedures for individuals protected under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e--16).

~~SEC.7 CONSTRUCTION~~

~~(a) IN GENERAL.--Except as provided in subsection (b)--~~

~~(1) nothing in this Act or the amendments made by this Act shall be construed to limit an employer in establishing job requirements that are otherwise lawful under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and~~

~~(2) nothing in title VII of the Civil Rights Act of 1964 or this Act shall be construed--~~

~~(A) to require or encourage an employer to adopt hiring or promotion quotas; or~~

~~(B) to prevent an employer from hiring the most effective individual for a job.~~

~~(b) REMEDIES, VOLUNTARY ACTIONS, AND AGREEMENTS. Nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, voluntary employer actions for work force diversity, or affirmative action or conciliation agreements, that are otherwise in accordance with the law.~~

JUNE 27, 1991 1:00 PM

102D CONGRESS
1st SESSION

S. ____

To provide for damages in cases of intentional employment discrimination, and for other purposes.

IN THE SENATE OF THE UNITED STATES

June __, 1991

A BILL

To provide for damages in cases of intentional employment discrimination, and for other purposes.

BE IT ENACTED IN THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

SECTION I. SHORT TITLE.

This Act may be cited as the "Civil Rights and Remedies Act of 1991."

SEC. 2. FINDING AND PURPOSE.

(a) FINDING.-- Congress finds that additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace.

(b) PURPOSE.-- The purpose of this Act is to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace.

SEC. 3. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION

The Revised Statutes are amended by inserting after section 1977 the following new section:

"SECTION 1977A DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.

"(a) RIGHT OF RECOVERY.--

"(1) CIVIL RIGHTS.-- In an action brought by a complaining party under section 706 of the Civil Rights Act of 1964 (42 USC 2000e-5(e)) against a respondent who intentionally engaged in an unlawful employment practice prohibited under section 703 or 704 of the Act (42 U.S.C. 2000e-2, 2000e-3) ~~and engaged in the practice on the basis of the religion, or sex, or national origin of an~~

~~individual, the complaining party~~, and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party——

~~"(A)~~ may recover the compensatory and punitive damages ~~described~~ as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent. ~~; and~~

~~"(B) may request that a court impose the equitable civil penalty described in subsection (c) against the respondent.~~

"(2) DISABILITY. -- In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a))) against a respondent who ~~intentionally~~ engaged in a practice that constitutes discrimination under section 102 of the Act (42 U.S.C. 12112), other than discrimination described in ~~paragraph (3)(A) or (6) of subsection (b) of the section,~~ subsection (b) paragraphs (3)(A), 5(A), or 5(B), or other than discrimination described in subsection (b) paragraph (6)(except for practices intended to screen out individuals with disabilities), against an individual, the complaining party ——

~~"(A)~~ may recover the compensatory and punitive damages ~~described~~ as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent. ~~; and~~

~~"(B) may request that a court impose the equitable civil penalty described in subsection (c) against the respondent.~~

[(B) Insert language reflecting that damages shall not be available against respondents acting in good faith who fail to make reasonable accomodation due to undue hardship.]

~~(3) NOTICE. — a complaining party who requests that a court impose an equitable civil penalty under subsection (c) shall provide notice of the request to the Chairman of the Equal Employment Opportunity Commission and the Secretary of Health and Human Services.~~

"(b) COMPENSATORY AND PUNITIVE DAMAGES.--

(1) DETERMINATION OF PUNITIVE DAMAGES.-- ~~A complaining party may recover compensatory damages under subsection (a)~~

~~if it is determined that the complaining party has demonstrated the existence of injury requiring compensation by clear and convincing evidence.~~ A complaining party may recover punitive damages under this subsection if the complaining party demonstrates that~~--~~

~~(A)~~ the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual. ~~; and~~

~~(B) the award of punitive damages is necessary to deter the respondent from engaging in such a discriminatory practice or discriminatory practices in the future.~~

(2) EXCLUSIONS FROM COMPENSATORY DAMAGES.-- Compensatory damages awarded under this section shall not include back pay, interest on back pay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

(3) LIMITATIONS.-- The sum of the amount of compensatory damages awarded under this section ~~against a respondent who is not a government, government agency, or political subdivision,~~ for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed --

(A) in the case of a respondent who has ~~more than~~ 100 or fewer employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000; ~~and~~

(B) in the case of a respondent ~~not described in subparagraph (A),~~ who has more than 100 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

~~(4) PREJUDGMENT INTEREST.-- The court described in paragraph (1) shall not award prejudgment interest to a complaining party on compensatory damages awarded under this section in an action in which the aggrieved individual is an employee or applicant for employment described in section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-~~

~~16(a)).~~

"(c) ~~EQUITABLE PENALTY DETERMINATION.--~~

~~(A) IN GENERAL.--A court shall impose an equitable civil penalty on a respondent under subsection (a) if the court finds that--~~

~~"(i) the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual; and--~~

~~"(ii) the penalty is necessary to deter the respondent from engaging in such a discriminatory practice or such discriminatory practices in the future.--~~

~~"(B) AMOUNT.--The court shall impose an equitable civil penalty sufficient to deter the respondent from engaging in such a discriminatory practice or discriminatory practices in the future.--~~

~~"(2) EQUITABLE CONSIDERATIONS.--In making the finding described in paragraph (1)(A), a court may consider--~~

~~"(A) the nature of the discriminatory practice or practices that are the subjects of the action described in subsection (a);--~~

~~"(B) the efforts of the respondent to instruct the managers, supervisors, and employees of the respondent about legal requirements regarding employment discrimination;--~~

~~"(C) the nature of compliance programs, if any, established by the respondent to ensure that discriminatory practices do not occur in the workplace;~~

~~"(D) any lawful affirmative action under taken by the respondent with respect to the group injured by the discriminatory practice or practices that are the subject of the action described in subsection (a);--~~

~~"(E) the availability to the aggrieved individual of an internal grievance procedure or remediation policy established by the respondent;--~~

~~"(F) whether the respondent made a prompt investigation of the discriminatory practice or discriminatory practices;--~~

~~"(G) the efforts of the respondent to correct the discriminatory practice or practices; and~~

~~"(H) the size of the respondent and the effect of the equitable civil penalty on the economic viability of the respondent.~~

~~"(3) LIMITATIONS.—The amount of an equitable civil penalty imposed under subsection (a) shall not exceed—~~

~~"(A) in the case of a respondent who has more than 100 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $[insert amount]; and~~

~~"(B) in the case of a respondent not described in subparagraph (A), $[insert amount].~~

~~"(4) RECOVERY OF COSTS.—~~

~~"(A) AWARD OF FEES.—If a court imposes an equitable civil penalty in a case brought under this section the court shall award reasonable attorneys' and expert witness fees incurred by the complaining party in seeking the penalty.~~

~~"(B) RELATIONSHIP TO PENALTY.—The court shall not subtract the amount of the fees described in subparagraph (A) from the amount of the equitable civil penalty imposed against a respondent under this section.~~

~~"(5) APPLICATION OF PROCEEDS OF PENALTY.—~~

~~"(A) CORRECTION OF DISCRIMINATORY PRACTICES.—If a court determines, in the discretion of the court, that an equitable civil penalty imposed under this section is needed to correct discriminatory practices at the place of employment, or in the community, in which the discriminatory practice described in subsection (a) occurred, the penalty shall be expended all or in part, as directed by the court, to correct the discriminatory practices. The penalty may be expended to undertake actions such as public awareness or education programs regarding discrimination on the basis of race, color, religion, sex, or national origin, in order to eliminate future discrimination.~~

~~"(B) TRUST FUND.—~~

~~"(i) FULL PAYMENT.—If a court does not make the determination described in subparagraph (A), the~~

~~penalty shall be deposited in the Equal Employment Enforcement Trust Fund, established in section 9511 of the Internal Revenue Code of 1986.~~

~~"(ii) PAYMENT IN PART.--If a court directs that part of the penalty shall be expended as described in subparagraph (A), the remainder of the penalty shall be deposited in the Fund.~~

~~"(C) DETERMINATION.--In making the determination described in subparagraph (A), the court may consider--~~

~~"(i) anti-discrimination and anti-harassment policies and procedures established by the respondent, prior to the practice that is the subject of the action described in subsection (a), to ensure that discriminatory practices would not occur;~~

~~"(ii) corrective actions taken by the respondent on becoming aware of a claim that a discriminatory practice had occurred; and~~

~~"(iii) policies and procedures established by the respondent after the claim to ensure that discriminatory practices do not occur again.~~

~~"(d)~~ JURY TRIAL.--

"(1) IN GENERAL.-- (A) If a complaining party seeks compensatory or punitive damages under this section, any party may demand a trial by jury.

~~"(2) DETERMINATIONS.--If a party requests a trial by jury in an action brought under this section--~~

~~"(A) the jury shall determine all factual issues related to liability; and~~

~~"(B) if the determination described in subsection (b)(1) is made--~~

~~"(i), the jury shall determine the amount of compensatory damages awarded to the complaining party; and~~

~~"(ii)~~ (B) T~~t~~he court shall not inform the jury of the limitations described in subsection (b)(3).

"(e) DEFINITION.-As used in this section:

"(1) ~~AGGRIEVED INDIVIDUAL. The term `aggrieved individual' means a person who has been subjected to a discriminatory practice.~~

~~"(2)~~ COMPLAINING PARTY.-The term `complaining party' means--

"(A) in the case of a person seeking to bring an action under subsection (a)(1), a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

"(B) in the case of a person seeking to bring an action under subsection (a)(2), a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S:C. 12101 et seq.).

~~"(3)~~ "(2) DISCRIMINATORY PRACTICE .-- The term `discriminatory practice' means a practice described in paragraph (1) or (2) of subsection (a).".

~~"SEC. 4. EQUAL EMPLOYMENT ENFORCEMENT TRUST FUND.~~

~~(a) ESTABLISHMENT. Subchapter A of chapter 98 of the Internal Revenue Code of 1986 (relating to trust fund code) is amended by adding at the end the following new section:~~

~~SEC. 9511 EQUAL EMPLOYMENT ENFORCEMENT TRUST FUND~~

~~"(a) CREATION OF FUND. There is established in the Treasury of the United States a fund to be known as the Equal Employment Enforcement Trust Fund (referred to in this section as the `Fund'), consisting of such amounts as may be appropriated or credited to the Fund as provided in this section.~~

~~"(b) TRANSFERS TO FUND. There are appropriated to the Fund amounts equivalent to the additional revenues received in the Treasury as the result of the amendments made by section 3 of the Civil Rights and Remedies Act of 1991.~~

~~"(c) EXPENDITURES.~~

~~"(1) PURPOSES.~~

~~"(A) CIVIL RIGHTS ENFORCEMENT. Fifty percent of the amounts in the Fund shall be available, to the extent provided in appropriation Acts, for the purposes of making expenditures to carry out section 706 of the Civil 21 Rights Act of 1964 (42 U.S.C. 2000e-5).~~

~~"(B) FAMILY VIOLENCE PROTECTION. Fifty percent~~

~~of the amounts in the Fund shall be available, to the extent provided in appropriation Acts, for the purposes of making expenditures to carry out section 303 of the Family Violence Prevention and Services Act (42 U.S.C. 10402).~~

~~"(2) PAYMENTS BASED ON ESTIMATES.--Payments under paragraph (1) shall be made on the basis of estimates by the Secretary of the Treasury. Proper adjustments shall be made in amounts subsequently transferred to the extent prior estimates were in excess of or less than the amounts required to be transferred.".~~

~~(b) CONFORMING AMENDMENT.--Subchapter A of chapter 98 of the Internal Revenue Code of 1986 is amended in the table of sections by adding at the end the following new item:~~

~~"Sec. 9511. Equal Employment Enforcement Trust Fund.".~~

Sec. 4. ATTORNEYS' FEES

The last sentence of Section 722 of the Revised Statutes (42 USC 1988) is amended by inserting ", 1981A" after "1981".

SEC. 5. COVERAGE OF CONGRESS AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) COVERAGE OF THE SENATE.--

(1) APPLICATION TO SENATE EMPLOYMENT.-- The rights and protections provided pursuant to the amendment made by this Act shall, subject to paragraphs (2) through (5), apply with respect to any employee in an employment position in the Senate and any employing authority of the Senate.

(2) INVESTIGATION AND ADJUDICATION OF CLAIMS.-- All claims raised by any individual with respect to Senate employment pursuant to the provision described in paragraph (1) shall be investigated and adjudicated by the Select Committee on Ethics, pursuant to S. Res. 338, 88th Congress, as amended, or such other entity as the Senate may designate.

(3) RIGHTS OF EMPLOYEES.-- The Committee on Rules and Administration shall ensure that Senate employees are informed of their rights under the provisions described in paragraph (1).

(4) APPLICABLE REMEDIES.-- When assigning remedies to individuals found to have a valid claim under the provisions described in paragraph (1), the Select Committee on Ethics,

or such other entity as the Senate may designate, shall to the extent practicable apply the same remedies applicable to all other employees covered by the provisions described in paragraph (1). Such remedies shall apply exclusively.

(5) EXERCISE OF RULEMAKING POWER.-- Notwithstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in paragraph (1) shall be within the exclusive jurisdiction of the United States Senate. The provisions of paragraphs (2), (3), and (4) are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the senate to change its rules, in the same manner, and to the same extent, and to the same extent, as in the case of any other rule of the Senate.

(b) COVERAGE OF THE HOUSE OF REPRESENTATIVES.--

(1) IN GENERAL.- Notwithstanding any other provision of law, the purposes of this Act shall, subject to paragraph (2), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(2) EMPLOYMENT IN THE HOUSE.--

(A) APPLICATION.-The rights and protections under the amendment made by this Act shall, subject to subparagraph (B), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) ADMINISTRATION.--

(i) IN GENERAL.-- In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii) RESOLUTION.-- The resolution referred to in clause (i) is House Resolution 15 of the One Hundred First Congress, as agreed to January 3, 1989, or any other provision that continues in effect the provisions of, or is a successor to, the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988).

