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| **Record Group/Collection:** | George H.W. Bush Presidential Records |
| **Collection/Office of Origin:** | Chief of Staff, White House Office of |
| **Series:** | Sununu, John, Files |
| **Subseries:** | Issues Files |

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| **OA/ID Number:** | 29146 |
| **Folder ID Number:** | 29146-006 |

**Folder Title:**
Civil Rights (1 of 2) 1991 [8]

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THE WHITE HOUSE

WASHINGTON

July 10, 1990

Dear Ted:

I very much appreciate your letter of June 29 on civil rights. I too am grateful for the time you have spent with me and with others in trying to develop an effective and fair civil rights bill that would receive bipartisan support.

What has been frustrating to me in the process is the realization that there may be common ground achievable on the principles of what the bill should address, and how it should address them. Converting what may be general agreement to mutually agreeable language has been very elusive.

During the process, I have had the feeling that at least part of the problem was that the negotiations may have gotten into a duel over whose language to use. Pride of authorship shouldn't be allowed to stand in the way of agreement, and I thought I would take one last crack at cutting through these difficulties.

The Administration's basic concern is that the bill as crafted now, will, even if unintentionally, compel businesses to adopt quota policies in hiring and promotion as the only or best defense against the likelihood of legal action.

The key to a solution, I believe, is to use language directly from _Griggs_, language that has become the basis of what we agree was a functioning process at eliminating discrimination. The _Griggs_ decision and those Supreme Court decisions based on the _Griggs_ holdings have become an effective framework that we, together, have agreed is well worth preserving.

Thus, I propose the following language to address the concerns we have raised and the issues you have identified in our discussions.

On the definition of business necessity, I think we can accommodate your desires by including language from _Griggs_. Rather than "substantially and demonstrably related to effective job performance," which is not a formulation that _Griggs_ actually uses, how about "has a manifest relationship to the employment in question"? (This is on page 432 of the case.)

On "job performance plus" and related issues, consistent with preserving _Griggs_ and its framework, we must take account of the very recent case (_Watson_ in 1988) that for the first time expanded disparate impact theory to cover subjective hiring practices. The definition of business necessity must therefore accommodate the special characteristics of such practices. It should also permit employers to pursue business goals besides those related to job performance per se. (This would address issues such as the non-smoking criterion you have commented on.)

I think this could by accomplished with language that the Court used back in 1979. In New York Transit Authority v. Beazer, just eight years after Griggs, in an opinion written by Justice Stevens (author of the principal Wards Cove dissent), joined by Chief Justice Burger (author of Griggs) and by Justice Blackmun (who wrote the other dissent in Wards Cove), the Court upheld the practice of excluding methadone users even from non-safety-sensitive jobs with the Transit Authority, explaining that the "legitimate employment goals of safety and efficiency ... are significantly served by -- even if they do not require -- [the employer's] rule." 440 U.S., page 587.

Merging the two sets of language together would produce the following:

> "The term 'justified by business necessity' means that the challenged practice or group of practices has a manifest relationship to the employment in question or that the respondent's legitimate employment goals are significantly served by -- even if they do not require -- the challenged practice or group of practices."

This formulation codifies Griggs and its progeny, just as you have urged. In order for the formulation to be acceptable however, we also would need to agree explicitly, and with a record, that there would be no legislative history changing or clouding its meaning. Instead, the legislative history should be confined to the following:

> "The definition of 'business necessity' is drawn from Chief Justice Burger's opinion in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) and Justice Stevens' opinion in New York Transit Authority v. Beazer, 440 U.S. 568, 587 (1979). The definition is intended to have the same meaning that the term 'business necessity' has been given by the United States Supreme Court in Griggs and its progeny."

Finally, I am still troubled by the proposed language on the "group of employment practices" issue. I agree with you that if a test is shown to produce a disparate impact, the employer should have to justify the test; but that doesn't mean the employer should have all of its practices subjected to judicial scrutiny as a matter of course.

I have noted that you are concerned about a question that arose in a case called Sledge v. J.P. Stevens, where the defendant's hiring process was basically a "black box" to the plaintiff because the defendant had no articulable hiring standards. I'm somewhat puzzled by the conclusions drawn from the case, since as I understand it, even after Wards Cove, the plaintiff won that case under the rule reaffirmed in Wards Cove.

