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Series:	Sununu, John, Files
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OA/ID Number:	29146
Folder ID Number:	29146-003

Folder Title:
Civil Rights (1 of 2) 1991 [5]

Stack:	Row:	Section:	Shelf:	Position:
G	15	24	7	5

Statement by Senator John C. Danforth
June 4, 1991

I am joining today with a number of my colleagues to introduce civil rights legislation. I am doing so for the following reasons:

First, I do not agree with the decisions by the Supreme Court in Wards Cove and other cases related to fairness in employment. I believe the bills we are introducing are good policy and can become law.

Second, I believe there is a national consensus on fairness in employment. The American people want the law to ensure that people are treated fairly in decisions about hiring, promotion and similar matters. They do not want discrimination against, or in favor of, people on the basis of race, religion, gender, or disability. They want a fair chance to right wrongs in court, and they want businesses to have a fair chance to defend themselves without quotas.

Third, I know the President wants a bill. He tried very hard to get a bill last year, and continues to want to sign civil rights legislation. He has sent up his own bill, which reverses many of the same cases.

Fourth, I believe civil rights should not be fodder for partisan cannons, and am concerned the debate is headed in that direction. There are some who argue that being "against quotas" is politically helpful for Republicans. There are some on the other side, I suppose, who argue that having a civil rights bill vetoed is politically helpful for Democrats, and sharpens a charge that Republicans are "against fairness." If there is an issue where political consultants should get lost, this is it. Do Americans want an important part of the nation's commitment to fairness to be an annual partisan jousting match? I believe they do not.

The time has come to enact legislation. Our purpose today is to help create the conditions for success. We are introducing bills to provide, among other things, that hiring will be based on merit; that victims of discrimination will have redress in the courts; and that victims of discrimination based on gender, or other factors not related to race, will have access to damages.

We are introducing three bills. This is because we believe the issues in last year's bill, which proved to be an indigestible lump, can be addressed more readily if they are separated into readily distinguishable areas.

The first bill would reverse five cases on which there is very little disagreement. This bill should be handled relatively easily, perhaps in a matter of a few weeks. The second bill reverses Wards Cove. It would shift back to employers the responsibility to show business necessity. It would provide that hiring will be on the basis of merit. It requires as a general rule that plaintiffs specify a practice or practices they are challenging. The third bill provides women and others injured by non-racial discrimination with access to damages, and with caps in certain circumstances.

This proposal will not be difficult to criticize. It is, after all, intended to find a consensus that moves the law forward. Finding

consensus means the proposal will meet no one's definition of a "pure" bill. Moving the law forward means passing legislation, so there is no comfort here for those who want an issue, not a bill.

The time has come to pass solid, bipartisan civil rights legislation. We have a duty to the American people to make the laws fairer and better than they are today.

THE WHITE HOUSE

WASHINGTON

May 30, 1991

THE CHIEF of STAFF has seen

MEMORANDUM FOR GOVERNOR SUNUNU
BOYDEN GRAY
ROGER PORTER

FROM: FRED MCCLURE

SUBJECT: Clearance of a Statement of Administration Policy

We have just received the attached draft letter from the Department of Justice regarding H.R. 1, the Civil Rights and Women's Equity in Employment Act of 1991. There is a senior advisors' veto recommendation on this bill.

Because of scheduled debate on this legislation, this letter must go to the Hill today. Therefore, we would appreciate your comments by 5:15 p.m. today.

Please direct all comments to my office at x2230.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

DRAFT

June 3, 1991
(House)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 1 - Civil Rights and Women's Equity in Employment Act of 1991
(Brooks (D) Texas and 169 others)

If H.R. 1 were presented to the President in the form reported by the House Education and Labor Committee or in the form of the Brooks-Fish substitute or the Towns-Schroeder substitute, the President's senior advisers would recommend a veto. The Administration strongly supports enactment of the Michel substitute.

H.R. 1

The President vetoed a very similar bill last year because it did not meet the criteria he announced on May 17, 1990.

Civil rights legislation must operate to obliterate consideration of factors such as race, color, religion, sex, or national origin from employment decisions. But H.R. 1 is a quota bill in at least three respects. The disparate impact sections as drafted would virtually force employers to adopt quotas and unfair preferences. Unless an employer's bottom-line numbers are "correct," he or she will almost certainly face lawsuits in which a successful defense will be virtually impossible. If a suit is brought and a sweetheart deal is struck at the expense of innocent third parties, the Wilks section would then insulate unlawful quotas from challenge in court. And the Zipes section will subject plaintiffs unsuccessfully challenging quota settlements to attorney fees, even where their challenge was not frivolous and was brought in good faith.

By making it virtually impossible for an employer to prevail, the disparate impact sections also violate another principle stated by the President: any bill must reflect the fundamental principles of fairness that apply throughout our legal system. In addition, the Wilks section would encourage the settlement of certain cases at the expense of innocent non-parties; close the courts to many individuals whose civil rights have been violated; and insulate consent decrees that impose quotas from appropriate judicial review. Similarly, one provision would explicitly shield affirmative action, court-ordered remedies, and conciliation agreements from the neutral application of the bill's other provisions.

A civil rights bill should deter workplace harassment, but it must do so in a manner that is reasonable and does not produce a

windfall for lawyers. The damages section would provide for jury trials and the award of unlimited compensatory and punitive damages in all Title VII disparate treatment cases. This would radically transform the employment provisions of the Civil Rights Act by undermining its carefully balanced system of mediation and conciliation. This time-tested system would be scrapped and replaced with a new system modeled on our Nation's tort litigation -- which is now widely recognized to be in crisis.

The Administration believes that the protections of Title VII should be extended to employees of Congress in a meaningful way, which necessarily includes redress in the courts. It is fundamentally unfair to allow an employer to be the judge of its own case.

Other objectionable provisions include: ill-advised rules on attorney's fees; an unclear provision affecting "mixed motive" discrimination cases; unconstitutional retroactivity provisions; unreasonable new statutes of limitations; and an improper rule of construction.

The Brooks-Fish Substitute

The Brooks-Fish substitute fails to address concerns expressed by the President in vetoing similar legislation in the last Congress. The language in the amendment purporting to prohibit quotas would endorse racial preferences, not eliminate them. The substitute expressly permits plans that use racial preferences as long as the plans are labelled "voluntary." In addition, the proposed definition of business necessity would impose an onerous burden on employers. It would add the requirement that the relationship between the employment practice and the requirements for job performance be "significant" as well as manifest. Moreover, the substitute creates unlimited compensatory damages in cases of intentional discrimination and creates only a partial cap on punitive damages. Other amendments amount to only cosmetic changes which fall far short of rendering the substitute acceptable.

The Administration's concerns with the substitute were set forth in detail by the Attorney General in a May 31 report to Representative Michel.

The Administration's Proposal/Michel Substitute

The Administration's proposal (the Michel substitute) would strengthen our Nation's civil rights laws without institutionalizing reverse discrimination or subjecting American businesses and the victims of discrimination alike to endless and costly litigation. Like H.R. 1, the Administration's proposal would overturn the Lorance and Patterson decisions, and would place on the employer the burden of proving the business

necessity (as defined by past Supreme Court decisions) of an employment practice that has a disparate impact on a class of workers. The Administration's proposal also makes available new monetary remedies, with a $150,000 cap, for victims of harassment in the workplace. In sum, the Administration's bill achieves every legitimate end of H.R. 1. These important new protections for American employers should not be held hostage for measures that will produce quotas, disproportionately disadvantage small and medium-sized businesses, and unduly enrich the plaintiffs' bar.

The Towns-Schroeder Substitute

The Towns-Schroeder substitute is similar in many respects to the Brooks-Fish substitute, but is even more objectionable. In particular, it would promote expensive and prolonged litigation by allowing unlimited awards of both compensatory and punitive damages in cases of intentional discrimination. In addition, its prohibition of consideration of gender in all contracts would bar, for instance, private and parochial single-sex schools.