(C) EXERCISE OF RULEMAKING POWER.-- The provisions of subparagraph (B) are enacted by the House of

Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

(c) INSTRUMENTALITIES OF CONGRESS.--

(1) IN GENERAL.-- The rights and protections under the amendment made by this Act, shall, subject to paragraph (2), apply with respect to any employee in an employment position in an instrumentality of the Congress and any chief official of such an instrumentality.

(2) ESTABLISHMENT OF REMEDIES AND PROCEDURES BY INSTRUMENTALITIES. -- The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively.

(3) REPORT TO CONGRESS. -- The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) DEFINITION OF INSTRUMENTALITIES.-- For purposes of this section, instrumentalities of the Congress include the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Office of Technology Assessment, and the United States Botanic Garden.

SEC. 6. SEVERABILITY

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Letter	From Evan J. Kemp, Jr. to John Sununu Re: Civil Rights Language Proposed by Danforth (5 pp.)	6/24/91	~~P-5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights (1 of 2) 1991 [2]

Open on Expiration of PRA
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FOIA/SYS Case #:	1998-0004-F[2]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P-3 Release would violate a Federal statute [(a)(3) of the PRA]
P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

Copy to Boyden

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

JUN 24 1991

The Honorable John H. Sununu
Chief of the Staff to the President
First Floor, West Wing
The White House
Washington, D.C. 20500

THE CHIEF of STAFF
has seen

Dear Governor:

As Chairman of the principal Federal agency charged with implementing civil rights laws as they apply to employment discrimination, I am urging that the Administration not accept the "business necessity" language proposed by Senator Danforth in his letters to you of June 19 & 20, 1991.

The focus of the Danforth "business necessity" language will, if adopted, undermine the President's America 2000: An Education Strategy by making it extremely difficult for employers to show that use of educational credentials and objective measures of academic achievement are legally defensible. The tragedy of the Danforth proposal is that it would actually cause disproportionate harm to minorities, while claiming the flag of civil rights.

In proposing his latest definition of "business necessity," Senator Danforth quoted the following language from the 1971 Supreme Court Griggs v. Duke Power Co. decision:

> The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. (401 U.S. 433 n.9, emphasis in Senator Danforth's letter).

My concern is that the Commission and the courts have so broadly construed the meaning of Griggs that all selection procedures, not just employment tests, must be shown to be a "business necessity" if they adversely affect members of a class covered by Title VII. The 1978 Uniform Guidelines on Employee Selection Procedures, for example, define the universe of affected practices as follows:

> Section 2B: Employment decisions. These guidelines apply to tests and other selection procedures which are used as the basis for any employment decision. Employment

> decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law. Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above (emphasis added).

The most serious shortcoming of Senator Danforth's proposal is its focus on <u>job performance</u> in the "business necessity" definition. While seemingly reasonable at first blush, Senator Danforth's focus on <u>job performance</u> will make it extremely difficult, if not impossible, for employers to show that use of educational credentials and objective measures of academic achievement are legally defensible.

The Danforth proposal may constrain an employer in unexpected ways. Imagine the virtual impossibility of defending, for example, an employer's use of a high school diploma or a liberal arts degree in English or history in terms of how that knowledge directly relates to job performance for most entry-level positions. It simply can't be done. Furthermore, are undergraduate education majors the only teaching candidates qualified to teach? The Danforth proposal's focus means a school district in many cases would not be able to prefer candidates with advanced degrees because the undergraduate education degree is the only "correct" curriculum directly related to <u>job performance</u>. The Administration's bill, by contrast, would permit that same school district to insist on candidates with advanced degrees and non-education majors with degrees, for example, in English or history.

An additional unintended consequence of the Danforth's bill's focus on <u>job performance</u> is that it will undermine the President's <u>America 2000: An Education Strategy</u>. One of the strategic national goals established by President Bush is that by the year 2000:

> "(E)very school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment in our modern economy."

Yet as Chester Finn recently wrote in a <u>New York Times</u> op-ed piece (5/18/91) entitled "Educational Reform vs. Civil Rights Agendas," realizing the President's educational strategy will mean challenging the status quo:

> How many personnel directors will be able to convince a Federal enforcer or judge that a young person's command of science and geography is germane to the work of a forklift operator or receptionist? Yet so long as

> employers are inhibited from examining a candidate's test scores, 'rational' students will see no payoff for buckling down to learn such subjects. High marks won't matter.

Challenging the status quo means reexamining Griggs in light of an economy that is significantly more complex and demanding than is suggested by the facts at issue in that power plant. The fact situation in Griggs revealed that Duke Power waived their high school diploma requirement for initial assignment to manual labor positions but required the diploma for those wishing to transfer to better paying indoor jobs. Duke Power used an alternative requirement that instead of having a high school diploma, in order to qualify for positions requiring more than a strong back, it was necessary to attain the average score for high school graduates nationwide on two professionally developed ability tests. As I am sure by now you are aware, both the high school diploma and test requirements adversely affected minorities and the rest, as they say, is history.

The Supreme Court has held that an employer has the burden to defend the "business necessity" of any employment standard that adversely affects members of a class covered by Title VII. Unreasonably narrow interpretations of "business necessity" by the EEOC, the Labor Department, and some lower courts created terrible legal risks for firms that required educational achievement of their applicants. As a consequence of Griggs, given the expense and uncertainty of Title VII litigation, many employers simply abandoned requiring high school diplomas and checking transcripts for any job. Furthermore, the Supreme Court in Griggs stated that:

> "(I)t is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long range requirements fulfill a genuine business need."

We think that improving this nation's competitiveness warrants addressing the promotability issue of "capability for the next succeeding position" and the Administration's bill does so.

The unintended consequence of Griggs has been to eliminate employers' ability to reward learning. The resulting lack of signals to students from employers that academic achievement counts has meant that for the past two decades since the 1971 Griggs decision, the most basic incentive for many students to take school seriously has been missing. Now, more than a quarter of a century after the Civil Rights Act of 1964 was passed and in an increasingly competitive multi-national marketplace, we find that our economy is less dependent on strong backs and is more dependent on jobs requiring developed cognitive skills and abilities and the capability to benefit from training for the next succeeding position.

According to the Hudson Institute's 1988 report Opportunity 2000, more than half of all new jobs created over the next 20 years will require some education beyond high school and almost a third will be filled by college graduates (compared with only 22% of all occupations today). Notwithstanding employers' ever increasing dependence on individual competence in order to remain competitive, students, parents and teachers will not be able to point to a reward for learning if employers are for all practical purposes precluded from even inquiring about degree status much less rewarding academic achievement. As the Secretary of Labor's Commission on Workforce Quality and Labor market Efficiency has recently urged:

> The business community should...show through their hiring and promotion decisions that academic achievements will be rewarded.

The need to encourage academic achievement by encouraging employers to reward students who achieve academically will be met by the Administration's definition of "business necessity" which is the same as the definition adopted by the Supreme Court. The Danforth bill's definition of "business necessity," focusing on job performance, will in effect make use of educational credentials and objective measures of academic achievement indefensible unless quotas are also employed.

For fifteen months, I've maintained that we would not have an acceptable civil rights bill until we aired the philosophical differences between the Administration (back to merit hiring) and the civil rights community (proportional representation in the workplace). Lawyers could not write a satisfactory bill until these very real philosophical differences were openly confronted.

As you know, Governor, I was deeply involved in the early negotiations on the Americans With Disabilities Act (ADA). The White House and disability community had few differences on sections concerning employment, transportation, relay communications for the deaf, or coverage of state and local governments. The area of contention was public accommodations. At that time, I told you the disability community wanted total access: a "flat world" tomorrow. Because it was a question of civil rights, the disability community did not believe there could be a cost defense. You replied that it wasn't fair to place a financial burden on small businesses that had no government contracts or received no federal money.

You stated that the disability community's demand was not reasonable and clearly against Republican Party philosophy. Eventually both sides agreed to the "readily achievable" standard for existing public facilities to ensure mainstream opportunities for disabled people. The ADA negotiations were exemplary in that both sides thoroughly discussed areas of philosophical disagreement. Had we not done so, the ADA would never have become law.

Hopefully the information I have provided will encourage additional candor about these differing philosophies between the parties. Unless the latest Danforth definition of "business necessity" is rejected, when employers realize that they will be unable to defend use of educational credentials and objective measures of academic achievement under the Danforth bill, they will have little choice but to revert to hiring by the numbers. For these reasons I urge the Administration <u>not</u> agree to the Danforth compromise "business necessity" language.

Best regards,

Evan

Evan J. Kemp, Jr.
Chairman

Office of the Attorney General
Washington, D.C. 20530

June 21, 1991

The Honorable John C. Danforth
United States Senate
Washington, D.C. 20510

Dear Senator Danforth:

Governor Sununu has asked me to respond to your letters of June 19 and 20. In your first letter, you set out several phrases used in the course of discussions of "business necessity" in the opinion in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and stated that one of these phrases -- "manifest relationship to the employment in question" -- has been declared unacceptable by the principal proponents of H.R. 1. You suggested in both letters that we should instead accept as the holding of Griggs the phrase "shown to be related to job performance." Finally, you suggest in your second letter that this phrase be codified as the definition of "business necessity." As I will explain in some detail, the one phrase declared "off limits" is the only phrase that has been rationally defended as the definition of business necessity under Griggs.

I appreciate your efforts to identify language in Griggs which the proponents of H.R. 1 will accept. I can imagine your frustration that the proponents, notwithstanding their insistence that they are "merely restoring Griggs", are in fact prepared to accept anything but the legal standard established by Griggs.

One difficulty, however, with your suggestion is that it rejects two decades of Supreme Court precedent. Indeed, the very language now deemed unacceptable is the only language that the Court has always treated as the operative standard: "manifest relationship to the employment in question." Contrary to your suggested reading of the case, an unbroken line of Supreme Court opinions overwhelmingly confirms this proposition. Nor is this an issue on which there has ever been disagreement among the Justices.

- Scarcely a year after Griggs was decided, Justice Thurgood Marshall remarked in passing that Griggs "even placed the burden on the employer 'of showing that any given requirement must have a manifest relationship to the employment in question.'" Jefferson v. Hackney, 406 U.S. 535, 577 (1972) (Marshall, J., dissenting) (quoting Griggs).

- In 1973, in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805-806, the Court quoted the "related to job performance" language, but only because it had been specifically quoted and relied on by the court below (463 F.2d 337, 352 (1972)). The Supreme Court itself rejected its application to the case before the Court. See 411 U.S. at 806-807.

- In 1975, Justice Stewart, speaking for the Court and joined by Justices Douglas, Brennan, White, Marshall, and Rehnquist, said that the Court in Griggs had "unanimously held" that an employer must "meet[] 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (quoting Griggs).

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  This reading of Teal was later confirmed in an opinion by Justice Blackmun, in which Justices Brennan and

Marshall joined. Justice Blackmun quoted the phrase "manifest relationship to the employment in question," attributing it both to Teal and to Griggs. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1004 (1988) (Blackmun, J., joined by Brennan and Marshall, JJ., concurring in part and concurring in the judgment). Elsewhere in the same opinion, these Justices quoted the same language yet again. See id. at 1001.

Justice Powell's dissent in Teal also quoted the phrase "manifest relationship to the employment in question." See 457 U.S. at 461 (quoting Dothard's quotation of Griggs).

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- Finally, in the discussion of business necessity in Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989), the Court cited the page on which the phrase "manifest relationship to the employment in question" appears in Watson, Beazer, and Griggs. Even the dissenting opinion (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ.) quotes this same language at least three times. Id. at 666, 668 n. 14.

In sum, the phrase "manifest relationship to the employment in question" correctly states the legal standard to which the Supreme Court has unwaveringly held since Griggs was first decided. Apart from the citations in Teal and McDonnell Douglas, which for the reasons discussed above do not undermine my conclusion, the phrase you propose to treat as the holding in Griggs has never even been cited by the Court.

In response to the argument in your June 20 letter, I must say that it is not surprising that the opinion in Griggs would contain numerous phrases using the words "job performance" or the like. The facts of that particular case, and the arguments generated by those facts, naturally led the Court to focus on the question of whether the employment practices at issue predicted job performance.

It is equally unsurprising, however, that the Court has never thought or said that every disparate impact case should be shoehorned into a narrow analytical framework dictated by the particular facts at issue in Griggs. That is why the Court has always relied on the more general language of Griggs -- "manifest relationship to the employment in question" -- when stating the legal standard established by Griggs.

To take but one example, this language reflects the fact that the Griggs Court expressly left open the question "whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need." Griggs, 401 U.S. at 432 (emphasis added). The Court later held unambiguously, in a manner that would have been difficult or impossible under the definition of business necessity that you propose, that the business necessity standard is satisfied if an employer's "legitimate employment goals...are significantly served by -- even if they do not require -- [a challenged practice]." Beazer, 440 U.S. at 587, n.31 (Stevens, J., joined by Burger, C.J., and by Stewart, Blackmun, and Rehnquist, JJ.) (emphasis added). This understanding of business necessity has been completely noncontroversial on the Court. Indeed, even the dissenting opinion in Wards Cove firmly stated: "The opinion in Griggs made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose." Wards Cove, 490 U.S. at 665 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) (emphasis added).

Neither does it seem sensible to create a legal rule under which any employment practice not related to job performance could give rise to a finding of liability under Title VII. We know that there are legitimate employment criteria that would not meet this standard. "No smoking" rules provide one kind of example. A rule against hiring those with criminal convictions to work on a police force offers another example. An employer's decision to reject all applicants who lie on their employment applications is yet another example.

For over a year, Americans have been told again and again that the goal of this legislative initiative is to "restore Griggs." But we have never been told why the language from Griggs that the Supreme Court has been using for 20 years to define "business necessity" fails to codify Griggs. Nor have we been told why this language, or the language from Justice

Stevens' 1979 Beazer opinion, is "unacceptable" as an appropriate legal standard.