Basically, I continue to fear language that causes more problems than it solves, or language with unintended consequences that would stimulate a quota-based defensive position. The language in your letter creates an exception that will swallow up the basic rule and thus permit challenges to employers' hiring based on their having the "wrong" demographic distribution. Still, consistent with our willingness to work out the differences, I suggest legislative history specifically endorsing the result in the Sledge case, along with our rewrite of your "group of practices" section to reduce that risk while permitting appropriate challenges to groups of practices that produce a disparate impact. I attach both. These suggestions, along with the new proposal on business necessity, would substantially alleviate our concerns about quotas in this part of the bill.

This is really as far as we can go on these points. Can't we agree on this effort to base the language directly on Griggs and Beazer as a way out of struggling with intended or unintended impacts of new words?

If we can deal quickly with these issues so directly related to our concerns on the quota implications and the potential for quota practices that could result from your proposed bill, then I am sure we can develop a way to handle the remaining issues.

Sincerely,

John H. Sununu

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The Honorable Edward Kennedy
United States Senate
Washington, DC 20510

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Samuel L. Maury
Executive Director

May 17, 1991

The Honorable Neil Abercrombie
United States House of Representatives
Washington, DC 20515

RE: Civil Rights Legislation

Dear Representative Abercrombie:

I understand various documents representing potential agreements between civil rights groups and the business community are being circulated on the Hill. To the extent that these documents are perceived to reflect the outcome of recent discussions between The Business Roundtable and civil rights groups, we would emphasize that no definitive conclusions were reached in the discussions.

We expect that there will be other such documents, and we do not intend to comment on the specifics of each document other than to reiterate a fundamental point. We agreed with the civil rights groups that a basic understanding had to be reached on all issues before we could proceed with any specific issues. We did not reach a basic understanding on all of the issues, and, because the issues are so interrelated, we cannot support piecemeal amendments to the bill.

We continue to believe the best way to lead to resolution of the difficult issues involved in this legislation would be passage by the House of H.R. 1375 as an alternative to H.R. 1.

Sincerely,

Sam Maury

Samuel L. Maury

225-2800

# COMPROMISE FEATURES OF THE DEMOCRATIC SUBSTITUTE

Consensus was reached on a number of major issues by civil rights groups and the business community before discussions were terminated. Many essential points of concern which were identified are addressed in a substitute to be offered during Floor consideration.

1. CAP ON DAMAGES --

The substitute would limit punitive damages in cases of intentional discrimination to $150,000 or the amount of compensatory damages, whichever is greater, as passed last Congress.

H.R. 1 does not place a limit on the amount of damages.

2. BUSINESS NECESSITY -- A key disagreement about the legal standards to apply in discrimination cases was resolved by compromise language that bridges the difference between the various formulations.

The new operative words of the legal definition would be "substantial and manifest relationship". In addition, another key term, "requirements for effective job performance", was also defined in a manner designed to accommodate business concerns.

Thus, the term "required by business necessity" means the practice or group of practices must bear a substantial and manifest relationship to the requirements for effective job performance.

3. NO QUOTAS -- Language would make clear that quotas in employment practices are not encouraged, required, "or permitted".

4. DISPARATE IMPACT CASES -- New language specifies that:

-- Plaintiffs must challenge specific practices unless the court determines, after discovery, that plaintiffs cannot identify specific practices.

-- Employers may defend against a challenge to a group of practices by demonstrating that a "specific practice does not contribute in a meaningful way" to the disparity.

5. RELATIVE QUALIFICATIONS/ADDITIONAL QUALIFICATIONS -- New language makes clear that:

-- Employers may rely on relative qualifications or skills as the basis for employment decisions.

-- Employers have the right to determine the requirements for a job, as long as they are job related.

6. STATUTE OF LIMITATIONS: Lowered from two years in H.R. 1 to 18 months.

7. COERCED WAIVER OF ATTORNEY'S FEES -- would still be prohibited, but allows for negotiations of fees, including a voluntary waiver. Eliminates self-enforcing provision opposed by business.

8. TESTING -- New language prohibits the adjustment of employment test scores on the basis of race, color, sex, religion, or national origin, as well as the use of tests which are not valid and fair. In addition, it would permit an employer to use alternative selection procedures.