* * * * *

(Not to be Distributed Outside Executive Office of the President)

This draft Statement of Administration Policy was developed by the Legislative Reference Division (Ratliff), in consultation with the Departments of Justice (Wise), and Labor (McDaniel), EEOC (Kyllo), SBA (Dean), White House Counsel (Lund), Office of Policy Development (McGettigan), TCJ (Silas), and LVE (Wire).

The rule on H.R. 1 makes in order three substitute amendments. These amendments are addressed below following the description of the bill as reported by the House Education and Labor Committee.

Differences from Bill Vetoed in 1990

H.R. 1 is identical to S. 2104, a civil rights bill vetoed by the President in 1990, except for the following new provisions:

- Employers would have to demonstrate that challenged employment practices not involving selection bear a significant relationship to a "significant business objective." (S. 2104 required only a "manifest business objective.")

- An employee would only have to identify specific employment practices that result in a disparate impact if the court finds that the employee can identify the practices from reasonably available information. (S. 2104 required this identification unless the court found that

the employer destroyed, concealed, refused to produce, or failed to keep records necessary to make that showing.)

- o H.R. 1 does not include S. 2104's limit on the amount of punitive damages that may be awarded for cases of intentional discrimination.

- o In the version reported by the Education and Labor Committee, a "Glass Ceiling Commission" would be required to be established to study artificial barriers to the advancement of women and minorities to senior positions of employment, and the Department of Labor would be directed to develop a pay-equity program.

Recent Supreme Court Decisions and Related Provisions of H.R. 1

H.R. 1 is designed to reverse six recent Supreme Court decisions. These decisions and the related provisions of H.R. 1, as ordered reported by the House Judiciary Committee, are described below.

-- Wards Cove

Supreme Court Decision. In "disparate impact" cases under Title VII of the Civil Rights Act, the burden is on plaintiffs to identify a particular employment practice and show that the employment practice does not serve "in a significant way, the legitimate employment goals of the employer." (A "disparate impact" case is one in which no intentional discrimination is alleged but an employment practice is alleged to have an unjustified, though inadvertent, disparate impact based on race, color, religion, sex, or national origin.)

H.R. 1 (Sections 3 and 4) overrides the Supreme Court in three ways. First, it places the burden on the defendant to demonstrate that an employment practice is "required by business necessity" if significant numerical disparities are found. Second, Section 3 contains a lengthy definition of the term "business necessity" which states that it is intended to codify the definition of "business necessity" in the Griggs case and to overrule Wards Cove. Third, Section 4 would relieve many plaintiffs of the obligation to identify specific practices and to prove causation.

-- Price Waterhouse

Supreme Court Decision. Where an employment decision is proven to have been based in part on race, color, religion, sex, or national origin, Title VII has not been violated if a defendant can show that the same decision

would have been reached if such factors had not been considered.

H.R. 1 (Section 5) provides that a violation of Title VII is proven if a contributing factor in an employment decision is shown to have been a complainant's race, color, religion, sex, or national origin. The term "contributing factor" is not defined, and it may not mean "causal factor." However, a court could not order a hire, promotion, or reinstatement if the defendant showed that complainant would have not been hired, promoted, or retained even if discrimination had not been a factor.

-- Wilks

Supreme Court Decision. Persons not party to, but adversely affected by, consent decrees mandating unlawful racial preferences can challenge them in court.

H.R. 1 (Section 6) bars challenges to such consent decrees by non-parties if: (1) they had notice of the proposed judgment; (2) their interests were "adequately represented" by another person who challenged the decree; or (3) a court determines that "reasonable efforts" were made to provide notice to them.

-- Lorance

Supreme Court Decision. The statute of limitations with respect to a discriminatory seniority system begins to run on the date it is adopted by the employer, not the date the complainant is adversely affected by it.

H.R. 1 (Section 7) specifies that where a seniority system has been adopted "with the intent to discriminate," the "application" of the system constitutes an unlawful practice throughout the period that it is in effect.

-- Patterson

Supreme Court Decision. The statutory guaranty of the right to "make and enforce contracts" regardless of race ("Section 1981") applies only during the formation of a contract.

H.R. 1 (Section 12) specifies that the right to "make and enforce contracts" regardless of race extends beyond the formation of the contract to "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." H.R. 1 would further specify that the prohibition applies to private as well as governmental discrimination.

-- Shaw

Supreme Court Decision. Prevailing plaintiffs in job discrimination cases against the Federal Government may not recover interest to compensate for delays in obtaining relief.

H.R. 1 (Section 10) permits plaintiffs prevailing in Title VII discrimination cases against the Federal Government to recover "the same interest to compensate for delay in payment" as would be available in cases involving non-public parties, "except that prejudgment interest may not be awarded on compensatory damages."

Other Provisions of H.R. 1

In addition, H.R. 1 would:

-- Amend the current requirement that an employment discrimination complaint be filed within 180 days after "the alleged unlawful employment practice occurred" to permit complaints to be filed within two years after the practice "occurred or has been applied to affect adversely the person aggrieved, whichever is later." (Section 7)

-- Authorize jury trials and compensatory damages for intentional violations of Title VII and punitive damages when violations are committed with malice or callous indifference to the rights of others. (Section 8)

-- Authorize awards of expert witness fees to prevailing parties in Title VII cases. (Section 9)

-- Authorize prevailing parties to recover attorneys fees in addition to other costs, even for work performed after they have rejected a settlement offer more favorable than the final judgment. H.R. 1 would also guarantee plaintiffs' lawyers a fee unless the parties or their counsel attest that waivers of attorney fees were not "compelled as a condition of settlement." (Section 9)

-- Authorize prevailing parties, where judgments or orders granting relief are subsequently challenged, to recover from the original defendants the costs of defending (as a party, intervenor, or otherwise) the judgment or order. If the party attacking the judgment prevails, then the defendant must pay those costs. (Section 9)

-- Lengthen the statute of limitations from 30 to 90 days for filing suits against the Federal Government following final agency actions. (Section 10)

-- Specify, with respect to Federal laws protecting the civil rights of persons, that: (1) all such laws shall be "broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies;" (2) that no such laws shall "be construed to repeal or amend by implication any other Federal law protecting such civil rights;" and (3) agencies and courts, in interpreting such laws, shall not use this bill as "a basis for limiting the theories of liabilities, rights, and remedies available" under such laws unless the law has been specifically amended by this bill. (Section 11)

-- Specify that the bill shall not be construed to "require or encourage an employer to adopt hiring or promotion quotas," provided that the bill shall not "be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law." The bill does not forbid quotas. (Section 13)

-- Provide that H.R. 1 shall apply to Congress, but that the means for its enforcement shall be determined by each House. (Section 16)

Administration Bill/Michel Substitute

On March 1, 1991, the Justice Department transmitted an Administration bill that was subsequently introduced as H.R. 1375/S. 611. Like H.R. 1, the Administration bill would place the burden of proof on the employer to demonstrate "business necessity," overruling a contrary ruling in Wards Cove. However, the bill's definition of business necessity would be closer to the Wards Cove definition than H.R. 1. The bill would also reverse Lorance and Patterson, consistent with H.R. 1.

The bill does not contain the provision in H.R. 1 that would bar certain challenges to consent decrees by non-parties. Instead, the bill expressly provides that the Federal Rules of Civil Procedure apply in determining who is bound by employment discrimination decrees.

The bill would make available new monetary remedies for victims of sexual harassment in the workplace. The provision provides for bench trials, and caps awards at $150,000. H.R. 1, by contrast, would grant women and religious minorities the right to jury trials and unlimited monetary damages for intentional discrimination.

The Brooks-Fish Substitute

The Brooks-Fish substitute closely tracks many provisions of H.R. 1, including those on expert witness and attorney fees, the "Glass Ceiling Commission," and the Department of Labor pay-equity program. The substitute differs from H.R. 1 in the following principal ways:

- Its definition of business necessity would require that a challenged employment practice bear a "significant and manifest relationship to the requirements for effective job performance." Employers would be allowed to rely upon "relative qualifications or skills" in making employment-related decisions; but if such reliance resulted in a disparate impact, the employer would have to demonstrate that the reliance was required by business necessity.