In your op-ed in the New York Times yesterday you said "[i]f ever the devil was in the details he has been present..." in this issue. I could not agree more. This is not a political issue, or one in which new language can be lightly substituted for well understood precedent. As the President's chief legal advisor, I have insisted on a reasoned and substantive review of every proposal offered to deal with these matters. Before this Administration and the Congress accept the departure from precedent and from the stated objective of this legislation which your proposal incorporates, I think it is only prudent that we have a clear understanding as to why the definition of "business necessity" consistently used by the Supreme Court for many years, and without any objection from any member of the Court, is suddenly unacceptable as a matter of policy.

Additionally, I must note that any agreement on an acceptable definition of "business necessity" would be inseparable from agreement on the related issues raised by efforts to codify disparate impact analysis and on the other matters addressed in these bills. As you know from the conversations that your staff had with Administration attorneys, S. 1208 -- like H.R. 1 -- suffers in our view from serious shortcomings in several respects.

I trust that we can continue to discuss these issues with a view to achieving a constructive outcome.

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Sincerely,

Dick Thornburgh
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COMMITTEES:
APPROPRIATIONS
COMMERCE, SCIENCE, AND TRANSPORTATION
ETHICS
INDIAN AFFAIRS
INTELLIGENCE

June 13, 1991

VIA FACSIMILE (456-2397)
CONFIRMATION (456-6797)

The Honorable John Sununu
Chief of Staff
The White House
Washington, D.C. 20500

Re: Civil Rights

Dear Governor Sununu:

Per Senator Gorton's request, I am sending with this letter the following items:

1. Draft Dear Republican Colleague letter prepared by Senator Gorton;

2. Dear Colleague letter dated June 13, distributed by Senator Hatch; and

3. A side-by-side comparison that summarizes the key provisions of the principal civil rights bills introduced into this Congress, i.e., the Brooks/Kennedy bill, H.R. 1 (as introduced and as passed by the House), the Danforth three-part proposal, S. 1207, S. 1208 and S. 1209, and the Administration/Dole bill, S. 611. A copy of this document previously was sent to Boyden Gray.

Hard copies of these materials will be delivered to your office tomorrow morning.

Sincerely,

Curtis D.W. Hom
Legislative Assistant to
Senator Slade Gorton

CDH:v

DRAFT - June 13, 1991

[Date]

Dear Republican Colleague:

1. The 1964 Civil Rights Act, proposed changes to which are now the focus of a major national and Congressional debate, was advanced, vigorously and eloquently, by Senator Hubert Humphrey, and others, as designed to bring about a color-blind society. It now has been enforced and interpreted over a period of almost three decades by courts and administrative agencies.

The 1964 Civil Rights Act does not deal expressly with "unintentional discrimination" or with "disparate impact", concepts which are very much at the focus of the current debate. Those are concepts which have been developed by the courts as they have decided specific litigation based on specific fact situations.

2. In the case of Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849 (1971), the Supreme Court first dealt with those concepts in an organized fashion. In Griggs, the Duke Power Company required job applicants and employees to have completed high school or to have passed a general aptitude test to be eligible to be hired by or transferred to more desirable departments within the company. Prior to passage of the Civil Rights Act of 1964, the Duke Power Company had a history of overt employment discrimination. The Court said:

> "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the job for which it was used. . . . But Congress directed the thrust of the [Civil Rights Act] of the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

401 U.S. at 432, 91 S.Ct. at 853 (emphasis added).

Notably, Griggs dealt with one specific employment practice as it affected one specific employer, although the holding was couched in general language.

3. The Griggs test evolved over the years in a long series of lawsuits involving varying factual situations, but the Supreme Court became increasingly sensitive to the fact that "unintentional discrimination", while perhaps a useful concept, had the potential to create great abuse. In Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777 (1988), which extended the "disparate impact" analysis to subjective employment and evaluation practices such as interviews and evaluations for the first time, Justice O'Connor cautioned:

> "We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. * * * It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. * * * If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today."

108 S.Ct. at 2787-88.

4. A year later, in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), a majority of the Supreme Court came down with the next step on disparate impact, or unintentional discrimination. That decision triggered the current civil rights bill controversy. The Supreme Court said:

> "[In a] disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. * * * The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the

same time though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster; this degree of scrutiny would be almost impossible for most employers to meet, and would result in a hose of evils we have identified above. [e.g., quotas]."

109 S.Ct. at 2125-26.

I believe this decision to be totally consistent with Griggs, while critics assert that it overrules Griggs. The fundamental question, however, is whether or not Wards Cove articulates an appropriate balance in disparate impact cases. I submit that it clearly does so.

5. Immediately after that decision, however, Senator Kennedy, at the behest of the civil rights community, introduced a bill to overturn the Supreme Court's decision in Wards Cove. That bill would have allowed a "business necessity" defense only when the employer could establish that the challenge practice was:

"essential to effective job performance (emphasis added)."

If you will look back at the language used by the Supreme Court in the previous section, you will see that it was the obvious intent of Senator Kennedy's bill to force employers to impose quotas upon themselves, as it used precisely the language that the Supreme Court said would inevitably result in such quotas. That bill was a quota bill beyond a shadow of a doubt. The civil rights community has never wavered from that goal, and the more elaborate the statutory language they propose the more litigation their language will engender and the more likely the response of self imposed quotas by employers will be.

6. After extended debate ending late in the last Congress, the Congress passed and sent to the President a bill in which the Kennedy language had been somewhat modified, but which still overturned the Supreme Court's Wards Cove decision and which still, in the view of the President and most Republicans, would have forced employers to hire by quota. The President's veto was sustained by a margin of one vote in the Senate.

7. The President's characterization of that bill as a quota bill is accepted by a vast majority of Americans. As Senator Gramm pointed out at lunch on Tuesday, the issue is the single most driving issue he has found in years affecting potential voter behavior in 1992. Your constituents are vehemently and overwhelmingly opposed to such legislation. For its actual

impact on your business communities, note the Washington Post article of Thursday, a copy of which is attached.

8. H.R. 1 as introduced into the House in January, was substantially identical to the vetoed 1990 bill. While H.R. 1, as modified and passed by the House last week, is somewhat milder than its original version in some provisions outside of the ambit of the dispute over quotas, its Wards Cove language is quota language as clearly as was that of the 1990 bill, and is so regarded by the President and by a majority of the American people.

9. It is my firm opinion, regrettably, that the Danforth bill on the Wards Cove decision (the two other separate Danforth bills cover other subject matter areas) is not significantly different from, or less onerous than, H.R. 1 as passed the House. The White House agrees. The Danforth bill expressly overrules Wards Cove and is complicated enough to provide years if employment for legions of lawyers. It attempts, vainly I believe, to codify a rapidly evolving field of court-developed law and to freeze it into a statutory straight jacket. The Danforth bill is just as likely as is H.R. 1 to cause intelligent employers to impose quotas on themselves in order to avoid protracted litigation.

10. Having said all this, the fundamental question still is whether or not the Wards Cove decision was properly decided by the Supreme Court majority. I submit that it was.

As I have already pointed out, the basic 1964 Civil Rights Act says nothing about unintentional discrimination, disparate impact, or business necessity. They are all court constructs, each case dealing with a different fact situation, and they cannot effectively and fairly be codified. The Supreme Court should be left with the task of developing the law in this field.

Moreover, if you understand the essence of Wards Cove, I think that you will agree that it states a perfectly fair and appropriate test. Perhaps the clinching argument for this proposition is the fact that, since the date of that decision, plaintiffs have not been losing significantly greater numbers of disparate impact cases than they were before the decision was rendered. The long series of bills seeking to overturn Wards Cove are a solution in search of a problem.

The Civil Rights Act of 1964 ain't broke; it doesn't need fixing. And it certainly doesn't need fixing in a fashion which adds unfairly to the burdens imposed on business people, adds a layer of court and administrative supervision to every hiring decision, and contradicts the desires of the vast majority of our constituents.

Sincerely,

SLADE GORTON
United States Senator

Enclosures
Washington Post Article

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 13, 1991

Dear Colleague:

I sincerely commend Senator Danforth on his recent efforts to try and develop legislation that satisfies the concerns of all parties involved in the civil rights debate. Clearly, the bill that passed the House of Representatives last week satisfied none of the concerns that have been raised with regard to this legislation.

I have concerns and questions, however, about the details of the legislation with which Senator Danforth has decided to move forward. These concerns have been conveyed by a separate letter to Senator Danforth. Moreover, I do not feel that many persons have given the President's bill sufficient attention.

The President's bill is a strong bill. It represents a compromise between the status quo under Wards Cove, by shifting the burden of persuasion to the employer, and the Democrat's bill. The President's bill, in my view, ought to form the basis for resolving this matter in a way which adequately responds to recent Supreme Court decisions, but will not lead employers to hire by the numbers to avoid litigation.

I admit, therefore, to reservations over efforts that are aimed at achieving a "middle ground" between the Democratic bill, which I believe will inevitably result in unfair preferences, and the President's bill. This is a road some of us have been down before. With the second anniversary of the Wards Cove decision upon us, I have yet to hear how cases that ought to have been won have been lost in court because of that decision. I urge interested senators to discuss with the Attorney General how cases have played out under Wards Cove.

The debate over civil rights does not resonate in this country because persons do not believe in equal opportunity. It resonates because people out there, many based on firsthand experience, believe that unfair preferences and reverse discrimination are already too much a part of the workplace. The divisiveness of this matter is not a result of Washington political rhetoric. It is a reaction to what has been happening in the workplace. Indeed, according to a Washington Post story (attached hereto), even a survey taken by the Leadership Conference on Civil Rights reflects this.

This letter might be a useful starting point to briefly outline some of the questions and concerns I have with Senator Danforth's proposal. I address here only one of his bills i.e. on Wards Cove (S.1208), but also have some concerns about the other bills.

Let me mention at the outset that the disparate impact standard itself is a very powerful tool for plaintiffs. Relying as it does on workforce statistics as its underlying premise, and requiring no intention to discriminate, the theory itself, in any form, creates significant pressure for employers quietly to make sure their numbers are right to avoid these kinds of lawsuits.

That is why carefully keeping this theory within reasonable bounds is important. What we are trying to avoid is even more pressure on employers to hire and promote by the numbers. This is the concern that led Justice O'Connor, in her 1988 plurality opinion in Watson v. Ft. Worth Bank & Trust Co., 108 S.Ct. 2777 (1988) (plurality opinion), to say that the plaintiff must identify the practice causing the disparity in a job, the burden of persuasion remains at all times with the plaintiff to show that discrimination occurred, and the definition of "business necessity" must reflect Griggs v. Duke Power Co.. She feared that in the absence of these safeguards, employers will quietly resort to hiring and promoting by numbers, whatever the euphemism used to mask it. These safeguards were especially important, she said, because in Watson the Court for the first time extended the disparate impact theory to subjective practices, like supervisor evaluations and interviews. As you know, after Justice Kennedy was confirmed, these same principles were adopted by a majority of the Court in Wards Cove.

With respect to the particulars of the bill, I have these comments. First, one of the most visible aspects of this controversy is the definition of "business necessity." Proponents of reversing Wards Cove have always said that all they want to do is to "restore" Griggs. They have never produced a definition, however, which does so. Neither, unfortunately, does the Danforth bill.

In Griggs, the Court defined business necessity as "manifest relationship to the employment in question." The Court's subsequent disparate impact cases clearly reflect this definition.[1]

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[1]Incidently, I have always believed that the Wards Cove formulation--"whether the challenged practice serves, in a significant way, the legitimate employment goals of the employer"--is consistent with Griggs. Indeed, the Court pretty much said so in 1979. New York Transit Authority v. Beazer. 440 U.S. 568, 587 n.31. (1979).

The Court has used this phrase in Albemarle Paper Co. v. Moody, 422 U.S. at 425 (1975); Dothard v. Rawlinson, 433 U.S. at 329 (1977); New York Transit Authority v. Beazer, 440 U.S. at 587 n.31 (1979); Connecticut v. Teal, 457 U.S. at 446 (1982) (a Justice Brennan opinion); and Watson v. Ft. Worth Bank & Trust, 108 S.Ct. 2777, 2790 (1988) (O'Connor plurality opinion for four Justices). Even Justice Stevens' dissent in Wards Cove, joined by Justices Brennan, Marshall, and Blackmun, cites the "manifest relationship" language at least three times as the applicable disparate impact standard. 109 S.Ct. at 2129, 2130 n.14.

The most obvious problem with the Danforth bill's deviation from Griggs is its new standard requiring that employment practices "bear a manifest relationship to the requirements for effective job performance." The phrase "effective job performance" or like phrases have consistently caused the concern that employers will only be able to hire marginally qualified applicants. At a minimum, since this is a new and different standard that has not appeared in any Supreme Court disparate impact case including Griggs, it will engender years of costly litigation to thrash out its meaning.

As many industrial psychologists have advised me, terms like "effective job performance" suggests job performance is dichotomous rather than continuous. Job performance simply cannot be separated into "effective" (or "successful") versus "ineffective" (or "unsuccessful"). Job performance is better viewed along a continuum, such as ineffective, minimally effective, fully effective, excellent, and outstanding. So long as requirements yield a minimally effective employee under S.1208, those standards cannot be raised if to do so results in a disparate impact on a group.

I do not believe that the bill's language--"nothing in Title VII or this Act shall be construed to prevent an employer from hiring the most effective individual for a job"--resolves this concern in any way. The problem with this language and all other versions of the bill to date, other than the President's and Al Simpson's, is not that employers will literally be "prevented" from doing anything. The problem is that the potential for litigation and liability costs for not satisfying the bill's disparate impact rules will make quiet hiring and promoting by the numbers the only safe recourse to avoid a lawsuit. These rules create the problem.