9. RETROACTIVITY -- Precludes retroactive application of the legislation in the absence of a finding of "manifest injustice" under existing Federal Rules of Procedure.

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^White House Democratic Efforts on Civil Rights Bill<
^Eds: Top 9 gr with White House comment, new Foley prediction on veto-proof majority; picks up 5th graf pvs, President Bush vetoed.<
^By WILLIAM M. WELCH=
^Associated Press Writer=

WASHINGTON (AP) - The White House said today efforts by congressional Democrats to soften their civil rights legislation doesn't alter President Bush's belief that the bill would prompt employers to use quotas in hiring.

White House spokesman Roman Popadiuk said the Bush administration continues to support its own less-sweeping civil rights bill despite changes Democrats have made in their measure. House leaders say they expect the full House to vote on civil rights bills late next week.

House Speaker Tom Foley said he expects the House to pass the Democrats' bill with a two-thirds, veto-proof majority.

``The president is committed to signing a strong civil rights bill and he will not sign a quota bill. The president has a bill in Congress and we think it is the best bill,'' Popadiuk said.

He said language in the Democratic version strengthening its prohibition on the use of hiring quotas would not be sufficient to attract administration support for the bill.

``Just putting in a sentence does not change the effect of the text,'' he said.

Foley said on Monday that the Democrats' revised civil rights bill would pass the House with as many votes as last year's version, but a veto-proof majority still appeared elusive. Today, however, Foley said he expected Democrats to gain a two-thirds, veto-proof majority in the House.

``I decided to predict it, and if wrong I'll take it back,'' Foley said.

Democrats continued private meetings to gauge support for their latest version of job-discrimination legislation. The revision, made by House leaders in private after the bill cleared House committees, incorporates major changes aimed at pulling in the votes of wavering lawmakers - particularly southern Democrats.

President Bush vetoed the civil rights bill last year on grounds it would require racial quotas, and the Senate sustained the veto by a single vote.

House floor action is scheduled for next week, after Congress returns from a Memorial Day recess.

The bill is aimed at making it easier to prove job discrimination and would expand the ability of some discrimination victims to collect damages. It would effectively negate three restrictive Supreme Court rulings in 1989.

Although a final copy of the revised version was not ready, among its changes is the incorporation of a limit on punitive damages in suits charging sexual harassment.

The limit - $150,000 or an amount equal to compensatory damages, whichever is higher - also was included in last year's vetoed measure but was left out when the bill passed the House Judiciary and Education and Labor committees in March.

Some advocates of women's rights have opposed inclusion of that cap, but Foley defended it as a pragmatic move.

``It's a matter of going as far as we can under the circumstances and making progress,'' he said. ``We don't achieve everything at once.''

Other changes include language establishing a legal standard for justifying hiring practices that are fair on their face but have the effect of discriminating against a large class of people.

The new provision would allow employers to justify those practices by showing they ``bear a substantial and manifest relationship to the requirements for effective job performance.''

That language was tentatively agreed upon in private sessions between civil rights advocates and representatives of the Business Roundtable, a group of big corporations. Those talks were broken off after the business leaders cited a lack of White House support for their efforts.

Still another change in the Democrats' bill would prohibit adjusting job-placement test scores on account of race except when there is evidence of bias in a test.

That change is an effort to head off an expected Republican attack on the practice known as ``race-norming.'' More than half the states now use that method of scoring some job-placement test scores. Under it, blacks and Hispanics receive higher final scores than whites and Asian-Americans who achieve the same raw score.

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THE WHITE HOUSE

WASHINGTON

May 21, 1991

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: C. BOYDEN GRAY CBG

SUBJECT: New Fact Sheet on the President's Civil Rights Bill

Attached, as you requested, is a new fact sheet on the President's civil rights bill.