- The substitute would require an employee, after the completion of the discovery process, to identify the specific employment practices alleged to have resulted in a disparate impact. The employee would not be required to make this demonstration if the court found that the employee could not do so from the records of the employer.

- It provides that a violation of Title VII is proven if a motivating factor in an employment decision is shown to have been a complainant's race, color, religion, sex, or national origin. A court could not order a hire, promotion, or reinstatement if the defendant demonstrated that the employee would have not been hired, promoted, or retained even if discrimination had not been a factor.

- It would increase the statute of limitations for filing a Title VII claim from 180 days to 540 days.

- It would allow unlimited awards of compensatory damages in cases of intentional discrimination. It caps punitive damages at the greater of $150,000 or "an amount equal to the sum of compensatory damages awarded and equitable monetary relief."

- It would require that certain employment tests "validly and fairly" predict the ability of test takers to perform the job for which the test is used. Section 116 prohibits the adjustment of test scores on the basis of the race, color, religion, sex, or national origin of the test taker.

- It states that it shall not be construed "to require, encourage, or permit" an employer to adopt hiring or promotion quotas. It also approves the lawfulness of voluntary or court-ordered affirmative action.

The Towns-Schroeder Substitute

Justice advises that the Towns-Schroeder substitute is similar in most respects to the Brooks-Fish substitute. However, it would allow unlimited awards of both compensatory and punitive damages in cases of intentional discrimination.

Administration Position to Date

The Attorney General in a May 31, 1991, report to Representative Michel stated that he and other senior advisers would also recommend a veto of the Brooks-Fish substitute. A Justice Department report of March 12, 1991, on H.R. 1 stated that the Attorney General "and other senior advisers" would recommend a veto of the bill.

1990 Presidential Statement

On May 17, 1990, the President stated that he would support civil rights legislation which met three stated principles. These principles were restated in the President's October 22, 1990, veto message.

The first principle was that legislation must operate to obliterate considerations of factors such as race, color, religion, sex, or national origin from employment decisions. In this regard, the President said, "I will not sign a quota bill," and expressed concern that quotas could be an unintended consequence of legislation.

Second, the legislation must reflect fundamental principles of fairness. Specifically, individuals who believe their rights have been violated are entitled to their day in court, and an accused is innocent until proved guilty.

Third, the civil rights laws should provide an adequate deterrent against workplace harassment. They should not, however, benefit lawyers by encouraging litigation at the expense of conciliation or settlement.

The President also stated that Congress "should live by the same requirements it prescribes for others."

The President affirmed his desire to strengthen employment discrimination laws "without resorting to the use of unfair preferences" in the State of the Union address on January 29, 1991.

Scoring for the Purpose of Pay-As-You-Go and the Caps

According to TCJ (Silas), H.R. 1 is not subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990 because it would not require any direct spending.

MISSOURI

Copy to Bayden

May 31, 1991

The Honorable John H. Sununu
The White House
Washington, D. C. 20500

Dear John:

Enclosed please find a draft of three Civil Rights bills that I plan to introduce next Tuesday. I realize that they may not contain everything that you want, but I urge you to give them careful scrutiny. I believe that these bills can and should be passed into law and that both the civil rights community and the President should give them their support.

THE CHIEF of STAFF has seen

Sincerely,

Jack

Enclosures

ALD91.237 S.L.C.

102D CONGRESS
1ST SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

Mr. _____ introduced the following bill; which was read twice and referred to the Committee on _____

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.

"(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) 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 court—

"(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), attorney's fees, and costs; 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 affect the interests of such person and that an opportunity was available to present objections to such judgment or order; and

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

"(ii) by a person whose interests were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order; or

"(iii) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons.

"(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 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, 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;

"(ii) by a person who, during the period of notice regarding the judgment or order—

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

"(II) prior to the entry of such judgment or order, failed to receive actual notice meeting the criteria described in clause (i)(II) of the judgment or order, despite the diligent and best efforts of the parties to provide individual notice; or

"(iii) 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) 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 meets the burdens 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—

''(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 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 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. 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), this

Act, and 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 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 (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, 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. 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. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), 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. 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.

ALD91.264 S.L.C.

102D CONGRESS
1ST SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

Mr. _____ introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To provide for damages in cases of intentional employment discrimination, 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 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 IN EMPLOYMENT.

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

"SEC. 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 U.S.C. 2000e–5(e)) against a respondent who intentionally engaged in an unlawful employment practice prohibited under section 703 of the Act (42 U.S.C. 2000e–2) and engaged in the practice on the basis of the religion, sex, or national origin of an individual, the complaining party—

"(A) may recover the compensatory damages described 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, against an individual, the complaining party—

"(A) may recover the compensatory damages described 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.

"(3) NOTICE.—A complaining party who requests that a court impose an equitable civil penalty under subsection (c) shall provide notice of the re-

quest to the Chairman of the Equal Employment Opportunity Commission and the Secretary of Health and Human Services.

"(b) COMPENSATORY DAMAGES.—

"(1) DETERMINATION.—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.

"(2) EXCLUSIONS.—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 amount of compensatory damages awarded under this section against a respondent who is not a government, government agency, or political subdivision, for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses 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, $150,000; and

"(B) in the case of a respondent not described in subparagraph (A), $50,000.

"(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.—

"(1) 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 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 practice again.

"(B) AMOUNT.—The court shall impose an equitable civil penalty sufficient to deter the re-

spondent from engaging in a discriminatory practice.

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

"(A) the nature of the discriminatory practice that is the subject 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 undertaken by the respondent with respect to the group injured by the discriminatory practice that is 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;

"(G) the efforts of the respondent to correct the discriminatory practice; 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, $150,000; and

"(B) in the case of a respondent not described in subparagraph (A), $50,000.

"(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 attorney's 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) antidiscrimination and antiharassment 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.—If a complaining party seeks compensatory 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) the 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) 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 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. 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 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 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.

Will get Complete Copy on Monday.

Document Originally
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Following Page

BAI91.355 S.L.C.

102D CONGRESS
1ST SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

Mr. _____ introduced the following bill; which was read twice and referred to the Committee on _____

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 a 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

(2) to provide statutory authority and 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 group 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.

"(B)(i) With respect to an unlawful employment practice based on disparate impact, the complaining party shall identify with particularity the employment practice(s) that are 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 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 the 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 employment 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.

"(C) An employment practice or group of employment practices 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.

"(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 be used as a defense only against a claim under this subsection.

"(4) 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.

"(6) For purposes of this subsection, a respondent may rely on relative qualifications or skills, as determined by relative performance or degrees of success, of an employee or applicant for employment on a selection factor, criterion or procedure, except that if such reliance results in a disparate impact based on race, color, religion, sex, or national origin, such reliance shall be demonstrated by the respondent to be required by business necessity.".

(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 THE 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 distinct 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 group 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 practices as described in paragraph (1), the practice or group of practices bears a manifest relationship to a legitimate business objective of the employer.

"(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 factors such as 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.

"(q) 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.".

(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) 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 em-

ployee 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 juris-

diction 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

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From Roger Porter to John Sununu Re: Meeting with Hugh Reilly (1 pp.)	5/30/91	~~P-2~~, ~~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 [5]

Open on Expiration of PRA
(Document Follows)
By _____ (NLGB) on 10/28/05

Date Closed:	1/3/2005	**OA/ID Number:**	29146-003
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]
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(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

THE WHITE HOUSE

WASHINGTON

May 30, 1991

THE CHIEF of STAFF has seen

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: ROGER B. PORTER RBP

SUBJECT: Meeting with Hugh Reilly

On May 29, Marianne McGettigan and I met with Hugh Reilly to discuss the Beck decision, decided in 1988. That case held that persons who are not members of a union, may only be compelled to pay dues to the union to pay for the negotiation and enforcement of a collective bargaining agreement. Mr. Reilly has been disappointed with the effort to enforce the Beck decision, particularly on the part of the NLRB.