Moreover, Senator Danforth's definition of "requirements for effective job performance," compounds the problem. By saying one need only perform the job "competently," it reinforces the notion that once minimally satisfactory job performance is obtained, raising standards is illegal if doing so causes a disparate impact. Defining "effective" in this way, renders the concept of relative qualifications a practical nullity. A plaintiff will easily be able to tell a hapless employer trying to hire or promote the best qualified person that under the bill's definition of effective job performance, there is no way to say one of two applicants is more "effective" than the other if both are competent. This language, inadvertently, denies the employer that flexibility.

Plus, why put into a statute, as Senator Danforth's bill does, that the person must be judged on the "actual work activities lawfully required by the employer?" Who determines what are part of the actual work activities of a job--a bureaucrat at EEOC? A federal judge? I thought employers get to determine what the job is--it is the practices they use to hire and promote for a job that are properly subject to a disparate impact analysis, not the content of the job. Moreover, the content of many jobs is fluid, reflecting the day-to-day realities of the workplace. The same questions apply to the term "competent," which will now be construed by bureaucrats and judges as well. I just don't think the workplace is so mechanical and rigid a place as to be susceptible to legislative categorizations such as these. The bill's further use of the phrase "important to the performance of the job" is subject to the same concerns.

Indeed, this is an entirely new legislative superstructure imposed on employers. All of these new terms and phrases are fraught with importance and will affect employers in the conduct of their business. The unavoidable consequence will be years of litigation to thrash all of this out. Employers have spent 20 years adjusting to <u>Griggs</u>. Instead of employers being able to focus on removing barriers to upper level jobs--the "glass ceiling"--this bill will force them to divert their attention back to entry and mid-level hiring and promotion issues many of them thought they had worked out in the last two decades.

Another concern, of course, is that this bill applies the "effective job performance" requirement to <u>all</u> selection practices. Many selection practices, however, such as layoffs and transfers due to a plant relocation or closure cannot possibly meet an "effective job performance" test. These selection decisions may be made for very legitimate <u>non-</u>performance related reasons. As we all recognize, if these decisions are made for discriminatory reasons, they will be pursued as cases of intentional discrimination.

It is becoming almost bizarre that, if we all say we want to restore <u>Griggs</u>, we just don't do that and avoid these problems.

Second, on the "particularity" issue, I think I understand what Senator Danforth is are trying to achieve. The bill's language, however, does not achieve the appropriate result.

The provisions of the Danforth bill bear little resemblance, to my knowledge, to what any court, before or after Wards Cove, has required. Why do we need language in this regard? Where are the post-Wards Cove cases that have reached a result in this regard with which we disagree? Codifying detailed, technical and confusing requirements will only lead to costly litigation with no real equal opportunity interests being served.

The Danforth language also still allows a blanket complaint against an employer's entire set of practices. It does not require that an individual practice cause a disparity. Indeed, by merely requiring identification of practices that are "responsible in whole or in significant part for the disparate impact," it allows a plaintiff to challenge all of an employer's practices. This type of challenge will occur since all such practices are, as a group, responsible for the disparity.

Even assuming that a complaint might be narrowed down after a case is well underway, which I doubt will occur under the bill's language, the key point remains: no employer wants to run the risk that it will have to defend all of its practices, let alone defend each of them under a new business necessity definition. How will they avoid the problem? By quietly hiring and promoting by the numbers, to avoid disparate impact in the first place and the lawsuit that will follow.

This language also opens the door to the resurrection of the discredited comparable worth theory of pay discrimination, i.e., that employees in primarily female (or minority) jobs are paid less than employees in different but allegedly comparable male (or non-minority) jobs. As you know, employers rely on a range of factors in setting pay, including marketplace factors and the like. There is no way anyone can narrow down the particular practices resulting in the setting of pay. Justice Kennedy, while still on the Court of Appeals for the Ninth Circuit, wrote an excellent opinion explaining why the disparate impact theory is inappropriate for challenges to paysetting practices precisely because of the need to identify the particular practice causing the disparity. AFSCME v. State of Washington, 770 F.2d 1481 (9th Cir. 1985).

I also tried to resolve this problem last year in an effort to reach a compromise. The language then, similar to the Danforth bill now, did not reflect my preferred approach. Simply stating that particular cases are not overruled will not preclude the use of the comparable worth theory, under this bill, in the future.

Third, under this bill, even if an employer can justify its practices under the very difficult test of "business necessity," he or she is still liable if a plaintiff can demonstrate that there is an alternative practice that would serve the employer as well but have less disparate impact. I understand that this provision may have been included under the view that it reflects what the law has always been. It does not. Rather, the Supreme Court has held only that such a showing would be evidence that the practice was being used as a pretext for discrimination, not dispositive of the question whether the employer committed discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

I think this has serious implications. An employer, to be protected from liability, would have to search the universe before implementing each and every one of its employment practices, even if such practices readily satisfy the business necessity standard, to try to find those that meet his needs with the least disparate impact. But even that is not enough, because there is no way that an employer can predict beforehand whether one particular practice versus another will have a disparate impact on any particular group. This provision, by itself, therefore, might lead an employer to hire or promote only by the numbers. That may be the only one way to avoid potential liability with any certainty.

Three other quick points. This bill has language saying the bill does not "require or encourage an employer to adopt hiring or promotion quotas." I have never argued that any bill requires such a result, only that the rewriting of the Supreme Court's disparate impact rules will induce employers quietly to hire by the numbers, whatever the euphemism used to mask it, to avoid these lawsuits. And saying the bill does not "encourage" this result is of no practical effect in light of its new disparate impact rules. Hortatory language does not help when the operative language of this bill leads in the direction of hiring and promoting by the numbers.

The language that "the mere existence of a statistical imbalance in the workforce of an employer on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation," solves none of our concerns. First, the issue is not the composition of the employer's workforce as a whole, but of a particular job. Second, which statistical imbalance is being referred to--the general population, the relevant labor market for the occupation in question, or the applicant pool? If it is the first comparison, it does not address the concerns we have raised about misuse of statistical comparisons. But, third, in any event, no plaintiff will allege that the disparate impact alone, whatever comparison is used, is illegal. The plaintiff will assert the disparity is caused by some or all of the employer's practices and that is what is illegal. This language gives no succor.

Finally, I applaud Senator Danforth's response to the pernicious practice of race-norming. But, if an employer is guilty of discrimination, why should an innocent job applicant have his or her test scores jimmied because of his or her race or ethnicity? Under this bill, if an employer unintentionally discriminates, innocent employees can have their test scores altered on these grounds. That is no more "fair" because it is embodied in a court order than if undertaken voluntarily by employers. If an employer has discriminated, then give the discriminatees back pay, the next available job that they have been wrongly denied, retroactive seniority, and, of course, end the use of the discriminatory practices--but don't juggle an innocent, future applicant's test scores because of race. What did he or she do to deserve such unfair treatment? If a particular test causes a disparate impact and cannot be defended under the Griggs business necessity standard, then the test itself fails. No readjustment of the scores would be needed in this circumstance.

I sincerely regret that I firmly believe that Senator Danforth's Wards Cove bill will have the same inevitable consequences as H.R. 1, albeit by using some different language. Perhaps the best solution, suggested by his splitting these issues into three bills, is to get behind the overturn of Lorance on seniority systems and Patterson on Section 1981 and challenge the Democrats to pass that bill. There is where we have had unanimity since day one.

Sincerely,

Orrin G. Hatch
United States Senator

Attachment

THE WASHINGTON POST

Rights Drive Said to Lose Underpinnings

Focus Groups Indicate Middle Class Sees Movement as Too Narrow

3/9/91

By Thomas B. Edsall
Washington Post Staff Writer

Key civil rights leaders are struggling to develop strategies to counter findings of a private voter study they commissioned that shows the civil rights movement has lost the moral high ground with key segments of the white electorate.

The study, according to one of its authors, Celinda Lake, found that "the civil rights organizations and proponents of civil rights were no longer seen as . . . addressing generalized discrimination, valuing work and being for opportunity. The proponents weren't seen as speaking from those values."

The study, commissioned by the Leadership Conference on Civil Rights, a coalition of labor, civil rights, women's and liberal organizations, found strong support for such basic principles as equal opportunity, promotion for merit and hard work, and for fairness in the workplace. But the study also found that many white voters believe civil rights advocates are pressing for special, preferential benefits instead of such goals as equal opportunity.

The conference, which declined to release the written reports or the poll data, is seeking to develop a strategy to win approval of the Civil Rights Act of 1991. The organization is particularly concerned because racial issues contributed to President Bush's victory in 1988, and the issue of "quotas" helped produce Republican victories in the 1990 California gubernatorial contest and the North Carolina Senate race.

Bush vetoed last year's civil rights bill because he said it would result in quotas, and congressional Democrats were unable to overturn it. The administration is ready to make a similar argument this year, and Democrats are looking for a way to defuse what has become a politically persuasive issue.

Ralph Neas, executive director of the conference, said, "We want to particularly stress that the bill is an inclusive bill, that it is a bill for racial minorities, it is a bill for women, it is a bill for persons with disabilities, it is a bill for all working Americans."

This strategy, according to the study, faces some hurdles. There is a strong receptivity to Bush's ar-

"Voters believe that business will implement this bill as quotas," Lake said. "Whenever legislation or policy distinguishes among groups [blacks, white, Hispanics, men, women], business, just to get it done, will implement quotas." These findings are especially damaging to efforts to counter the Bush administration's portrayal of pending civil rights legislation as promoting quotas. "There is no resistance to the Bush notion about quotas," one source said.

Another damaging finding of the study was that advocates of civil rights "have lost the advantage," Lake said. "It's a tremendous loss in terms of moving an agenda forward." She based her comments on the study for the leadership conference and on work her firm, Greenberg-Lake, has done in the past decade.

Lake said the problem facing civil rights proponents is that such advocacy is now seen as pressing the "narrow" concerns of "particularized" groups, rather than promoting a broad, inclusive policy of opposing all forms of discrimination.

The study found that many white voters believe there is pervasive reverse discrimination in the workplace and that civil rights leaders are more interested in special preferences than in equal opportunity, according to persons involved in the research.

The study, which included a national poll and focus groups held in white working-class and southern communities, did not find intensified racism or opposition to fundamental principles of equality. Instead, it showed strong support for basic egalitarian principles, including equality of opportunity and the obligation of employers to give everyone a fair chance.

In addition, the study found strong opposition to discriminatory practices based on race, gender, age or disability, according to Lake and Geoff Garin of Garin-Hart Strategic Research, another Democratic polling firm.

Garin would not make as strong a judgment of the difficulties facing the civil rights movement, but, he said, "at some point the civil rights community needs to restate its claim to the idea of a level playing field, and that means in part being more forthcoming in saying that

Neas contended that the most troublesome conclusions voiced by Lake were not based on the poll data, but on the focus groups, for which voters averse to civil rights had been purposefully selected, and on the basis of other work by the Greenberg-Lake firm, which has specialized in studying working and lower-middle-class white voters the past decade.

Lake said the critical views of the civil rights movement are held most strongly by key swing votes in the electorate—"blue-collar voters, economically marginal younger voters, ticket-splitting, swing white Southern voters"—who in any election are critical to the strategies of both parties to "add up enough voters to get to 51 percent."

"It is a broad-based problem," she added, with similar, if less intense, views held by many other white voters.

Among some of the other findings from the voter study, according to on-the-record interviews and background information provided by those familiar with it:

- Many white voters see the work force as a hierarchy, in which many hiring and promotion decisions are based as much, if not more, on race and gender as on merit and performance.

Civil rights laws are seen by a substantial number of voters as creating unfair advantages, setting up "rank orders of privilege in the labor market," one source said.

- Public support of egalitarian principle is closely tied to a strong belief that a primary responsibility of elected officials is to support the mainstream goals and values of the middle class.

Voters want politicians who represent them to "address the middle class, those who work hard and pay all the taxes," Lake said.

Civil Rights Proposals
Provision Summaries

Senator Slade Gorton
Updated: June 10, 1991

Civil Rights Proposal
Provision Summaries

I(A) DISPARATE IMPACT PROVISIONS (Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989)) -- Causation and Specificity.

"[W]e note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employers's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth, S. 1208.	Administration/Dole, S. 611
Plaintiff required to identify which practices contributed to disparate impact, but only if court finds plaintiff is able to do so.	Plaintiff required to identify which practices contributed to disparate impact unless court determines plaintiff, after discovery, is unable to do so.	Plaintiff required to identify particular employment practices that result in a significant disparate impact. Note: The 1990 Committee Report defined "significant" disparate impact as "anything more than trivial." In short, a mere laundry list of all employment practices, without proving the causal link, arguably would satisfy the specificity requirement.	Plaintiff required to identify employment practices, and prove the causal link to disparate impact.

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Revised: June 10, 1991

I(B) DISPARATE IMPACT PROVISIONS (Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989)) -- Burden of Proof (Production and Persuasion)

Once the plaintiff establishes a prima facie case, then "the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate impact plaintiff. . . . This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts, see Fed. Rule Evid. 301, and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration."

H.R. 1, As Introduced.	H.R. 1, as passed by the House.	Danforth, S. 1208.	Administration/Dole, S. 611:
After plaintiff establishes prima facie case, then employer must prove business necessity.	After plaintiff establishes prima facie case, then employer must prove business necessity.	After plaintiff establishes prima facie case, then employer must prove business necessity.	After plaintiff establishes prima facie case, if the employer produces evidence of a legitimate business justification, then plaintiff must persuade the court that there was disparate impact, and which particular practices caused the disparate impact.

I(C) DISPARATE IMPACT PROVISIONS (Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989)) -- Business Justification

In Wards Cove, the Court noted that "[In a] disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. [citations]. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster; this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above. [e.g., quotas]."