Attachment

THE WHITE HOUSE

WASHINGTON

# THE PRESIDENT'S CIVIL RIGHTS BILL

- The President's bill -- H.R. 1375 -- includes all of the worthwhile measures supported by a bipartisan consensus:
  - Overturns the Patterson and Lorance decisions.
  - Overturns the Wards Cove decision by shifting the burden of proof to the employer in defending "business necessity."
  - Creates new monetary remedies under Title VII with meaningful caps.
  - Authorizes expert witness fees in civil rights cases.
  - Extends the statute of limitations in cases involving the U.S. Government, and authorizes the award of interest against the Government.
- Only the President's bill uses the exact language from the holding in Griggs in defining "business necessity" -- "manifest relationship to the employment in question."
- Only the President's bill includes the exact "business necessity" language taken from the 1979 Beazer opinion, which was accepted in the Wards Cove dissent (written by the author of Beazer).
- Any deviation from the exact language of the Supreme Court's pre-Wards Cove holdings will inevitably raise the risks for employers who do not have the "right" numbers -- years of litigation will be needed to sort out the meaning of the new definition and employers who cannot endure that litigation will have to use quotas.
- Only the President's bill will avoid creating new pressures on employers to engage in "race norming."
- Only the President's bill will permit the President's educational reform initiative to go forward unimpeded (see attached op-ed by Dr. Chester Finn).
- Only the President's bill preserves the right of victims of illegal quotas to have their day in court and to be treated like other civil rights plaintiffs.
- Only the President's bill will avoid a new litigation explosion and new attorneys fees -- a lawyers' bonanza.

# Education Reform vs. Civil Rights Agendas

By Chester E. Finn Jr.

WASHINGTON

The Achilles' heel of education renewal is the lack of real-world incentives for young Americans to excel in school. Creating such incentives without triggering charges of discrimination is harder still.

Sure, it's important to get a diploma. But among those who complete high school, it matters little which courses they take, how hard they study or what grades they earn.

The reason, said the Commission on the Skills of the American Work-force in its 1990 report, is that employers have come to see the diploma as more a clue to character than to learning. "They realized long ago," the commission tartly notes, "that it is possible to graduate from high school in this country and still be functionally illiterate."

An ever growing proportion of high school graduates now heads for college rather than the workplace. But not more than 50 U.S. campuses reject more applicants than they admit. Most of our 3,400 degree-offering institutions welcome anyone with a heartbeat and a checkbook — and the latter may be waived if you qualify for financial aid.

## Tough tests will aid minority students.

Open access to higher education is a prized feature of American society. But what message does it send to the 11th grader deciding whether to stay home on Tuesday night to revise his chemistry lab report or go out and party with his friends?

President Bush's new education strategy, introduced last month, would change all this. The plan, developed by Secretary of Education Lamar Alexander and a group of advisers (myself included), proposes to set world-class standards in English, math, science, history and geography, and to accompany these with new national tests that colleges and employers will use in their admissions and hiring decisions.

When that day dawns, young people will have incentives to study. Admissions and personnel offices will confer real rewards on those who attain the new, higher standards in school and will levy unwelcome consequences on those who don't. In response, millions of students will alter their behavior. Americans, regardless of background, will take learning seriously because it will make a practical difference in their lives.

What happens in the meantime, however, if those new standards and tests yield results that differ by gender, race or ethnic group? Will any college or employer dare to use them?

Federal law already makes it difficult for employers to require any educational credentials or test scores that have a "disparate impact." Pending civil rights legislation would make this harder still. The Democrats' bill requires employers to prove that tests bear a "significant relationship to successful performance of the job." Even the Administration's milder version expects any education credentials to show a "manifest relationship" to the job.

How many personnel directors will be able to convince a Federal enforcer or judge that a young person's command of science and geography is germane to the work of a forklift operator or receptionist? Yet so long as employers are inhibited from examining a candidate's test scores, "rational" students will see no payoff for buckling down to learn such subjects. High marks won't matter.

Colleges could easily justify stiffer academic prerequisites. But few campuses can afford to be persnickety in their admissions decisions — and virtually all are determined to enroll more minority students at any cost. Never mind that the soaring dropout rate among minority college students is a sign of the weak educational foundation that reformers hope to strengthen.

A thoroughly revamped education system would help end this paralysis. Each year we would have millions more young Americans schooled to world standards as proved by test results that are indistinguishable by race, gender or ethnicity.

Today, however, we face a Catch-22 situation in which few students are apt to change their study habits because neither employers nor colleges reward academic achievement. The President is urging them to do so. Yet any that respond may be accused of discriminating. Is that any way to reach our national education goals?