There are several recent developments related to that case, however, that are encouraging to Mr. Reilly.

First, at the time of the meeting, the Supreme Court was scheduled to decide the case of Lehnert v. Ferris Faculty Association in the near future. The right outcome in that case would go a long way toward remedying the problems identified by Mr. Reilly. The decision was issued today and my office is in the process of analyzing it.

Second, the counsel of the NLRB has finally brought a complaint encompassing several cases against the International Association of Machinists for noncompliance with the Beck case. Those cases will be heard this summer and are expected to completed by September. Mr. Reilly will keep us informed of these and other developments.

These developments are encouraging in the short run. Mr. Reilly believes that long term improvements in the situation, however, can only be achieved through the appointment process. A vacancy on the NLRB will open in August.

We discussed who would be a good candidate for that position. Mr. Reilly's first choice appears to be Sharon Prost, counsel to Senator Hatch on the Labor and Human Resources Committee.

I share Mr. Reilly's enthusiasm for Sharon. We have worked with her on several issues including the Betts legislation, striker replacement, and parental leave. She is bright, knows labor law as well as anyone on the Hill, and is tenacious. She would bring a thorough knowledge of the issues and a persuasive voice to the Board.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. Memo	From C. Boyden Gray to John Sununu Re: New Danforth Civil Rights Bills (2 copies) (12 pp.)	6/4/91	~~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 [5]

Open on Expiration of PRA
(Document Follows)
By JJ (NLGB) on 10/28/05

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THE WHITE HOUSE

WASHINGTON

June 4, 1991

THE CHIEF of STAFF has seen

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: C. BOYDEN GRAY

SUBJECT: New Danforth Civil Rights Bills

Attached, pursuant to your request, is a preliminary Justice Department memorandum evaluating the new civil rights proposal that Senator Danforth is expected to introduce today. He has cured a few of the problems in the Democrat bills, but his proposal is fatally flawed, and it does not solve the quota problem by any means. The Danforth proposal is divided into three separate bills:

I. Disparate Impact Bill

- Like all the other Wards Cove provisions to which we have objected, this thing is complicated and ambiguous.

- The "group of practices" section is almost unintelligible, although it is designed to look at first glance as though it adopts the "Sununu-Kennedy compromise." It does not. In fact, this section is enormously problematic and its effects would almost certainly be virtually identical to the unacceptable provisions in the Democrat bills.

- The definition of business necessity is a strange blend of H.R. 1 and the Brooks substitute, with some new curlicues. It features the phony selection/non-selection bifurcation from H.R. 1, along with new operative language ("manifest relationship to requirements for effective job performance"). This language is not the language of Griggs, and I am not aware of any case in which it has appeared.

- "Effective job performance" is defined narrowly, in a way that excludes many legitimate business practices. Hiring entry-level employees with the qualifications needed for promotion to better positions later, for example, would not be permitted.

- The bill also contains extremely pernicious language asserting that the disparate impact sections "codify the meaning of business necessity" in Griggs and overrule the business necessity defense in Wards Cove "with respect to an employment practice or group of employment practices." This guarantees enormous confusion in the courts, and in fact

ensures that the confused language in the bill will be interpreted in a way that will promote quotas.

- The bill contains several legally meaningless and ineffective statements designed to create the impression that quotas and preferences are disfavored. Some are drawn from the Democrat bills, and at least one is new. Except for a provision on race-norming, however, none of them actually improves the bill or does anything to prevent the bill from causing quotas.

- In sum, this is clearly a quota bill, which contains no significant improvements over H.R. 1 on the critical issues.

III. Remedies Bill

- This bill allows compensatory damages for all intentional discrimination under Title VII. Awards would be decided by a jury, and the pain and suffering component of the award (though not the pecuniary losses component) would be capped at $50,000 for small businesses (up to 100 employees) and at $150,000 for larger employers.

- The bill also creates a new kind of civil penalty, which is similar to punitive damages except that the money would go to the Government instead of the victim; it would have the same $50,000/$150,000 caps.

- This bill is better than H.R. 1 because the caps are more real (although they are still too high at $100,000/$300,000 plus pecuniary losses). Introducing juries into Title VII, however, is a very serious flaw in the proposal, and there is no apparent good reason to create new monetary awards outside the harassment context.

II. "Miscellaneous" Bill

- This bill includes several of the non-controversial provisions included in the President's bill (Patterson, Lorance, etc.).

- The bill, however, also includes an inappropriate override of Price Waterhouse and an unacceptable override of Martin v. Wilks. The latter, which is almost the same as the "compromise" negotiated by Senator Hatch last year, would insulate many illegal quota schemes from legal challenge.

- With the Martin v. Wilks provision included, this is a quota bill.

Attachments

Senator Danforth has drafted three new bills, each of which makes proposals regarding the issues raised by H.R. 1. As a general matter, these bills are better than H.R. 1, but are still critically defective and very inferior to the Administration's bill.

Equal Employment Opportunity Act of 1991

This bill has two main features: it overturns Wards Cove, and it contains an anti-quota provision.

The Wards Cove provisions would dispense with the requirement that a particular practice be identified as causing the disparate impact. They would define "business necessity" as "manifest relationship to requirements for effective job performance" for "practices involving selection," and as "manifest relationship to a legitimate business objective" for non-selection practices.

The current Administration bill, of course, requires the complainant always to identify the particular practice being challenged. The particularity language in the Danforth bill would allow complainants to challenge a practice or group of practices. While it also contains language drawn in part from the bill the Administration returned with the President's veto last October, that language is apparently used to broaden the definition of an individual practice rather than to narrow the definition of a group of practices. Accordingly, the most straightforward reading of the admittedly confusing language in the bill would be to allow a blunderbuss attack on all the employer's practices so long as all are listed in the complaint, so that the limiting language from the earlier Administration bill becomes meaningless.

The defects with the treatment of "business necessity" are even more serious, and indeed the definition is essentially the same as that in the bill the President vetoed. The Danforth bill -- like H.R. 1 -- would preclude an employer from defending a selection practice for any non-job performance reason. Therefore, every business decision affecting employment must be based on "effective job performance." Furthermore, the definition again is different from the formulation in Griggs (which is purportedly codified): manifest relationship "to requirements for effective job performance" is both different and stricter than Griggs' manifest relationship "to the employment in question." The bill also contains many of the same circular, and therefore meaningless, reassurances that H.R. 1 includes. It adds a new and equally meaningless provision that the bill should not be construed "to prevent an employer from hiring the most effective individual for a job." This is meaningless because no court will read this vague exhortation to limit in any way the explicit defects in the bill, just discussed.

The anti-quota language is no better. It is stated that Title VII should not be construed to "require" or "encourage" quotas. But the word "permit" is missing; the word "quota" is nowhere defined; and, most fundamentally, the problem is that employers will be driven to adopt quotas surreptitiously, no matter how illegal they are. The bill would, moreover, apparently exclude any currently existing preferences from the definition of quotas. Even more troubling, it appears to endorse preferences resulting from "voluntary actions for work force diversity" -- i.e., quotas. This language is a sharp break with existing Supreme Court precedent, which has indicated that such voluntary preferences are allowed only in response to "manifest imbalance" in "traditionally segregated job categories," Johnson v. Transportation Agency, 480 U.S. 616, 631 (1987), quoting Steelworkers v. Weber, 443 U.S. 193, 197 (1979).

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The principal feature of this bill is its provision for damage awards and equitable civil penalties under Title VII of the Civil Rights Act in cases of intentional discrimination on the basis of religion, sex, and national origin. Compensatory damages over and above what is already available in the way of back-pay are made available in all Title VII disparate treatment cases. Where these awards are for nonpecuniary losses (pain and suffering, emotional distress, and the like), they are capped at $150,000 for private respondents with more than 100 employees and at $50,000 for private respondents with 100 employees or less. There is no cap, however, for economic harm, nor is there any cap at all for governmental respondents. Civil penalties of up to $150,000 for respondents with more than 100 employees and of up to $50,000 for respondents with 100 employees or less are also authorized. Civil penalties, at the court's discretion, can be expended on correcting the respondent's discriminatory practices, or can be deposited in a new Equal Employment Opportunity Trust Fund. Expenditures from the Fund, in turn, are to be split between improving Title VII enforcement and carrying out the Family Violence Prevention and Services Act. Any party may demand a jury trial in cases where compensatory damages are sought, and the jury is to decide both liability and the amount of any such award of compensatory damages.