In Griggs v. Duke Power, the Supreme Court noted that "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the job for which it was used." 401 U.S. 424, 432, 91 S.Ct. 849, 853. [. . .] "But Congress directed the thrust of the Act of the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

In New York Transit v. Beazer, the Court noted in a footnote that "Finally, the District Court noted that those goals are significantly served by -- even if they do not require -- [the Transit Authority's] rule as it applied to all methadone users including those who are seeking employment in non-safety-sensitive positions. . . . The record thus demonstrated that TA's rule bears a "manifest relationship to the employment in question."

(Note: the first quote in Griggs was cited in the White dissent in New York Transit v. Beazer, 440 U.S. 568, 602.).

Note that the first quote in Griggs seems far too precise to articulate a general rule; it seems more like an application of a principle to a given fact pattern (hiring tests), than the formulation of a general rule. The second quote seems more broadly written, more like a governing principle.

H.R. 1, as introduced.	H.R. 1, as passed in the House.	Danforth, S. 1208.	Administration/Dole, S. 611.
The term 'required by business necessity' means (A) in the case of employment practices involving selection, ... the practice or group of practices must bear a significant relationship to successful performance of the job; or (B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer. **Parallels, but is not identical to, the first definition of business necessity in Griggs.** **Note: no definition of what constitutes "selection."**	The term 'required by business necessity' means the practice or group of practices must bear a significant and manifest relationship to the requirements for effective job performance. . . . The term 'requirements for effective job performance' may include, in addition to effective performance of the actual work activities, factors which bear on such performance, such as attendance, punctuality, and no engaging in misconduct or insubordination, i.e., all negative factors. **Merges parts of both definitions of business necessity in Griggs, and comes up with a new test.**	The term 'required by business necessity' means (1) in the case of employment practices involving selection, . . . the practice or group of practices bears a manifest relationship to requirements for effective job performance; or (2) (if not involving selection), the practice . . . bears a manifest relationship to a legitimate business objective of the employer. The definition for 'requirements for effective job performance' also focuses on actual work activities. **Merges parts of both definitions of business necessity in Griggs, and comes up with a new test.** **Note: no definition of what constitutes "selection").**	The term 'justified by business necessity' means that the challenged practice has a manifest relationship to the employment in question or that the respondent's legitimate employment goals are significantly served by, even if they do not require the challenged practice. **Parallels the second definition of business necessity in Griggs, as interpreted by fn. 31 in Beazer.**

I(D) DISPARATE IMPACT PROVISIONS (Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989)) -- Alternative Practices

In Wards Cove, the Court clarified that: "[Even if plaintiffs] cannot persuade the trier of fact on the question of [employers'] business necessity defense, [plaintiffs] may still be able to prevail. To do so, [plaintiffs] will have to persuade the factfinder that 'other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate (hiring) interest(s);' by so demonstrating, [plaintiffs] would prove that '(employers were) using (their) tests merely as a "pretext" for discrimination.' [citation]. . . . If [plaintiffs], having established a prima facie case, come forward with alternatives to [employers'] hiring practices that reduce the racially-disparate impact of practices currently being used, and [employers] refuse to adopt these alternatives, such a refusal would belie a claim by [employers] that their incumbent practices are being employed for non-discriminatory reasons."

This appears intended to set out an evidentiary standard that the existence of less burdensome alternatives (and refusal by the employer to adopt them) would undercut the "good faith" requirement implicitly a part of the business necessity defense.

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth, S. 1208.	Administration S. 611.
Makes the existence of less burdensome alternatives sufficient for the plaintiff to win a disparate impact case, despite business necessity.	Makes the existence of less burdensome alternatives sufficient for the plaintiff to win a disparate impact case, despite business necessity.	Makes the existence of less burdensome alternatives sufficient for the plaintiff to win a disparate impact case, despite business necessity.	Makes the existence of less burdensome alternatives sufficient for the plaintiff to win a disparate impact case, despite business necessity, but only if employer refuses to adopt them.

II. MIXED MOTIVE PROVISIONS (Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989) (Brennen, Marshall, Blackmun, Stevens)).

Price Waterhouse clarified that if plaintiff establishes (both burden of persuasion and proof) that impermissible consideration was a motivating factor in an employment decision, then employer must prove that the same decision would have been made absent that consideration.

Focussing on the interpretation of whether an employment decision was made "because of" the individual's sex, 42 U.S.C. 2000e-2(a)(1), (2), the Court added that: "The critical inquiry . . . is whether gender was a factor in the employment decision at the moment it was made. Moreover, since we know that the words 'because of' do not mean '*solely* because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. . . ." 109 S.Ct. at 1785 (emphasis in original).

"It is difficult for us to imagine that, in the simple words, 'because of,' Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer *relied upon* sex-based consideration in coming to its decisions."

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth, S. 1208.	Administration/Dole, S. 611.
The plaintiff must prove that an impermissible consideration was a "contributing" factor in the employment practice. Cause of action fails if employer would have taken the same action in the absence of discriminatory employment practice.	The plaintiff must prove that an impermissible consideration was a "motivating" factor in the employment practice. Cause of action fails if employer would have taken the same action in the absence of discriminatory employment practice	The plaintiff must prove that an impermissible consideration was a "motivating" factor in the employment practice. Cause of action does not fail if employer would have taken the same action in the absence of discriminatory employment practice. Declaratory and injunctive relief, as well as costs and attorney's fees, may be awarded, but damages or reinstatement may not.	Does not address.

III. FINALITY OF JUDGMENTS OR ORDERS (Martin v. Wilks, 109 S.Ct. 2180 (1989), Hansberry v. Lee, 311 U.S. 32 (1940)).

In Martin v. Wilks, white fire fighters claimed that the City of Birmingham had discriminated against them by refusing to promote them because of their race. The City argued that their claim was barred because the City's promotion process had been sanctioned in a consent decree between the City and black firefighters, of which consent decree the white firefighters had been aware but were parties. The Court held that the consent decree did not bind the white firefighters because they were not made party to the decree, and they were not within a certified class of defendants whose interests were adequately represented by a named defendant.

Binds only parties and non-parties of a certified class whose interest were adequately represented by a named party.

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth, S. 1209.	Administration/Dole. S. 611.
Binds parties and non-parties alike, limited only by due process requirements.	Binds parties and non-parties alike, limited only by due process requirements.	Binds parties, as well as certain non-parties, depending on whether the order or decree was rendered before or after the effective date of the amendments, e.g., persons whose interests were adequately represented by a party to the case/degree (even though there was no certified class).	Reaffirms Martin v. Wilks. Binds parties and non-parties of a certified class whose interests are adequately represented by a named party to the case/decree.

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Revised: June 10, 1991

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IV. MAKING AND PERFORMANCE OF CONTRACTS (Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989)).

In Patterson, the Court held that Section 1981 only applied to making or enforcing contracts, not their performance. Section 1981 does not provide a remedy for individuals who are subjected to discriminatory performance of their employment contracts (through racial harassment, for example). Thus, the only available recourse is through use of Title VII.

(Note: Section 1981 was a post-Civil War statute to ensure that the slaves had the right to "make and enforce" contracts to the same extent as did white citizens. It first was used as an anti-discrimination tool in the mid-1900's.)

Section 1981 applies only to making or enforcing contracts, not their performance. Only Blacks are within the scope of Section 1981.

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth, S. 1209.	Administration/Dole, S. 611.
Section 1981 modified to apply to the making, performance, modification and termination of contracts. Only Blacks are within the scope of Section 1981.	**Section 1981 modified to apply to the making, performance, modification and termination of contracts. Only Blacks are within the scope of Section 1981.**	**Section 1981 modified to apply to the making, performance, modification and termination of contracts. Only Blacks are within the scope of Section 1981.**	**Section 1981 modified to apply to the making, performance, modification and termination of contracts. Only Blacks are within the scope of Section 1981.**

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V. SENIORITY SYSTEMS AS DISCRIMINATORY EMPLOYMENT PRACTICES (Lorance v. AT&T Technologies, Inc., 109 S.Ct. 2261 (1989))

In Lorance, female employees challenged a seniority system pursuant to Title VII, claiming that, although facially nondiscriminatory, it was adopted with an intent to discriminate against women. The Court held that the claim was barred by Title VII's requirement that a charge must be filed within 180 days (300 days if the matter can be referred to a state agency) after the alleged discrimination occurred.

Claims to challenge seniority systems as discriminatory must be filed within 180 days (300 days if the matter can be referred to a state agency) after an alleged discriminatory practice.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1209.	Administration/Dole, S. 611.
Establishes multiple points in time when an alleged unlawful employment practice occurs. Also provides that a seniority system can be challenged up to 2 years after the plaintiff has affected adversely by its provisions.	Establishes multiple points in time when an alleged unlawful employment practice occurs. Also provides that a seniority system can be challenged up to 540 days (1-1/2 years) after the plaintiff has affected adversely by its provisions.	Establishes multiple points in time when an alleged unlawful employment practice occurs. Does not extend time limits for filing claims.	Establishes multiple points in time when an alleged unlawful employment practice occurs. Does not extend time limits for filing claims.

VI. LIMITATIONS ON DAMAGES FOR INTENTIONAL DISCRIMINATION.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1207.	Administration/Dole, S. 611.
Allows for full compensatory and punitive damages, to be determined by a jury.	Allows for compensatory damages to be determined by a jury, and punitive damages capped for all employers at the greater of $150,000 or the sum of compensatory damages plus equitable monetary relief.	Authorizes compensatory damages (not including back pay) to be determined by a jury, and an "equitable penalty" if necessary to deter future discriminatory practices. There are similar caps for both types of award: $150,000 for companies of 100 or more employees; $50,000 for others. Costs are awarded if an equitable penalty is assessed. Also creates an "equal employment opportunity trust fund," funded by assessment of equitable penalties, and proceeds to be for civil rights enforcement programs and family violence protection programs.	Allows $150,000 of damages in excess of equitable monetary relief if the equities so require, damages (and liability if Constitutional) to be determined by the court.

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VII. ADDITIONAL REMEDIES FOR HARASSMENT IN THE WORKPLACE -- Declaratory and Injunctive Relief.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth (S. 1207, S. 1208, S. 1209).	Administration/Dole, S. 611.
Not addressed.	Not addressed.	Not addressed.	Creates new Title VII cause of action for sexual harassment, including (i) sexual advances relating to hiring or promotion, and (ii) sexual advances that create an intimidating, hostile or offensive working environment. Requires the plaintiff to utilize within 90 days complaint procedures established by the employers before a cause of action will lie. Also provides for immediate injunctive relief and expedited hearing of the case.

2. Alternative Means of Dispute Resolution.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1208.	Administration/Dole, S. 611.
Clarifies that amendments do not affect court-ordered remedies, affirmative action programs or conciliation agreements that are otherwise in accordance with the law. Also adds language that amendments do not require <u>or encourage</u> hiring or promotion quotas.	Clarifies that amendments do not limit employers from establishing job requirements, or require, permit or encourage quotas. "Quota" is very narrowly defined as a fixed number or percentage of persons which must be attained, or which cannot be exceeded, regardless of their qualifications. Also quietly codifies an unnamed string of Supreme Court cases regarding affirmative action by providing that the amendments shall be construed to approve the lawfulness of voluntary or court ordered affirmative action that is consistent with current Supreme Court cases.	Clarifies that amendments should not be construed to limit employers from establishing lawful job requirements, and also neither (i) requires or encourages hiring or promotion quotas, or (ii) prevents an employer from hiring the most effective individual for a job. Note: the bill <u>does not</u> state that employers should be discouraged from quotas!	Encourages alternative means of dispute resolution.

VIII. OTHER PROVISIONS

1. Expert Fees. Not authorized under Title VII.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1209.	Administration/Dole, S. 611.
Authorizes expert witness fees and other litigation expenses without limitation. Prohibits the waiver of attorney's fees as a condition to a consent or settlement.	Authorizes expert witness fees and other litigation expenses without limitation, including Section 1981 claims. Prohibits the waiver of attorney's fees as a condition to a consent or settlement.	Authorizes expert witness fees and other litigation expenses without limitation.	Limits expert witness fees to $300 per day.

3. Employment Ability Tests (Race Norming).

Current statutory law (42 USC Sec. 2000e-2(h)) permits employers to use ability tests "provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1208.	Administration/Dole, S. 611.
Does not address.	Permits ability tests that predict on a nondiscriminatory basis "the ability of such test takers to perform <u>the job</u> with respect to which such test is used." Also prohibits employers from adjusting scores of ability tests. **Taken together, these provisions would outlaw all but job specific tests for which race norming would not be necessary. In short, the only tests that would be valid are the ones that already have race norming built in.**	Prohibits race norming, unless used to comply with court order.	Does not address.

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4. Extraterritorial Application.

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth (S. 1207, S. 1208, S. 1209).	Administration/Dole, S. 611.
Does not address.	Covers U.S. workers employed abroad to the extent not inconsistent with local law.	Does not address.	Does not address.

5. Construction.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth (S. 1207, S. 1208, S. 1209).	Administration/Dole, S. 611.
Encourages broad construction.	Encourages broad construction.	See Alternative Means of Dispute Resolution, above.	Does not address.

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6. Effective Dates.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth (S. 1207, S. 1208, S. 1209).	Administration/Dole, S. 611.
Retroactive application.	Retroactive application.	Not addressed in S. 1207 and S. 1208. Generally date of enactment in S. 1209, except for provisions relating to finality of judgments or orders. Generally silent or prospective, except for provisions relating to finality of judgments or orders.	Prospective application.

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COMMITTEES:
APPROPRIATIONS
COMMERCE, SCIENCE, AND TRANSPORTATION
ETHICS
INDIAN AFFAIRS
INTELLIGENCE

June 13, 1991

VIA FACSIMILE (456-2397)
CONFIRMATION (456-6797)

The Honorable John Sununu
Chief of Staff
The White House
Washington, D.C. 20500

Re: Civil Rights

Dear Governor Sununu:

Per Senator Gorton's request, I am sending with this letter the following items:

1. Draft Dear Republican Colleague letter prepared by Senator Gorton;

2. Dear Colleague letter dated June 13, distributed by Senator Hatch; and

3. A side-by-side comparison that summarizes the key provisions of the principal civil rights bills introduced into this Congress, i.e., the Brooks/Kennedy bill, H.R. 1 (as introduced and as passed by the House), the Danforth three-part proposal, S. 1207, S. 1208 and S. 1209, and the Administration/Dole bill, S. 611. A copy of this document previously was sent to Boyden Gray.