*Chester E. Finn Jr., professor of education at Vanderbilt University, is author of "We Must Take Charge: Our Schools and Our Future." He was an Assistant Secretary of Education during the Reagan Administration.*

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THE WHITE HOUSE

WASHINGTON

May 21, 1991

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: C. BOYDEN GRAY CBG

SUBJECT: New Fact Sheet on the President's Civil Rights Bill

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  - Overturns the Wards Cove decision by shifting the burden of proof to the employer in defending "business necessity."
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# Education Reform vs. Civil Rights Agendas

By Chester E. Finn Jr.

## Tough tests will aid minority students.

WASHINGTON

The Achilles' heel of education renewal is the lack of real-world incentives for young Americans to excel in school. Creating such incentives without triggering charges of discrimination is harder still.

Sure, it's important to get a diploma. But among those who complete high school, it matters little which courses they take, how hard they study or what grades they earn.

The reason, said the Commission on the Skills of the American Workforce in its 1990 report, is that employers have come to see the diploma as more a clue to character than to learning. "They realized long ago," the commission tartly notes, "that it is possible to graduate from high school in this country and still be functionally illiterate."

An ever growing proportion of high school graduates now heads for college rather than the workplace. But not more than 50 U.S. campuses reject more applicants than they admit. Most of our 3,400 degree-offering institutions welcome anyone with a heartbeat and a checkbook — and the latter may be waived if you qualify for financial aid.

Open access to higher education is a prized feature of American society. But what message does it send to the 11th grader deciding whether to stay home on Tuesday night to revise his chemistry lab report or go out and party with his friends?

President Bush's new education strategy, introduced last month, would change all this. The plan, developed by Secretary of Education Lamar Alexander and a group of advisers (myself included), proposes to set world-class standards in English, math, science, history and geography, and to accompany these with new national tests that colleges and employers will use in their admissions and hiring decisions.

When that day dawns, young people will have incentives to study. Admissions and personnel offices will confer real rewards on those who attain the new, higher standards in school and will levy unwelcome consequences on those who don't. In response, millions of students will alter their behavior. Americans, regardless of background, will take learning seriously because it will make a practical difference in their lives.

What happens in the meantime, however, if those new standards and tests yield results that differ by gender, race or ethnic group? Will any college or employer dare to use them?

Federal law already makes it difficult for employers to require any educational credentials or test scores that have a "disparate impact." Pending civil rights legislation would make this harder still. The Democrats' bill requires employers to prove that tests bear a "significant relationship to successful performance of the job." Even the Administration's milder version expects any education credentials to show a "manifest relationship" to the job.

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HR1SUB4

from Gary Andres

AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 1, AS REPORTED
OFFERED BY

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the ''Civil Rights and Women's Equity in Employment Act of 1991''.

**SEC. 2. FINDINGS AND PURPOSES.**

(a) FINDINGS.--Congress finds that--

(1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and

(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.

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

(1) respond to the Supreme Court's recent decisions by restoring the civil rights protections that were

dramatically limited by those decisions; and

(2) strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

TITLE I

SEC. 101. DEFINITIONS.

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

''(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 employment practices that produces one or more decisions with respect to employment, employment referral, or admission to a labor organization, apprenticeship or other training or retraining program.

<u>''(o)(1) The term 'required by business necessity' means the practice or group of practices must bear a substantial and manifest relationship to the requirements for effective job performance.</u>

<u>''(2) Paragraph (1) is meant to codify the meaning of, and the type and sufficiency of evidence required to prove,</u>

'business necessity' as used in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and to overrule the treatment of business necessity as a defense in Wards Cove Packing Co., Inc., v. Atonio, 490 U.S. 642 (1989).

''(p) The term 'requirements for effective job performance' may include, in addition to effective performance of the actual work activities, factors which bear on such performance, such as attendance, punctuality, and not engaging in misconduct or insubordination.

''(q) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs, or those Federal entities subject to the provisions of section 717 (or the heads thereof).''.

SEC. 102. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.

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

''(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.--(1)(A) An unlawful employment practice based on disparate impact is established under this title if a complaining party demonstrates that an employment practice or group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice or group of practices is required by business necessity, except that an employment practice or group of practices demonstrated to be required by business necessity shall be unlawful if the complaining party demonstrates that another available practice or group of practices with less disparate impact (which difference is more than merely negligible) would serve the respondent as well.

''(B) If a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall be required after discovery to demonstrate which specific practice or practices within the group results in disparate impact unless the court finds that the complaining party cannot identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact.