The cap on damages and civil penalties is better in this bill than in the various versions of H.R. 1. The bill remains inferior to the Administration bill, however, in two critical respects. First, the Administration bill characterizes its monetary awards in such a way that there will be no jury trials; even if a court requires a jury trial under our bill, our bill would limit the jury's role to the determination of liability, and would leave it to the judge to set the amount of the award. Second, the Danforth bill allows the additional awards in cases besides harassment, where there is no credible evidence that

current awards of back-pay have been inadequate. (To be sure, however, the Administration itself would have allowed additional monetary awards in non-harassment cases in the bill sent up with the President's veto last October, with a uniform cap of $150,000 for all businesses.)

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The third and last bill addresses the remaining issues in H.R. 1. Some provisions are unobjectionable and are found in the Administration bill as well: the Patterson and Lorance decisions are overturned; court awards of expert witness fees (albeit without the Administration's $300/day cap) are authorized; the statute of limitations is extended and the award of interest is authorized in suits against the federal government; and alternative means of dispute resolution are encouraged. In three important respects, however, the bill departs from the Administration's approach.

First, the Danforth bill would overturn Martin v. Wilks in virtually the same way as the bill the President vetoed last year. The Administration bill would not and, of course, we have stressed that it is H.R.1's anti-Wilks provisions that, along with its anti-Wards Cove provisions, are principally responsible for making it a quota bill. (The bill accompanying the President's veto message last October had a Wilks provision, but it was much more narrowly limited than the Danforth bill's.) Senator Danforth's bill would provide that judgments entered before passage of the bill would bar parties from challenging illegal quotas in a variety of circumstances where they had no previous notice or opportunity to be heard. The bill would also provide for similar preclusive effect, albeit under a slightly different standard, for judgments entered after passage of the bill. As we pointed out when Senator Hatch made a similar proposal as part of his attempted "compromise" last fall, this bifurcation of constitutional rights is unprecedented. Moreover, since one hopes that quota decrees are becoming less rather than more common, and since the victims of existing quotas of course had no advance notice of the Danforth bill, it makes no sense at all to make it harder to challenge existing quota decrees than new ones.

In overturning Price Waterhouse, the Danforth bill does not differ significantly from H.R. 1. It would hold employers liable for a Title VII violation even where the employer can demonstrate that he or she would have taken the same action in the absence of discrimination, so long as discrimination was "a motivating factor." It is not at all clear why there should be liability in this situation. Indeed, the only real beneficiary would seem to be the plaintiff's attorney, since the bill makes clear that, while the "victim" is not entitled to his job, his lawyer is

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THE WHITE HOUSE

WASHINGTON

June 4, 1991

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: C. BOYDEN GRAY

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THE WHITE HOUSE

WASHINGTON

June 3, 1991

THE CHIEF of STAFF has seen

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: ROGER B. PORTER RBP

SUBJECT: Danforth Civil Rights Bill

At this morning's Senior Staff meeting you inquired about the civil rights legislation Senator Danforth has introduced. I asked Marianne McGettigan, our Associate Director for Legal Policy, to analyze the legislation.

A copy of her memorandum is attached. It is a concise and instructive description of what is in the Danforth bills.

Attachment

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Memo	From Marianne McGettigan to John Sununu Re: Danforth Civil Rights Bills (3 pp.)	6/3/91	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 [5]

Open on Expiration of PRA
(Document Follows)
By _____ (NLGB) on 10/28/05

Date Closed:	1/3/2005	**OA/ID Number:**	29146-003
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

THE WHITE HOUSE

WASHINGTON

June 3, 1991

MEMORANDUM FOR ROGER B. PORTER

FROM: MARIANNE MCGETTIGAN

SUBJECT: Danforth Civil Rights Bills

Senator Danforth has developed three bills to respond to the extension of damages in title VII and the five cases that are the subject of H.R. 1. It is unclear why he has chosen to propose three bills in lieu of one.

Reversal of Wards Cove

The first bill overturns Wards Cove in three ways.

1. It places the burden of proving that an employment practice is required by business necessity on the employer. The employee, however, must first identify the particular practice or practices alleged to cause the disparity and demonstrate that the practice(s) result in the disparity.

2. The employee is not required to specify the particular practice if the employee can demonstrate that the employment practices that are responsible, in whole or in significant part, for the disparate impact are not capable of separation for analysis. In that case, the employment practices may be analyzed as one employment practice.

It is the lack of requiring particularity in H.R. 1, that is at the heart of the characterization of that bill as a quota bill.

3. The definition of "business necessity" in the Danforth bill is divided into two parts:

- for employment practices involving selection, the practice must bear "a manifest relationship to requirements for effective job performance, and

- for employment decisions not involving selection practices (such as lay-offs), the practice must bear "a manifest relationship to a legitimate business objective of the employer."

In my view, the definition of "business necessity" in the Danforth bill is superior to the definition in the Administration's bill. It recognizes that there may exist "a legitimate business objective" of the employer. The Administration's bill recognizes only "employment goals." Thus, a decision to close a plant for financial reasons not involving payroll, might not be defensible under the Administration's bill whereas it is clearly defensible under the Danforth bill.

The Danforth bill goes on to define "requirements for effective job performance" to include factors such as punctuality, attendance, a willingness to avoid engaging in misconduct or insubordination, not having a history demonstrating unreasonable job turnover, and the like.

The bill also prohibits race-norming unless required by court action.

Remedies for Intentional Discrimination

The second Danforth bill addresses the issue of remedies for intentional discrimination. The Danforth bill is both broader and narrower than the Administration's bill. It does not cure the disparity in remedies available to the disabled and women, however. That reconciliation can only occur if the remedies for employment discrimination cases under section 1981 are limited in some way.

The Danforth bill is broader than the Administration bill in that it applies to any unlawful employment practice under title VII or the ADA. The Administration's bill is limited only to harassment cases.

The bill is narrower than the Administration's in that non-economic damages recoverable (at least for harassment) are capped at $150,000 for companies with more that 100 employees in each of 20 or more calendar weeks in the current or preceding calendar year and $50,000 for all other businesses. Jury trials are available.

In lieu of punitive damages, the bill provides an equitable penalty for discrimination undertaken with malice or reckless indifference to the federally protected rights of the aggrieved party. The same caps as those outlined above apply to this remedy. No jury trial is provided. Moreover, in deciding on the amount of equitable penalty there are a number of factors that the court considers, including, the nature of the discrimination, the nature of any compliance or educational programs of the employer, the availability of internal

grievance procedures, any lawful affirmative action programs of the employer, whether the employer promptly investigated the allegation, etc..

Unlike punitive damages, this equitable penalty does not go to the plaintiff. The court directs it to be used either to correct discriminatory practices or to a newly created fund in the Treasury called the Equal Employment Enforcement Trust Fund (50% of the fund will go to Title VII enforcement, and 50% to the Family Violence Prevention and Services Act). The court may also direct that the penalty be used for both purposes.

The incentive for the plaintiff to seek this equitable penalty is that the attorneys fees associated with seeking the penalty are recoverable. I doubt in most cases, the penalty will be sought. It may, however, be pleaded as a negotiating tool.

The Remaining Cases

The last Danforth bill addresses the remaining cases. These cases are dealt with generally as they are in the Administration's bill. I do not believe there will be any serious disagreement with respect to this bill.

Copy to Boyden 4-23

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PERSONAL AND CONFIDENTIAL

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

Dear Governor Sununu:

When Vernon and I met with you at the White House last week, you asked me what I thought of the Administration's 1991 alternative civil rights bill and I said I thought it did not meet the needs of the country, including its minorities, women and business community. I mentioned several specific problems at the time and would like to follow up my response with this letter, which more fully describes what I believe the fundamental shortcomings are in the present White House proposal.