Hard copies of these materials will be delivered to your office tomorrow morning.

Sincerely,

Curtis D. W. Hom

Curtis D.W. Hom
Legislative Assistant to
Senator Slade Gorton

CDH:v

DRAFT - June 13, 1991

[Date]

Dear Republican Colleague:

1. The 1964 Civil Rights Act, proposed changes to which are now the focus of a major national and Congressional debate, was advanced, vigorously and eloquently, by Senator Hubert Humphrey, and others, as designed to bring about a color-blind society. It now has been enforced and interpreted over a period of almost three decades by courts and administrative agencies.

The 1964 Civil Rights Act does not deal expressly with "unintentional discrimination" or with "disparate impact", concepts which are very much at the focus of the current debate. Those are concepts which have been developed <u>by the courts</u> as they have decided specific litigation based on specific fact situations.

2. In the case of <u>Griggs v. Duke Power Company</u>, 401 U.S. 424, 91 S.Ct. 849 (1971), the Supreme Court first dealt with those concepts in an organized fashion. In <u>Griggs</u>, the Duke Power Company required job applicants and employees to have completed high school or to have passed a general aptitude test to be eligible to be hired by or transferred to more desirable departments within the company. Prior to passage of the Civil Rights Act of 1964, the Duke Power Company had a history of overt employment discrimination. The Court said:

> "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. On the record before us, neither the high school completion requirement nor the general intelligence test is shown to <u>bear a demonstrable relationship to successful performance of the job for which it was used</u>. . . . But Congress directed the thrust of the [Civil Rights Act] of the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a <u>manifest relationship to the employment in question</u>."

401 U.S. at 432, 91 S.Ct. at 853 (emphasis added).

Notably, <u>Griggs</u> dealt with one specific employment practice as it affected one specific employer, although the holding was couched in general language.

Dear Colleague - **DRAFT June 12, 1991**
[Date]
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3. The Griggs test evolved over the years in a long series of lawsuits involving varying factual situations, but the Supreme Court became increasingly sensitive to the fact that "unintentional discrimination", while perhaps a useful concept, had the potential to create great abuse. In Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777 (1988), which extended the "disparate impact" analysis to subjective employment and evaluation practices such as interviews and evaluations for the first time, Justice O'Connor cautioned:

> "We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. * * * It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. * * * If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today."

108 S.Ct. at 2787-88.

4. A year later, in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), a majority of the Supreme Court came down with the next step on disparate impact, or unintentional discrimination. That decision triggered the current civil rights bill controversy. The Supreme Court said:

> "[In a] disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. * * * The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the

> same time though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster; this degree of scrutiny would be almost impossible for most employers to meet, and would result in a hose of evils we have identified above. [e.g., quotas]."

109 S.Ct. at 2125-26.

I believe this decision to be totally consistent with Griggs, while critics assert that it overrules Griggs. The fundamental question, however, is whether or not Wards Cove articulates an appropriate balance in disparate impact cases. I submit that it clearly does so.

5. Immediately after that decision, however, Senator Kennedy, at the behest of the civil rights community, introduced a bill to overturn the Supreme Court's decision in Wards Cove. That bill would have allowed a "business necessity" defense only when the employer could establish that the challenge practice was:

> "essential to effective job performance (emphasis added)."

If you will look back at the language used by the Supreme Court in the previous section, you will see that it was the obvious intent of Senator Kennedy's bill to force employers to impose quotas upon themselves, as it used precisely the language that the Supreme Court said would inevitably result in such quotas. That bill was a quota bill beyond a shadow of a doubt. The civil rights community has never wavered from that goal, and the more elaborate the statutory language they propose the more litigation their language will engender and the more likely the response of self imposed quotas by employers will be.

6. After extended debate ending late in the last Congress, the Congress passed and sent to the President a bill in which the Kennedy language had been somewhat modified, but which still overturned the Supreme Court's Wards Cove decision and which still, in the view of the President and most Republicans, would have forced employers to hire by quota. The President's veto was sustained by a margin of one vote in the Senate.

7. The President's characterization of that bill as a quota bill is accepted by a vast majority of Americans. As Senator Gramm pointed out at lunch on Tuesday, the issue is the single most driving issue he has found in years affecting potential voter behavior in 1992. Your constituents are vehemently and overwhelmingly opposed to such legislation. For its actual

impact on your business communities, note the Washington Post article of Thursday, a copy of which is attached.

8. H.R. 1 as introduced into the House in January, was substantially identical to the vetoed 1990 bill. While H.R. 1, as modified and passed by the House last week, is somewhat milder than its original version in some provisions outside of the ambit of the dispute over quotas, its Wards Cove language is quota language as clearly as was that of the 1990 bill, and is so regarded by the President and by a majority of the American people.

9. It is my firm opinion, regrettably, that the Danforth bill on the Wards Cove decision (the two other separate Danforth bills cover other subject matter areas) is not significantly different from, or less onerous than, H.R. 1 as passed the House. The White House agrees. The Danforth bill expressly overrules Wards Cove and is complicated enough to provide years if employment for legions of lawyers. It attempts, vainly I believe, to codify a rapidly evolving field of court-developed law and to freeze it into a statutory straight jacket. The Danforth bill is just as likely as is H.R. 1 to cause intelligent employers to impose quotas on themselves in order to avoid protracted litigation.

10. Having said all this, the fundamental question still is whether or not the Wards Cove decision was properly decided by the Supreme Court majority. I submit that it was.

As I have already pointed out, the basic 1964 Civil Rights Act says nothing about unintentional discrimination, disparate impact, or business necessity. They are all court constructs, each case dealing with a different fact situation, and they cannot effectively and fairly be codified. The Supreme Court should be left with the task of developing the law in this field.

Moreover, if you understand the essence of Wards Cove, I think that you will agree that it states a perfectly fair and appropriate test. Perhaps the clinching argument for this proposition is the fact that, since the date of that decision, plaintiffs have not been losing significantly greater numbers of disparate impact cases than they were before the decision was rendered. The long series of bills seeking to overturn Wards Cove are a solution in search of a problem.

Dear Colleague - DRAFT June 12, 1991
[Date]
Page 5

The Civil Rights Act of 1964 ain't broke; it doesn't need fixing. And it certainly doesn't need fixing in a fashion which adds unfairly to the burdens imposed on business people, adds a layer of court and administrative supervision to every hiring decision, and contradicts the desires of the vast majority of our constituents.

Sincerely,

SLADE GORTON
United States Senator

Enclosures
Washington Post Article

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 13, 1991

Dear Colleague:

I sincerely commend Senator Danforth on his recent efforts to try and develop legislation that satisfies the concerns of all parties involved in the civil rights debate. Clearly, the bill that passed the House of Representatives last week satisfied none of the concerns that have been raised with regard to this legislation.

I have concerns and questions, however, about the details of the legislation with which Senator Danforth has decided to move forward. These concerns have been conveyed by a separate letter to Senator Danforth. Moreover, I do not feel that many persons have given the President's bill sufficient attention.

The President's bill is a strong bill. It represents a compromise between the status quo under Wards Cove, by shifting the burden of persuasion to the employer, and the Democrat's bill. The President's bill, in my view, ought to form the basis for resolving this matter in a way which adequately responds to recent Supreme Court decisions, but will not lead employers to hire by the numbers to avoid litigation.

I admit, therefore, to reservations over efforts that are aimed at achieving a "middle ground" between the Democratic bill, which I believe will inevitably result in unfair preferences, and the President's bill. This is a road some of us have been down before. With the second anniversary of the Wards Cove decision upon us, I have yet to hear how cases that ought to have been won have been lost in court because of that decision. I urge interested senators to discuss with the Attorney General how cases have played out under Wards Cove.

The debate over civil rights does not resonate in this country because persons do not believe in equal opportunity. It resonates because people out there, many based on firsthand experience, believe that unfair preferences and reverse discrimination are already too much a part of the workplace. The divisiveness of this matter is not a result of Washington political rhetoric. It is a reaction to what has been happening in the workplace. Indeed, according to a Washington Post story (attached hereto), even a survey taken by the Leadership Conference on Civil Rights reflects this.

This letter might be a useful starting point to briefly outline some of the questions and concerns I have with Senator Danforth's proposal. I address here only one of his bills i.e. on Wards Cove (S.1208), but also have some concerns about the other bills.

Let me mention at the outset that the disparate impact standard itself is a very powerful tool for plaintiffs. Relying as it does on workforce statistics as its underlying premise, and requiring no intention to discriminate, the theory itself, in any form, creates significant pressure for employers quietly to make sure their numbers are right to avoid these kinds of lawsuits.

That is why carefully keeping this theory within reasonable bounds is important. What we are trying to avoid is even more pressure on employers to hire and promote by the numbers. This is the concern that led Justice O'Connor, in her 1988 plurality opinion in Watson v. Ft. Worth Bank & Trust Co., 108 S.Ct. 2777 (1988) (plurality opinion), to say that the plaintiff must identify the practice causing the disparity in a job, the burden of persuasion remains at all times with the plaintiff to show that discrimination occurred, and the definition of "business necessity" must reflect Griggs v. Duke Power Co.. She feared that in the absence of these safeguards, employers will quietly resort to hiring and promoting by numbers, whatever the euphemism used to mask it. These safeguards were especially important, she said, because in Watson the Court for the first time extended the disparate impact theory to subjective practices, like supervisor evaluations and interviews. As you know, after Justice Kennedy was confirmed, these same principles were adopted by a majority of the Court in Wards Cove.

With respect to the particulars of the bill, I have these comments. First, one of the most visible aspects of this controversy is the definition of "business necessity." Proponents of reversing Wards Cove have always said that all they want to do is to "restore" Griggs. They have never produced a definition, however, which does so. Neither, unfortunately, does the Danforth bill.

In Griggs, the Court defined business necessity as "manifest relationship to the employment in question." The Court's subsequent disparate impact cases clearly reflect this definition.[1]

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[1]Incidently, I have always believed that the Wards Cove formulation--"whether the challenged practice serves, in a significant way, the legitimate employment goals of the employer"--is consistent with Griggs. Indeed, the Court pretty much said so in 1979. New York Transit Authority v. Beazer. 440 U.S. 568, 587 n.31. (1979).

The Court has used this phrase in Albemarle Paper Co. v. Moody, 422 U.S. at 425 (1975); Dothard v. Rawlinson, 433 U.S. at 329 (1977); New York Transit Authority v. Beazer, 440 U.S. at 587 n.31 (1979); Connecticut v. Teal, 457 U.S. at 446 (1982) (a Justice Brennan opinion); and Watson v. Ft. Worth Bank & Trust, 108 S.Ct. 2777, 2790 (1988) (O'Connor plurality opinion for four Justices). Even Justice Stevens' dissent in Wards Cove, joined by Justices Brennan, Marshall, and Blackmun, cites the "manifest relationship" language at least three times as the applicable disparate impact standard. 109 S.Ct. at 2129, 2130 n.14.

The most obvious problem with the Danforth bill's deviation from Griggs is its new standard requiring that employment practices "bear a manifest relationship to the requirements for effective job performance." The phrase "effective job performance" or like phrases have consistently caused the concern that employers will only be able to hire marginally qualified applicants. At a minimum, since this is a new and different standard that has not appeared in any Supreme Court disparate impact case including Griggs, it will engender years of costly litigation to thrash out its meaning.

As many industrial psychologists have advised me, terms like "effective job performance" suggests job performance is dichotomous rather than continuous. Job performance simply cannot be separated into "effective" (or "successful") versus "ineffective" (or "unsuccessful"). Job performance is better viewed along a continuum, such as ineffective, minimally effective, fully effective, excellent, and outstanding. So long as requirements yield a minimally effective employee under S.1208, those standards cannot be raised if to do so results in a disparate impact on a group.

I do not believe that the bill's language--"nothing in Title VII or this Act shall be construed to prevent an employer from hiring the most effective individual for a job"--resolves this concern in any way. The problem with this language and all other versions of the bill to date, other than the President's and Al Simpson's, is not that employers will literally be "prevented" from doing anything. The problem is that the potential for litigation and liability costs for not satisfying the bill's disparate impact rules will make quiet hiring and promoting by the numbers the only safe recourse to avoid a lawsuit. These rules create the problem.

Moreover, Senator Danforth's definition of "requirements for effective job performance," compounds the problem. By saying one need only perform the job "competently," it reinforces the notion that once minimally satisfactory job performance is obtained, raising standards is illegal if doing so causes a disparate impact. Defining "effective" in this way, renders the concept of relative qualifications a practical nullity. A plaintiff will easily be able to tell a hapless employer trying to hire or promote the best qualified person that under the bill's definition of effective job performance, there is no way to say one of two applicants is more "effective" than the other if both are competent. This language, inadvertently, denies the employer that flexibility.

Plus, why put into a statute, as Senator Danforth's bill does, that the person must be judged on the "actual work activities lawfully required by the employer?" Who determines what are part of the actual work activities of a job--a bureaucrat at EEOC? A federal judge? I thought employers get to determine what the job is--it is the practices they use to hire and promote for a job that are properly subject to a disparate impact analysis, not the content of the job. Moreover, the content of many jobs is fluid, reflecting the day-to-day realities of the workplace. The same questions apply to the term "competent," which will now be construed by bureaucrats and judges as well. I just don't think the workplace is so mechanical and rigid a place as to be susceptible to legislative categorizations such as these. The bill's further use of the phrase "important to the performance of the job" is subject to the same concerns.