''(C) If the respondent demonstrates that a specific employment practice within a group of employment practices does not contribute in a meaningful way to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

''(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.

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

''(4) The mere existence of a statistical imbalance in an employer's workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation.

''(5) For purposes of this subsection, a respondent may rely upon relative qualifications or skills as determined by relative performance or degree of success on a selection factor, criterion, or procedure: Provided, That if such reliance results in a disparate impact based on race, color, religion, sex, or national origin, such reliance must be demonstrated by the respondent to be required by business necessity.''.

SEC. 103. 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), as amended by section 102, is amended by adding at the end thereof the following:

''(l) DISCRIMINATORY PRACTICE NEED NOT BE SOLE MOTIVATING FACTOR.--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 such employment practice, even though other factors also contributed to such practice.''.

(b) ENFORCEMENT PROVISIONS.--Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended by inserting before the period in the last sentence the following: ''or, in a case where a violation is established under section 703(l), if the respondent demonstrates that it would have taken the same action in the absence of any discrimination. In any case in which a violation is established under section 703(l), damages may be awarded only for injury that is attributable to the unlawful employment practice''.

SEC. 104. 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 sections 102 and 103, is amended by adding at the end thereof the following:

"(m) FINALITY OF LITIGATED OR CONSENT JUDGMENTS OR ORDERS.—(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws may not be challenged in a claim under the United States Constitution or Federal civil rights laws—

"(A) by a person who, prior to the entry of such judgment or order, had—

"(i) actual notice from any source 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;

"(B) by a person with respect to whom the requirements of subparagraph (A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order; or

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

A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.

''(2) 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 original proceeding;

''(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 United States Constitution.

''(3) Any action, not precluded under this subsection, that challenges an employment practice that implements and is within the scope of a litigated or consent judgment or order of the type referred to in paragraph (1) 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. 105. STATUTE OF LIMITATIONS; APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.**

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

(1) by striking out ''one hundred and eighty days'' and inserting in lieu thereof ''540 days'';

(2) by inserting after ''occurred'' the first time it appears ''or has been applied to affect adversely the person aggrieved, whichever is later,'';

(3) by striking out '', except that in'' and inserting in lieu thereof ''. In''; and

(4) by striking out ''such charge shall be filed''

and all that follows through ''whichever is earlier, and''.

(b) APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.--Section 703(h) of such Act (42 U.S.C. 2000e-2) is amended by inserting after the first sentence the following: ''Where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agreement with the intent to discriminate on the basis of race, color, religion, sex, or national origin, the application of such system or practice during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice.''.

SEC. 106. PROVIDING FOR DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

(a) DAMAGES GENERALLY.--Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) is amended by inserting before the last sentence the following: ''With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k)) or in the case of an unlawful employment practice under the Americans with Disabilities Act of 1990 (other than an unlawful employment practice established in accordance with paragraph (3)(A) or paragraph (6) of section 102(b) of that Act as it relates to standards and criteria that tend to screen out individuals with disabilities)--

''(A) compensatory damages may be awarded; and

''(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded against such respondent;

in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon. Compensatory and punitive damages and jury trials shall be available only for claims of intentional discrimination. If compensatory or punitive damages are sought with respect to a claim of intentional discrimination arising under this title, any party may demand a trial by jury.''.

(b) LIMITATION ON PUNITIVE DAMAGES.--Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-(g)) is amended--

(1) by inserting ''(1)'' after ''(g)''; and

(2) by adding at the end the following:

''(2) The amount of punitive damages that may be awarded under paragraph (1)(B) to an individual against a respondent shall not exceed--

''(A) $150,000; or

''(B) an amount equal to the sum of compensatory damages awarded under paragraph (1)(A) and equitable monetary relief awarded under paragraph (1), whichever is greater.''.

SEC. 107. CLARIFYING ATTORNEY'S FEE PROVISION.

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

(1) by inserting ''(1)'' after ''(k)'';

(2) by inserting ''(including expert fees and other litigation expenses) and'' after ''attorney's fee'';

(3) by striking out ''as part of the''; and

(4) by adding at the end thereof the following:

''(2) No waiver of all or substantially all of an attorney's fee shall be compelled as a condition of a settlement of a claim under this title, except that nothing in this section shall be construed to limit the right to negotiate a settlement in which an attorney's fee is voluntarily waived in whole or in part.