Some of the fundamental flaws are as follows:

1. It fails to overrule Wards Cove. As you know from our discussions last year, one of the principal purposes of any bill which would gain the support of the civil rights groups and a significant majority of the Congress, is to codify and restore the meaning of "business necessity" as used in Griggs and to overrule the Court's treatment of that issue in Wards Cove. Judge Richard Posner, a Reagan appointee, stated in Allen v. Seidman, 881 F.2d 375, 377, 381 (7th Cir. 1989), that Wards Cove diluted the "necessity" in the "business necessity test" and "modified the ground rules that most lower courts had followed in disparate impact cases."

The Griggs decision itself, in discussing the employer's burden in a disparate impact case, refers at least four times to the employer's need to show a connection between

a challenged employment practice and job performance. Therefore, any reasonable bill should require employers to justify all selection practices which result in disparate impact by showing that such practices "bear a significant relationship to successful performance of the job." The Administration's proposed bill, however, does not require an employer under any circumstances to demonstrate business necessity in terms of successful job performance, nor does it require any proof of "necessity."

It uses the term "business necessity" in Section 4 but defines it in Section 3 to mean just the opposite. Thus, even where a company's interests (to quote from the bill) "do not require" a particular employment practice which acts to exclude qualified minorities or women, it may continue using the practice under the White House proposal if the company merely shows that its "legitimate employment goals are significantly served by" the challenged practice which admittedly results in the disparate impact.

This erroneous standard is almost identical to the Wards Cove standard which most persons agree any reasonable civil rights bill must be designed to reverse. Indeed, the Section-by-Section Analysis accompanying the White House proposal clearly indicates at pages 1 and 3 that the intent of the bill is to codify the meaning of business necessity as set forth in Wards Cove. In contrast, any reasonable bill should include statutory language clearly stating that the bill's definition section "is meant to codify the meaning of 'business necessity' as a defense as used in Griggs v. Duke Power Co. (401 U.S. 424 (1971)) and to overrule the treatment of business necessity as a defense as used in Wards Cove Packing Co., Inc. v. Atonio (109 S. Ct. 2115 (1989))." If you accept Griggs -- and you have said you do -- you cannot at the same time insist on Wards Cove, which eviscerated Griggs. Moreover, in our meetings last year you always agreed that the bill could contain language which specifically said that Wards Cove was overruled.

What specific problems would result from the White House/Wards Cove standard? Among other things, the term "legitimate employment goals" includes community relations, customer preference, convenience, minor cost savings, corporate image and many other factors unrelated to job performance. This would permit blatantly discriminatory practices such as allowing airlines to hire only young women as flight attendants due to customer preferences, or permitting a business in an all-white area to refuse to hire minority workers because it is better "community relations" to

limit hiring to neighborhood residents, or to accommodate the aversion that some white customers might have to seeing blacks handle money.

In addition, the Administration proposal dilutes the business necessity test by permitting employers to prevail if they show only that the challenged practice "has a manifest relationship to the employment in question." Unlike Griggs, this definition is wide open and is not linked in any way to job performance (or even to legitimate employment objectives). Qualified minorities and women could be excluded from employment opportunities by the use of practices that have no relation to their ability to perform the job.

In short, in response to the question "Should companies have to show they select workers based on their ability to perform the job, particularly when such jobs have traditionally been denied to women and minorities?", the White House's answer is "no." No responsible person could support that position because in this country most Americans today believe that actual qualifications and merit should determine who gets hired and promoted -- indeed, that is the very foundation of the fair employment laws.

The White House bill even goes further than Wards Cove with respect to the plaintiff's opportunity, as recognized by such cases as Albemarle Paper, to show that a practice is unlawful, even if required business necessity, where there is a lesser discriminatory alternative that would serve the company as well. The White House language would limit the consideration of alternatives to those which are "comparable in cost," effectively overruling Albemarle Paper by making relatively minor differences in cost an absolute defense. The bill also limits this rule only to the rare situation where the employer "refused to adopt such alternative" even after the plaintiff has demonstrated the availability of the alternative at trial.

2. Martin v. Wilks and Price Waterhouse are not addressed at all in the White House proposal. When President Bush vetoed the Civil Rights Act of 1990, the White House nevertheless recognized the need to respond to the Supreme Court's rulings in five key cases -- Patterson, Lorance, Wards Cove, Wilks and Price Waterhouse -- and proposed legislation intended to counteract, at least to some extent, the results of each of these rulings. This year, however, the current White House bill has removed all provisions related to the Wilks and Price Waterhouse decisions.

The Justice Department is wrong in asserting that these rulings have not had a substantial adverse impact on the job protections for women and minorities. Price Waterhouse made it lawful for firms to engage in intentional discrimination on the basis of sex, race, religion or national origin as long as such intentional discrimination is not the only factor that motivates the employer's conduct. Prior law said that where a decision was based on two factors -- one legitimate factor and one intentionally discriminatory factor -- the worker did not have to be hired or promoted but the discriminatory conduct itself would be ruled illegal and the employer could be ordered not to discriminate in the future. That changed as a result of Price Waterhouse, and even the most blatant kinds of discrimination have been ruled to be lawful merely because the employer's discriminatory motive was accompanied by another, legitimate reason for not hiring, or not promoting, or for discharging the plaintiff.

The same kind of serious problems have resulted from the Court's decision in Martin v. Wilks, which allows previously settled cases to be re-opened almost without limitation. Like the ruling in Price Waterhouse, the Wilks case overturned settled case law which prevented untimely re-openings in cases where the courts had already considered and fully approved the terms of a consent decree. As a direct result of Wilks, many previously closed cases have been attacked by reverse-discrimination challenges which have often proved to be meritless and always caused great harm and disruption. The kind of endless and repetitive litigation that Wilks has generated wastes the resources of the parties and the courts and makes it more difficult to eliminate discrimination because of the multiplication of efforts required to resolve even one case; it jeopardizes the strongest incentive to settle, which is bringing an end to the costs and uncertainties of litigation; and it inflames the emotions of applicants and employees to stir up litigation which, in many cases, ultimately benefits no one.

I am enclosing sections of a recent analysis that specifically addresses the substantial adverse impact which the Wilks and Price Waterhouse decisions are continuing to have on victims of job discrimination. The current Administration proposal, abandoning a position taken only months ago, does nothing to address the considerable damage caused by these two rulings.

3. Under the White House proposal, disparate impact cases based on more than one employment practice could no longer be brought successfully. Wards Cove made it

substantially more difficult for workers to bring cases where a group of several practices or selection factors has a discriminatory impact on women or minorities, because it required them for the first time to isolate the precise impact of each practice or factor within the group. Prior to the decision in Wards Cove, there was no requirement to isolate the exact impact of each component within a group of employment practices so long as it was shown that the totality of the practices had an adverse effect on minorities or women. See, e.g., Green v. USX Corp., 843 F.2d 1511, 1520-25 (3rd Cir. 1988); Griffin v. Carlin, 755 F.2d 1516, 1523 (11th Cir. 1985); and Segar v. Smith, 738 F.2d 1249, 1270-71 (D.C. Cir. 1984).

Last year I disagreed with the Attorney General on this issue, because he thought the plaintiffs should lose whenever they could not identify the impact of each factor, even if the reason for this was the employer's deliberate destruction, concealment or failure to keep the relevant records. The current Administration proposal goes even further than this by precluding all challenges to a group of employment practices which result in a disparate impact, whether or not the plaintiffs can make specific showings. Thus, even where (1) severe discriminatory impact has resulted from a combination of only two employment practices, (2) records are available from the firm to show the impact of both practices, and (3) the company concedes it has no evidence whatsoever of business necessity, the complaint would have to be dismissed under the Administration's bill.