Indeed, this is an entirely new legislative superstructure imposed on employers. All of these new terms and phrases are fraught with importance and will affect employers in the conduct of their business. The unavoidable consequence will be years of litigation to thrash all of this out. Employers have spent 20 years adjusting to <u>Griggs</u>. Instead of employers being able to focus on removing barriers to upper level jobs--the "glass ceiling"--this bill will force them to divert their attention back to entry and mid-level hiring and promotion issues many of them thought they had worked out in the last two decades.

Another concern, of course, is that this bill applies the "effective job performance" requirement to <u>all</u> selection practices. Many selection practices, however, such as layoffs and transfers due to a plant relocation or closure cannot possibly meet an "effective job performance" test. These selection decisions may be made for very legitimate <u>non-</u>performance related reasons. As we all recognize, if these decisions are made for discriminatory reasons, they will be pursued as cases of intentional discrimination.

It is becoming almost bizarre that, if we all say we want to restore <u>Griggs</u>, we just don't do that and avoid these problems.

Second, on the "particularity" issue, I think I understand what Senator Danforth is are trying to achieve. The bill's language, however, does not achieve the appropriate result.

The provisions of the Danforth bill bear little resemblance, to my knowledge, to what any court, before or after Wards Cove, has required. Why do we need language in this regard? Where are the post-Wards Cove cases that have reached a result in this regard with which we disagree? Codifying detailed, technical and confusing requirements will only lead to costly litigation with no real equal opportunity interests being served.

The Danforth language also still allows a blanket complaint against an employer's entire set of practices. It does not require that an individual practice cause a disparity. Indeed, by merely requiring identification of practices that are "responsible in whole or in significant part for the disparate impact," it allows a plaintiff to challenge all of an employer's practices. This type of challenge will occur since all such practices are, as a group, responsible for the disparity.

Even assuming that a complaint might be narrowed down after a case is well underway, which I doubt will occur under the bill's language, the key point remains: no employer wants to run the risk that it will have to defend all of its practices, let alone defend each of them under a new business necessity definition. How will they avoid the problem? By quietly hiring and promoting by the numbers, to avoid disparate impact in the first place and the lawsuit that will follow.

This language also opens the door to the resurrection of the discredited comparable worth theory of pay discrimination, i.e., that employees in primarily female (or minority) jobs are paid less than employees in different but allegedly comparable male (or non-minority) jobs. As you know, employers rely on a range of factors in setting pay, including marketplace factors and the like. There is no way anyone can narrow down the particular practices resulting in the setting of pay. Justice Kennedy, while still on the Court of Appeals for the Ninth Circuit, wrote an excellent opinion explaining why the disparate impact theory is inappropriate for challenges to paysetting practices precisely because of the need to identify the particular practice causing the disparity. AFSCME v. State of Washington, 770 F.2d 1481 (9th Cir. 1985).

I also tried to resolve this problem last year in an effort to reach a compromise. The language then, similar to the Danforth bill now, did not reflect my preferred approach. Simply stating that particular cases are not overruled will not preclude the use of the comparable worth theory, under this bill, in the future.

Third, under this bill, even if an employer can justify its practices under the very difficult test of "business necessity," he or she is still liable if a plaintiff can demonstrate that there is an alternative practice that would serve the employer as well but have less disparate impact. I understand that this provision may have been included under the view that it reflects what the law has always been. It does not. Rather, the Supreme Court has held only that such a showing would be evidence that the practice was being used as a pretext for discrimination, not dispositive of the question whether the employer committed discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

I think this has serious implications. An employer, to be protected from liability, would have to search the universe before implementing each and every one of its employment practices, even if such practices readily satisfy the business necessity standard, to try to find those that meet his needs with the least disparate impact. But even that is not enough, because there is no way that an employer can predict beforehand whether one particular practice versus another will have a disparate impact on any particular group. This provision, by itself, therefore, might lead an employer to hire or promote only by the numbers. That may be the only one way to avoid potential liability with any certainty.

Three other quick points. This bill has language saying the bill does not "require or encourage an employer to adopt hiring or promotion quotas." I have never argued that any bill requires such a result, only that the rewriting of the Supreme Court's disparate impact rules will induce employers quietly to hire by the numbers, whatever the euphemism used to mask it, to avoid these lawsuits. And saying the bill does not "encourage" this result is of no practical effect in light of its new disparate impact rules. Hortatory language does not help when the operative language of this bill leads in the direction of hiring and promoting by the numbers.

The language that "the mere existence of a statistical imbalance in the workforce of an employer on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation," solves none of our concerns. First, the issue is not the composition of the employer's workforce as a whole, but of a particular job. Second, which statistical imbalance is being referred to--the general population, the relevant labor market for the occupation in question, or the applicant pool? If it is the first comparison, it does not address the concerns we have raised about misuse of statistical comparisons. But, third, in any event, no plaintiff will allege that the disparate impact alone, whatever comparison is used, is illegal. The plaintiff will assert the disparity is caused by some or all of the employer's practices and that is what is illegal. This language gives no succor.

Finally, I applaud Senator Danforth's response to the pernicious practice of race-norming. But, if an employer is guilty of discrimination, why should an innocent job applicant have his or her test scores jimmied because of his or her race or ethnicity? Under this bill, if an employer unintentionally discriminates, innocent employees can have their test scores altered on these grounds. That is no more "fair" because it is embodied in a court order than if undertaken voluntarily by employers. If an employer has discriminated, then give the discriminatees back pay, the next available job that they have been wrongly denied, retroactive seniority, and, of course, end the use of the discriminatory practices--but don't juggle an innocent, future applicant's test scores because of race. What did he or she do to deserve such unfair treatment? If a particular test causes a disparate impact and cannot be defended under the Griggs business necessity standard, then the test itself fails. No readjustment of the scores would be needed in this circumstance.

I sincerely regret that I firmly believe that Senator Danforth's Wards Cove bill will have the same inevitable consequences as H.R. 1, albeit by using some different language. Perhaps the best solution, suggested by his splitting these issues into three bills, is to get behind the overturn of Lorance on seniority systems and Patterson on Section 1981 and challenge the Democrats to pass that bill. There is where we have had unanimity since day one.

Sincerely,

Orrin G. Hatch
United States Senator

Attachment

THE WASHINGTON POST

Rights Drive Said to Lose Underpinnings

Focus Groups Indicate Middle Class Sees Movement as Too Narrow

3/9/91

By Thomas B. Edsall
Washington Post Staff Writer

Key civil rights leaders are struggling to develop strategies to counter findings of a private voter study they commissioned that shows the civil rights movement has lost the moral high ground with key segments of the white electorate.

The study, according to one of its authors, Celinda Lake, found that "the civil rights organizations and proponents of civil rights were no longer seen as . . . addressing generalized discrimination, valuing work and being for opportunity. The proponents weren't seen as speaking from those values."

The study, commissioned by the Leadership Conference on Civil Rights, a coalition of labor, civil rights, women's and liberal organizations, found strong support for such basic principles as equal opportunity, promotion for merit and hard work, and for fairness in the workplace. But the study also found that many white voters believe civil rights advocates are pressing for special, preferential benefits instead of such goals as equal opportunity.

The conference, which declined to release the written reports or the poll data, is seeking to develop a strategy to win approval of the Civil Rights Act of 1991. The organization is particularly concerned because racial issues contributed to President Bush's victory in 1988, and the issue of "quotas" helped produce Republican victories in the 1990 California gubernatorial contest and the North Carolina Senate race.

Bush vetoed last year's civil rights bill because he said it would result in quotas, and congressional Democrats were unable to overturn it. The administration is ready to make a similar argument this year, and Democrats are looking for a way to defuse what has become a politically persuasive issue.

Ralph Neas, executive director of the conference, said, "We want to particularly stress that the bill is an inclusive bill, that it is a bill for racial minorities, it is a bill for women, it is a bill for persons with disabilities, it is a bill for all working Americans."

This strategy, according to the study, faces some hurdles. There is a strong receptivity to Bush's ar-

"Voters believe that business will implement this bill as quotas," Lake said. "Whenever legislation or policy distinguishes among groups [blacks, white, Hispanics, men, women], business, just to get it done, will implement quotas." These findings are especially damaging to efforts to counter the Bush administration's portrayal of pending civil rights legislation as promoting quotas. "There is no resistance to the Bush notion about quotas," one source said.

Another damaging finding of the study was that advocates of civil rights "have lost the advantage," Lake said. "It's a tremendous loss in terms of moving an agenda forward." She based her comments on the study for the leadership conference and on work her firm, Greenberg-Lake, has done in the past decade.

Lake said the problem facing civil rights proponents is that such advocacy is now seen as pressing the "narrow" concerns of "particularized" groups, rather than promoting a broad, inclusive policy of opposing all forms of discrimination.

The study found that many white voters believe there is pervasive reverse discrimination in the workplace and that civil rights leaders are more interested in special preferences than in equal opportunity, according to persons involved in the research.

The study, which included a national poll and focus groups held in white working-class and southern communities, did not find intensified racism or opposition to fundamental principles of equality. Instead, it showed strong support for basic egalitarian principles, including equality of opportunity and the obligation of employers to give everyone a fair chance.

In addition, the study found strong opposition to discriminatory practices based on race, gender, age or disability, according to Lake and Geoff Garin of Garin-Hart Strategic Research, another Democratic polling firm.

Garin would not make as strong a judgment of the difficulties facing the civil rights movement, but, he said, "at some point the civil rights community needs to restate its claim to the idea of a level playing field, and that means in part being more forthcoming in saying that

Neas contended that the most troublesome conclusions voiced by Lake were not based on the poll data, but on the focus groups, for which voters averse to civil rights had been purposefully selected, and on the basis of other work by the Greenberg-Lake firm, which has specialized in studying working and lower-middle-class white voters the past decade.

Lake said the critical views of the civil rights movement are held most strongly by key swing votes in the electorate—"blue-collar voters, economically marginal younger voters, ticket-splitting, swing white Southern voters"—who in any election are critical to the strategies of both parties to "add up enough voters to get to 51 percent."

"It is a broad-based problem," she added, with similar, if less intense, views held by many other white voters.

Among some of the other findings from the voter study, according to on-the-record interviews and background information provided by those familiar with it:

- Many white voters see the work force as a hierarchy, in which many hiring and promotion decisions are based as much, if not more, on race and gender as on merit and performance.

Civil rights laws are seen by a substantial number of voters as creating unfair advantages, setting up "rank orders of privilege in the labor market," one source said.

- Public support of egalitarian principle is closely tied to a strong belief that a primary responsibility of elected officials is to support the mainstream goals and values of the middle class.

Voters want politicians who represent them to "address the middle class, those who work hard and pay all the taxes," Lake said.

Civil Rights Proposals
Provision Summaries

Senator Slade Gorton
Updated: June 10, 1991

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Civil Rights Proposal
Provision Summaries

I(A) DISPARATE IMPACT PROVISIONS (Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989)) -- Causation and Specificity.

"[W]e note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employers's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."

H.R. 1, as introduced.	H.R. 1; as passed the House.	Danforth, S. 1208.	Administration/Dole, S. 611
Plaintiff required to identify which practices contributed to disparate impact, but only if court finds plaintiff is able to do so.	Plaintiff required to identify which practices contributed to disparate impact unless court determines plaintiff, after discovery, is unable to do so.	Plaintiff required to identify particular employment practices that <u>result in</u> a significant disparate impact. Note: The 1990 Committee Report defined "significant" disparate impact as "anything more than trivial." **In short, a mere laundry list of all employment practices, without proving the causal link, arguably would satisfy the specificity requirement.**	Plaintiff required to identify employment practices, and prove the causal link to disparate impact.

I(B) DISPARATE IMPACT PROVISIONS (Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989)) -- Burden of Proof (Production and Persuasion)

Once the plaintiff establishes a prima facie case, then "the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate impact plaintiff. . . . This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts, see Fed. Rule Evid. 301, and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration."

H.R. 1, As Introduced.	H.R. 1, as passed by the House.	Danforth, S. 1208.	Administration/Dole, S. 611:
After plaintiff establishes prima facie case, then employer must prove business necessity.	After plaintiff establishes prima facie case, then employer must prove business necessity.	After plaintiff establishes prima facie case, then employer must prove business necessity.	After plaintiff establishes prima facie case, if the employer produces evidence of a legitimate business justification, then plaintiff must persuade the court that there was disparate impact, and which particular practices caused the disparate impact.

I(C) DISPARATE IMPACT PROVISIONS (Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989)) -- Business Justification

In Wards Cove, the Court noted that "[In a] disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. [citations]. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster; this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above. [e.g., quotas]."

In Griggs v. Duke Power, the Supreme Court noted that "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the job for which it was used." 401 U.S. 424, 432, 91 S.Ct. 849, 853. [. . .] "But Congress directed the thrust of the Act of the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

In New York Transit v. Beazer, the Court noted in a footnote that "Finally, the District Court noted that those goals are significantly served by -- even if they do not require -- [the Transit Authority's] rule as it applied to all methadone users including those who are seeking employment in non-safety-sensitive positions. . . . The record thus demonstrated that TA's rule bears a "manifest relationship to the employment in question."

(Note: the first quote in Griggs was cited in the White dissent in New York Transit v. Beazer, 440 U.S. 568, 602.).

Note that the first quote in Griggs seems far too precise to articulate a general rule; it seems more like an application of a principle to a given fact pattern (hiring tests), than the formulation of a general rule. The second quote seems more broadly written, more like a governing principle.