This approach would lead to a complete abandonment of Griggs in most cases and would thereby limit victims to bringing cases where discriminatory intent could be proven. Even the October 20, 1990 White House proposal, which accompanied the President's veto, permitted disparate impact challenges to a group of employment practices at least in some circumstances. Because most Griggs-type cases today challenge barriers that consist of more than just one employment practice, this proposal would make the law in this important area even worse, rather than better, than Wards Cove.

4. The damages provision in the White House proposal would do little to advance the Administration's goal of stamping out intentional discrimination. The October 20, 1990 White House proposal on damages permitted judges, not juries, to award a maximum of $150,000 and only in limited circumstances where other remedies do not provide a sufficiently strong deterrent and where the award is "otherwise justified by the equities." The current bill cuts

back even further by limiting monetary relief to claims of harassment and excluding all other types of intentionally discriminatory employment practices, such as intentional refusals to hire, denials of promotion, and firings. This would do little to provide a meaningful remedy in many cases where women workers suffer tremendous humiliation, mental distress, physical harm and economic loss as a result of acts of intentional discrimination. The hearings on this legislation have provided numerous examples of this kind of case and of the need to equalize the remedies for all protected classes.

I also believe the current damages provision in the White House bill is unconstitutional because it requires judges and not juries to make the awards. In addition, before the court may award any amount (which in no case may exceed $150,000), it must consider a series of factors which would seem to limit the size of the award to the victim of intentional discrimination. With all respect, I do not think this proposal serves the President's commitment to the nation in his last address to the Congress that his Administration would fight to stamp out overt bigotry and prejudice.

5. A new defense to liability is created by the White House proposal in harassment cases. For the first time since Title VII was enacted in 1964, the White House bill would give companies a new defense in cases involving intentional harassment on the basis of race, religion, sex or national origin. Even where the evidence of this type of illegal harassment is undisputed, the bill directs the court "that no such unlawful employment practice shall be found to have occurred" if the <u>victim</u> "failed to avail himself or herself of a procedure, of which the [victim] was or should have been aware, established by the employer for resolving complaints of harassment in an effective fashion within a period not exceeding 90 days."

There are absolutely no limits on what procedures the company may adopt or on the manner in which company officials could monitor the victim's compliance with such requirements. For example, victims could be forced, in order to preserve their harassment claims, to take a month off without pay "to recover from the incident and reduce tensions in the workplace." It is no surprise that House Democrats had a field day attacking this provision during the committee hearings and mark-ups on H.R. 1.

6. Waiver of the rights to sue. Under Section 12 of the White House bill, companies could probably fire current

employees and clearly refuse to hire new workers unless they agreed to sign a binding statement waiving all rights to file job discrimination complaints in a federal or state court or with the Equal Employment Opportunity Commission (EEOC). Ever since 1964, workers who suffered discrimination on the job have had the right to file complaints with the EEOC and in court. This provision would change that by allowing firms to require workers to sign agreements providing that all job bias disputes must be decided by a private arbitrator, with no standards or protections to ensure that procedures are conducted fairly and that bias victims can obtain adequate remedies.

This provision is inconsistent with a number of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including employment discrimination cases. See, for example, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) and McDonald v. City of West Branch, 466 U.S. 284 (1984). It could limit the rights not only of women and ethnic, religious and racial minorities, but also of persons with disabilities, who only recently were extended protection by the Americans with Disabilities Act. It could prevent many discrimination issues from ever being considered by a court at any time, thereby fundamentally changing this area of law. Although alternative dispute resolution should be encouraged, access to the courts is critical in some cases and it is the availability of strong court enforcement that often leads to successful early resolution of job bias claims.

7. The White House proposal fails to solve effectively the Lorance problem. Section 7 of the White HOuse proposal only responds to part of the problem caused by the decision in Lorance v. AT&T Technologies, Inc., which held that certain claims may be dismissed as untimely even where the complaint is filed as soon as the plaintiff is harmed by the practice, simply because the practice was adopted years earlier when the plaintiff had no reason to think it would ever adversely affect her. The Administration's bill limits the Lorance provision to seniority systems even though the holding in Lorance has been applied to other types of employment practices, such as promotion policies. Thus a female job applicant could continue to be barred from challenging a discriminatory test even if she filed a charge the same day she took the test, simply because the test was adopted more than 180 days earlier.

8. The White House bill very strangely provides no relief for the persons most hurt by the 1989 Supreme Court decisions. The transition rules proposed by the Administration would require courts to continue to apply the decisions in Patterson, Wards Cove, Lorance and the other 1989 Supreme Court decisions for years to come, long after the effective date of the bill which is intended to reverse those decisions. Section 14 of the White House bill states that the amendments "shall not apply to any claim arising before the effective date of this Act." Because cases often take years to litigate, hundreds of cases now pending at the EEOC or in court would under this plan continue to be decided under the old decisions.

For example, a disparate impact violation which occurs one day before the effective date of this Act might be litigated until the year 2000 and during that entire time the trial and appellate courts would have to apply the legal standards in Wards Cove, not those in the new Act. This proposal simply makes no sense. This plan also would provide no relief at all to victims who lost their case solely because of the Supreme Court's erroneous decisions in 1989. This includes the claims of Ms. Brenda Patterson and more than 300 other claims of intentional racial discrimination which have been dismissed since the Patterson decision in June of 1989.

9. The White House bill would leave in place an extremely short statute of limitations -- only six months. Most responsible people feel it should be longer.

I have tried in a non-polemic fashion to point out some of the major shortcomings of the White House bill. I feel this is the time for calm in this country. As there is a political consensus that a Civil Rights Act of 1991 is needed to change some or all of the effects of the erroneous decisions in Patterson, Martin v. Wilks, Price Waterhouse, Lorance and Wards Cove, it is in the public interest that an appropriate bill be drawn, and, for the reasons stated above, and others, the White House bill, with all respect, falls far short.

With kindest regards,

Sincerely,

William T. Coleman, Jr.

Price Waterhouse v. Hopkins

The Department of Justice's February 7, 1991, memorandum fails to recognize the serious impact of the Price Waterhouse v. Hopkins decision. Prior to Price Waterhouse, the courts had ruled that employers were always liable for intentional discrimination, even if legitimate considerations were mixed with unlawful bias in motivating an employment decision, such as the refusal to promote an employee. While an employee could not obtain a promotion as a remedy in a job bias case if non-discriminatory reasons would have caused the same result, courts in such cases did find the discrimination unlawful and could order the employer to stop discriminating in the future and to pay the plaintiff's attorneys fees.[2] In Price Waterhouse v. Hopkins, however, the Supreme Court ruled that where an employer can show that the same decision would have been made for non-discriminatory reasons, even blatant discrimination is perfectly legal and courts may award no relief whatsoever.

The Justice Department's review of Price Waterhouse's impact in the lower courts focuses exclusively on the number of favorable rulings obtained by individual plaintiffs and defendants. This numerical survey completely ignores the fundamental question of whether proven, intentional discrimination should be condoned by Title VII and unremedied in the courts. The Justice Department's current position on this question directly contradicts the earlier positions of both the Reagan and Bush Administrations. In its Supreme Court brief for the government in Price Waterhouse itself, the Reagan Justice Department stated that where non-discriminatory factors would have produced the same employment action in the absence of discrimination, the plaintiff is entitled to "an award of attorney's fees and an injunction against future discrimination."[3] In vetoing the Civil Rights Act last year, President Bush also agreed that courts should be able to award

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[2] See, e.g., Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985); King v. Transworld Airlines, Inc., 738 F.2d 255 (8th Cir. 1984); Ostroff v. Employment Exchange, Inc., 638 F.2d 302 (9th Cir. 1982); Nanty v. Barrows Co., 660 F.2d 302 (9th Cir. 1981); Roberts v. Fri, 29 F.E.P. Cases 1445 (D.C. Cir. 1980); see also EEOC Commission Decision No. 70-925, 72-0591, 72-0606, CCH EEOC Decisions (1973) Pars. 6158, 6314, 6310; Commission Decision Nos. 75-007 and 75-091, CCH EEOC Decisions (1983) Pars. 6436, 6528 (supporting the position that a finding of invidious motivation is dispostive of Title VII liability, leaving open only the scope of appropriate remedy).

[3] Brief for the United States as Amicus Curiae at 24, Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (No. 87-1167) (citations omitted).

relief for proven discrimination, and included a provision in his alternative bill to provide such relief "consistently with the principles enunciated in other civil rights cases" before Price Waterhouse.[4] The Justice Department offers no explanation for its apparent retreat from this position.

In fact, a reading of lower court opinions indicates that Price Waterhouse has served to legitimate blatant discrimination in the workplace. For example, in EEOC v. Alton Packaging Corp.,[5] the court found no Title VII liability, despite the fact that the plaintiff provided direct proof that intentional discrimination had played a role in the employer's promotion process. The court found that one of the two persons who decided not to promote the plaintiff had stated that "if it was his company, he wouldn't hire any black people,"[6] and the other person making the decision had yelled at another black employee "--- ---- it, you people can't do a ------- thing right." However, because the employer could show that the plaintiff would not have been promoted even if the workplace were free from bias, the defendant escaped all liability for its conduct under Price Waterhouse, and the plaintiff could not obtain injunctive relief or attorneys fees. Because of Price Waterhouse, the same two managers who harbor racial animus can continue to make promotion decisions that affect black employees.

The Justice Department dismisses the Alton case with the statement that "the plaintiff would not have received promotion even if race were not considered." This completely misses the point. No one has suggested that in such cases the employee should receive a promotion. The Justice Department analysis, however, ignores the fact that as a result of Price Waterhouse, the employer in Alton may continue to discriminate in future promotions. As courts had ruled before Price Waterhouse, Title VII and the interests of justice require that courts have the authority to remedy such blatant discrimination through awarding attorneys fees and injunctive relief.

Price Waterhouse also legalized invidious discrimination in Pajic v. CIGNA,[7] a case not even mentioned in the Justice Department's survey. In Pajic, the plaintiffs, two women, proved that they had been repeatedly subjected to adverse employment actions, and ultimately terminated, in connection with their

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[4] Section By Section Analysis of Proposed Administration Bill (1990) at 3.

[5] 901 F.2d 920 (11th Cir. 1990).

[6] Id. at 922.

[7] 1990 U.S. Dist. LEXIS 16278 (E.D. Pa. Nov. 30, 1990).

efforts to obtain pay equity for women. After the company finally approved the salary adjustments that the plaintiffs had been requesting for ten years, the defendant's Director of Human Resources warned the plaintiffs not to act like "shop stewards" in informing their predominantly female staff that the pay raises would not be retroactive, and threatened to hold the plaintiffs personally responsible for any EEOC lawsuits. Another manager involved in the adverse employment actions against the plaintiffs had made several discriminatory remarks regarding women employees, referring to them as "broads, bimbos and glorified secretaries."

Although the court credited this evidence of discriminatory motives, it found that legitimate, non-pretextual reasons would have produced the same employment actions, and relied on Price Waterhouse v. Hopkins to deny the plaintiffs any remedy whatsoever. Consequently, the plaintiffs were unable to obtain attorneys fees or injunctive relief to prevent future discrimination. Because of Price Waterhouse, the employer in Pajic succeeded in intentionally discriminating against female employees without so much as a reprimand from the court.

Price Waterhouse has also forced other courts to ignore evidence of bias in cases involving racial discrimination against white as well as minority employees. For example, in Gautier v. Watkins,[8] the court accepted the EEOC's finding that race played a role in the determination not to promote a white employee, and in Brown v. Amoco Production Co.,[9] the court found that an impermissible racial motive may have played some part in the decision to terminate a black employee. After Price Waterhouse, however, these impermissible racial criteria will continue to factor into the decision-making process, because in both cases the existence of non-discriminatory factors that would have produced the same employment actions prevented the courts from responding to the discrimination.

The Justice Department nevertheless asserts that Price Waterhouse has not had a negative impact because many plaintiffs have continued to win mixed-motive cases where employers failed to prove that they would have taken the same action even if they had not discriminated. This analysis completely misses the point. It has never been suggested that Price Waterhouse would make such cases more difficult for plaintiffs to win. However, where employers can show that they would have taken the same action absent discrimination, Price Waterhouse legalizes even the most blatant discrimination, precluding courts from even ordering the discrimination to cease. In addition, since so many Title

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[8] 747 F. Supp. 82 (D.D.C. 1990).

[9] 1989 U.S. Dist. LEXIS 8952 (E.D. La. July 31, 1989).

VII cases involve multiple motives, the risk that Price Waterhouse will make a court unable to award any remedy--such as ordering the discrimination to stop or awarding the costs of bringing the lawsuit--will inevitably deter plaintiffs from challenging blatant and intentional bias in the workplace.

Martin v. Wilks

The Justice Department seriously understates the significant impact of the Martin v. Wilks decision. Its analysis completely misses the point.

The Justice Department is certainly correct that most of the "reverse discrimination" collateral attacks and interventions under Martin v. Wilks which have been decided to date have upheld the challenged decrees. This confirms the argument of the bill's proponents that these challenges are not meritorious, and that it is best to resolve these questions once and for all at the time of the adoption of the original decree.

The question is not whether the Wilks decision "would result in the wholesale disruption of employment discrimination decrees";[1] it is whether the Martin decision would embroil settling plaintiffs and defendants in repetitive, meritless litigation. There are three principal evils of such endless and meritless litigation:

- It wastes the resources of plaintiffs, defendants, and the courts and makes it more difficult to eliminate discrimination because of the multiplication of time and effort to resolve discrimination lawsuits.
- It risks the elimination of the strongest of all incentives to settle a case on mutually agreeable terms: bringing an end to the costs and uncertainties of litigation.
- It inflames the emotions of applicants and employees to stir up litigation time and again, to no avail.

It is difficult to compile a comprehensive list of reverse-discrimination challenges under Wilks until a decision has been reported. There is no means of collecting information nationwide on new case filings in State and Federal courts, and the Equal Employment Opportunity Commission is barred by law from releasing the names of respondents to any charge of discrimination, including "reverse discrimination" charges. Unless one learns of the existence of the charge directly from the charging party or the respondent, they do not come to public attention until a case has been filed in court and until the existence of the case itself somehow comes to public attention. On-line computerized news databases such as NEXIS are not too useful because there is no common set of words used in news articles which would make it possible to collect even published news on the filing of Wilks-type challenges.

Even with these limitations, however, it is clear that

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[1] February 7, 1991 Memorandum to the Attorney General at 1.

an impressive array of challenges to decrees have been brought or maintained under Wilks:

Birmingham Fire Department, Alabama[2]

Birmingham Police Department, Alabama

Birmingham Engineering Department, Alabama

Birmingham Streets and Sanitation Department, Alabama

Gadsden Fire Department, Alabama

Jefferson County, Alabama

Jefferson County Sheriff's Department, Alabama

Jefferson County Personnel Board, Alabama

Oakland Fire Department, California

San Francisco Fire Department, California (2 cases)

San Francisco Police Department, California

San Francisco Community College District, California (3 cases)

San Francisco Unified School District, California

United States Forestry Service, Bay area, California

Albany, Georgia

Chicago Police Department, Illinois

Boston Fire Department, Massachusetts

Boston Police Department, Massachusetts (hiring)

Boston Police Department, Massachusetts (promotions)

Omaha Police Department, Nebraska (at least 5 cases in court and 9 administrative proceedings)

New York Police Department, New York (2 cases)

Cincinnati Fire Department, Ohio (3 cases)

Cincinnati Police Department, Ohio

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[2] The challenges to the Birmingham and Jefferson County decrees are multiple.

Cleveland Fire Department, Ohio (2 cases)

Toledo Fire Department, Ohio

Youngstown Police Department, Ohio

Pittsburgh Police Department, Pennsylvania (2 cases)

Memphis Fire Department, Tennessee

Memphis Police Department, Tennessee (2 cases)

Many of these cases are still pending in court, and will continue to tie up --- pointlessly --- the resources of the original plaintiffs and defendants for years to come. Wilks has clearly had a substantial negative impact.