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H.R. 1, as introduced.	H.R. 1, as passed in the House.	Danforth, S. 1208.	Administration/Dole, S. 611.
The term 'required by business necessity' means (A) in the case of employment practices involving selection, ... the practice or group of practices must bear a significant relationship to successful performance <u>of the job</u>; or (B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.	The term 'required by business necessity' means the practice or group of practices must bear a <u>significant and manifest</u> relationship to the requirements for <u>effective job performance</u>. . . . The term 'requirements for effective job performance' may include, in addition to effective performance of the actual work activities, factors which bear on such performance, such as attendance, punctuality, and no engaging in misconduct or insubordination, i.e., <u>all negative factors</u>.	The term 'required by business necessity' means (1) in the case of employment practices involving selection, . . . the practice or group of practices bears <u>a manifest relationship to requirements for effective job performance</u>; or (2) (if not involving selection), the practice . . . bears a manifest relationship to a legitimate business objective of the employer. The definition for 'requirements for effective job performance' also focuses on <u>actual work activities</u>.	The term 'justified by business necessity' means that the challenged practice has a manifest relationship to the <u>employment in question</u> or that the respondent's legitimate <u>employment goals</u> are significantly served by, even if they do not require the challenged practice.
Parallels, but is not identical to, the first definition of business necessity in Griggs.	**Merges parts of both definitions of business necessity in Griggs, and comes up with a new test.**	**Merges parts of both definitions of business necessity in Griggs, and comes up with a new test.**	**Parallels the second definition of business necessity in Griggs, as interpreted by fn. 31 in Beazer.**
Note: no definition of what constitutes "selection."		**Note: no definition of what constitutes "selection").**	

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I(D) DISPARATE IMPACT PROVISIONS (Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989)) -- Alternative Practices

In Wards Cove, the Court clarified that: "[Even if plaintiffs] cannot persuade the trier of fact on the question of [employers'] business necessity defense, [plaintiffs] may still be able to prevail. To do so, [plaintiffs] will have to persuade the factfinder that 'other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate (hiring) interest(s);' by so demonstrating, [plaintiffs] would prove that '(employers were) using (their) tests merely as a "pretext" for discrimination.' [citation]. . . . If [plaintiffs], having established a prima facie case, come forward with alternatives to [employers'] hiring practices that reduce the racially-disparate impact of practices currently being used, and [employers] refuse to adopt these alternatives, such a refusal would belie a claim by [employers] that their incumbent practices are being employed for non-discriminatory reasons."

This appears intended to set out an evidentiary standard that the existence of less burdensome alternatives (and refusal by the employer to adopt them) would undercut the "good faith" requirement implicitly a part of the business necessity defense.

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth, S. 1208.	Administration S. 611.
Makes the existence of less burdensome alternatives sufficient for the plaintiff to win a disparate impact case, despite business necessity.	Makes the existence of less burdensome alternatives sufficient for the plaintiff to win a disparate impact case, despite business necessity.	Makes the existence of less burdensome alternatives sufficient for the plaintiff to win a disparate impact case, despite business necessity.	Makes the existence of less burdensome alternatives sufficient for the plaintiff to win a disparate impact case, despite business necessity, but only if employer refuses to adopt them.

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II. MIXED MOTIVE PROVISIONS (Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989) (Brennen, Marshall, Blackmun, Stevens)).

Price Waterhouse clarified that if plaintiff establishes (both burden of persuasion and proof) that impermissible consideration was a motivating factor in an employment decision, then employer must prove that the same decision would have been made absent that consideration.

Focussing on the interpretation of whether an employment decision was made "because of" the individual's sex, 42 U.S.C. 2000e-2(a)(1), (2), the Court added that: "The critical inquiry . . . is whether gender was a factor in the employment decision at the moment it was made. Moreover, since we know that the words 'because of' do not mean '*solely* because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. . . ." 109 S.Ct. at 1785 (emphasis in original).

"It is difficult for us to imagine that, in the simple words, 'because of,' Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based consideration in coming to its decisions."

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H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth, S. 1208.	Administration/Dole, S. 611.
The plaintiff must prove that an impermissible consideration was a "contributing" factor in the employment practice. Cause of action fails if employer would have taken the same action in the absence of discriminatory employment practice.	The plaintiff must prove that an impermissible consideration was a "motivating" factor in the employment practice. Cause of action fails if employer would have taken the same action in the absence of discriminatory employment practice	The plaintiff must prove that an impermissible consideration was a "motivating" factor in the employment practice. Cause of action does not fail if employer would have taken the same action in the absence of discriminatory employment practice. Declaratory and injunctive relief, as well as costs and attorney's fees, may be awarded, but damages or reinstatement may not.	Does not address.

III. FINALITY OF JUDGMENTS OR ORDERS (Martin v. Wilks, 109 S.Ct. 2180 (1989), Hansberry v. Lee, 311 U.S. 32 (1940)).

In Martin v. Wilks, white fire fighters claimed that the City of Birmingham had discriminated against them by refusing to promote them because of their race. The City argued that their claim was barred because the City's promotion process had been sanctioned in a consent decree between the City and black firefighters, of which consent decree the white firefighters had been aware but were parties. The Court held that the consent decree did not bind the white firefighters because they were not made party to the decree, and they were not within a certified class of defendants whose interests were adequately represented by a named defendant.

Binds only parties and non-parties of a certified class whose interest were adequately represented by a named party.

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth, S. 1209.	Administration/Dole. S. 611.
Binds parties and non-parties alike, limited only by due process requirements.	Binds parties and non-parties alike, limited only by due process requirements.	Binds parties, as well as certain non-parties, depending on whether the order or decree was rendered before or after the effective date of the amendments, e.g., persons whose interests were adequately represented by a party to the case/degree (even though there was no certified class).	Reaffirms Martin v. Wilks. Binds parties and non-parties of a certified class whose interests are adequately represented by a named party to the case/decree.

IV. MAKING AND PERFORMANCE OF CONTRACTS (Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989)).

In Patterson, the Court held that Section 1981 only applied to making or enforcing contracts, not their performance. Section 1981 does not provide a remedy for individuals who are subjected to discriminatory performance of their employment contracts (through racial harassment, for example). Thus, the only available recourse is through use of Title VII.

(Note: Section 1981 was a post-Civil War statute to ensure that the slaves had the right to "make and enforce" contracts to the same extent as did white citizens. It first was used as an anti-discrimination tool in the mid-1900's.)

Section 1981 applies only to making or enforcing contracts, not their performance. Only Blacks are within the scope of Section 1981.

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth, S. 1209.	Administration/Dole, S. 611.
Section 1981 modified to apply to the making, performance, modification and termination of contracts. Only Blacks are within the scope of Section 1981.	Section 1981 modified to apply to the making, performance, modification and termination of contracts. Only Blacks are within the scope of Section 1981.	Section 1981 modified to apply to the making, performance, modification and termination of contracts. Only Blacks are within the scope of Section 1981.	Section 1981 modified to apply to the making, performance, modification and termination of contracts. Only Blacks are within the scope of Section 1981.

V. SENIORITY SYSTEMS AS DISCRIMINATORY EMPLOYMENT PRACTICES (Lorance v. AT&T Technologies, Inc., 109 S.Ct. 2261 (1989))

In Lorance, female employees challenged a seniority system pursuant to Title VII, claiming that, although facially nondiscriminatory, it was adopted with an intent to discriminate against women. The Court held that the claim was barred by Title VII's requirement that a charge must be filed within 180 days (300 days if the matter can be referred to a state agency) after the alleged discrimination occurred.

Claims to challenge seniority systems as discriminatory must be filed within 180 days (300 days if the matter can be referred to a state agency) after an alleged discriminatory practice.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1209.	Administration/Dole, S. 611.
Establishes multiple points in time when an alleged unlawful employment practice occurs. Also provides that a seniority system can be challenged up to 2 years after the plaintiff has affected adversely by its provisions.	**Establishes multiple points in time when an alleged unlawful employment practice occurs.** Also provides that a seniority system can be challenged up to 540 days (1-1/2 years) after the plaintiff has affected adversely by its provisions.	**Establishes multiple points in time when an alleged unlawful employment practice occurs.** Does not extend time limits for filing claims.	**Establishes multiple points in time when an alleged unlawful employment practice occurs. Does not extend time limits for filing claims.**

VI. LIMITATIONS ON DAMAGES FOR INTENTIONAL DISCRIMINATION.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1207.	Administration/Dole, S. 611.
Allows for full compensatory and punitive damages, to be determined by a jury.	Allows for compensatory damages to be determined by a jury, and punitive damages capped for all employers at the greater of $150,000 or the sum of compensatory damages plus equitable monetary relief.	Authorizes compensatory damages (not including back pay) to be determined by a jury, and an "equitable penalty" if necessary to deter future discriminatory practices. There are similar caps for both types of award: $150,000 for companies of 100 or more employees; $50,000 for others. Costs are awarded if an equitable penalty is assessed. Also creates an "equal employment opportunity trust fund," funded by assessment of equitable penalties, and proceeds to be for civil rights enforcement programs and family violence protection programs.	Allows $150,000 of damages in excess of equitable monetary relief if the equities so require, damages (and liability if Constitutional) to be determined by the court.

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VII. ADDITIONAL REMEDIES FOR HARASSMENT IN THE WORKPLACE -- Declaratory and Injunctive Relief.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth (S. 1207, S. 1208, S. 1209).	Administration/Dole, S. 611.
Not addressed.	Not addressed.	Not addressed.	Creates new Title VII cause of action for sexual harassment, including (i) sexual advances relating to hiring or promotion, and (ii) sexual advances that create an intimidating, hostile or offensive working environment. Requires the plaintiff to utilize within 90 days complaint procedures established by the employers before a cause of action will lie. Also provides for immediate injunctive relief and expedited hearing of the case.

VIII. OTHER PROVISIONS

1. Expert Fees. Not authorized under Title VII.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1209.	Administration/Dole, S. 611.
Authorizes expert witness fees and other litigation expenses without limitation. Prohibits the waiver of attorney's fees as a condition to a consent or settlement.	Authorizes expert witness fees and other litigation expenses without limitation, including Section 1981 claims. Prohibits the waiver of attorney's fees as a condition to a consent or settlement.	Authorizes expert witness fees and other litigation expenses without limitation.	Limits expert witness fees to $300 per day.

2. Alternative Means of Dispute Resolution.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1208.	Administration/Dole, S. 611.
Clarifies that amendments do not affect court-ordered remedies, affirmative action programs or conciliation agreements that are otherwise in accordance with the law. Also adds language that amendments do not require or encourage hiring or promotion quotas.	Clarifies that amendments do not limit employers from establishing job requirements, or require, permit or encourage quotas. "Quota" is very narrowly defined as a fixed number or percentage of persons which must be attained, or which cannot be exceeded, regardless of their qualifications. Also quietly codifies an unnamed string of Supreme Court cases regarding affirmative action by providing that the amendments shall be construed to approve the lawfulness of voluntary or court ordered affirmative action that is consistent with current Supreme Court cases.	Clarifies that amendments should not be construed to limit employers from establishing lawful job requirements, and also neither (i) requires or encourages hiring or promotion quotas, or (ii) prevents an employer from hiring the most effective individual for a job. Note: the bill does not state that employers should be discouraged from quotas!	Encourages alternative means of dispute resolution.

3. Employment Ability Tests (Race Norming).

Current statutory law (42 USC Sec. 2000e-2(h)) permits employers to use ability tests "provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth, S. 1208.	Administration/Dole, S. 611.
Does not address.	Permits ability tests that predict on a nondiscriminatory basis "the ability of such test takers to perform <u>the job</u> with respect to which such test is used." Also prohibits employers from adjusting scores of ability tests. **Taken together, these provisions would outlaw all but job specific tests for which race norming would not be necessary. In short, the only tests that would be valid are the ones that already have race norming built in.**	Prohibits race norming, unless used to comply with court order.	Does not address.

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4. Extraterritorial Application.

H.R. 1, as introduced.	H.R. 1, as passed the House.	Danforth (S. 1207, S. 1208, S. 1209).	Administration/Dole, S. 611.
Does not address.	Covers U.S. workers employed abroad to the extent not inconsistent with local law.	Does not address.	Does not address.

5. Construction.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth (S. 1207, S. 1208, S. 1209).	Administration/Dole, S. 611.
Encourages broad construction.	Encourages broad construction.	See Alternative Means of Dispute Resolution, above.	Does not address.

6. Effective Dates.

H.R. 1, as introduced.	H.R. 1, as passed by the House.	Danforth (S. 1207, S. 1208, S. 1209).	Administration/Dole, S. 611.
Retroactive application.	Retroactive application.	Not addressed in S. 1207 and S. 1208. Generally date of enactment in S. 1209, except for provisions relating to finality of judgments or orders. Generally silent or prospective, except for provisions relating to finality of judgments or orders.	Prospective application.

NEWS CONFERENCE ON CIVIL RIGHTS LEGISLATION
JUNE 4, 1991

Senator Danforth. My position is that the President is making a good faith effort. Last year on two different occasions he asked Senator Specter and Senator Jeffords and me to go to the White House, where he said to try to work something out.

Senator Domenici. Can I get an observation on the way out? You keep asking about where is the President. Frankly, I talked to a lot of Senators who spent hours negotiating last year, and frankly while they had difficulty reaching agreement with the President, I hope no one forgets they had an equally difficult time reaching agreement with Senator Kennedy, and the civil rights leaders. Many of them said we'd just about get there, and it was a moving target. So I think this group is going to try to bridge the gap between both, not just the President. I mean clearly, unless the Democratic leadership here, and the civil rights leadership, wants a bill, if they want a bill, they're have to negotiate with this group. If they want a veto, so they can claim that they tried and lost, then they don't have to (negotiate).

Senator Danforth. I know that the President himself last year asked Senator Jeffords and Senator Specter and me to come to the White House, two different times, and two different times he gave us the charge of trying to work something out. And at one point we had something that was satisfactory to the White House, and we thought satisfactory to Senator Kennedy, and then that same afternoon that proposal blew up. So, we came very close last year.

REMARKS IN SENATE
June 4, 1991
Senator Chafee

Senator Chafee. Before I go further, Madam President, I want to commend our President, President Bush, for his support of civil rights legislation. Indeed, he supported civil legislation when he was a congressman from Texas, when it was far from popular to do so. So the position of the President on civil rights is clear. He has supported civil rights in the past, he seeks a good civil rights bill this year, and I am hopeful that we can obtain his support in this package of bills that we are presenting today. I know that he wants to see a good civil rights bill passed this year, as he did last year.