''(3) In any action or proceeding in which any judgment or order granting relief under this title is challenged, the court, in its discretion and in order to promote fairness, may allow the prevailing party in the original action (other than the Commission or the United States) to recover from either an unsuccessful party challenging such relief or a party against whom relief was granted in the original action or from more than one such party under an equitable allocation determined by the court, a reasonable attorney's fee (including expert fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor or otherwise) such judgment or order. In determining whether to allow recovery of fees from the party challenging the initial judgment or order, the court should consider not only whether such challenge was unsuccessful, but also whether the award of fees against the challenging party promotes fairness, taking into consideration such factors as the reasonableness of the challenging party's legal and factual position and whether other special circumstances make an award unjust.''.

**SEC. 108. 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 out ``thirty days'' and inserting in lieu thereof ``ninety 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 non-public parties, except that prejudgment interest may not be awarded on compensatory damages''.

**SEC. 109. CONSTRUCTION.**

Title XI of the Civil Rights Act of 1964 (42 U.S.C. 2000h et seq.) is amended by adding at the end thereof the following:

''SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS.

''(a) EFFECTUATION OF PURPOSE.--All Federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies.

''(b) NONLIMITATION.--Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to repeal or amend by implication any other Federal law protecting such civil rights.

''(c) INTERPRETATION.--In interpreting Federal civil rights laws, including laws protecting against discrimination on the basis of race, color, national origin, sex, religion, age, and disability, courts and administrative agencies shall not rely on the amendments made by the Civil Rights and Women's Equity in Employment Act of 1991 as a basis for limiting the theories of liability, rights, and remedies available under civil rights laws not expressly amended by such Act.''.

SEC. 110. RESTORING PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

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

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

(2) by adding at the end thereof the following:

''(b) For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

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

SEC. 111. VOLUNTARY AND COURT-ORDERED AFFIRMATIVE ACTION APPROVED; QUOTAS DEEMED UNLAWFUL EMPLOYMENT PRACTICE.

(a) RULES OF CONSTRUCTION.--Nothing in the amendments made by this Act shall be construed--

(1) to limit an employer in establishing its job requirements if such requirements are lawful under title VII of the Civil Rights Act of 1964, as amended; or

(2) to require, encourage, or permit an employer to adopt a hiring or promotion quota, on the basis of race, color, religion, sex, or national origin, and the use of such quota shall be deemed to be an unlawful employment

practice under such title: Provided, That the amendments made by this Act shall be construed to approve the lawfulness of voluntary or court-ordered affirmative action that is--

(A) consistent with the decisions of the Supreme Court of the United States in employment discrimination cases; or

(B) in the absence of such decisions, otherwise in accordance with employment discrimination law;

as in effect on the date of the enactment of this Act.

(b) DEFINITION.--For purposes of subsection (a), the term ''quota'' means a fixed number or percentage of persons of a particular race, color, religion, sex, or national origin which must be attained, or which cannot be exceeded, regardless of whether such persons meet necessary qualifications to perform the job.

SEC. 112. 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 thereby.

SEC. 113. APPLICATION OF AMENDMENTS AND TRANSITION RULES.

(a) APPLICATION OF AMENDMENTS.

the amendments made by--

(1) section 102 shall apply to all proceedings pending on or commenced after June 5, 1989;

(2) section 103 shall apply to all proceedings pending on or commenced after May 1, 1989;

(3) section 104 shall apply to all proceedings pending on or commenced after June 12, 1989;

(4) sections 105(a)(1), 105(a)(3) and 105(a)(4), 105(b), 106, 107, 108, and 109 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) section 105(a)(2) shall apply to all proceedings pending on or commenced after June 12, 1989; and

(6) section 110 shall apply to all proceedings pending on or commenced after June 15, 1989.

(b) TRANSITION RULES.--

(1) IN GENERAL.--Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 102, 103, 105(a)(2), or 110 shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

(2) SECTION 104.--Any orders entered between June 12, 1989 and the date of enactment of this Act, that permit a

challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by section 104, shall be vacated if, not later than 6 months after the date of enactment of this Act, a request for such relief is made. For the 1-year period beginning on the date of enactment of this Act, an individual whose challenge to an employment practice that implements a litigated or consent judgment or order is denied under the amendment made by section 104, or whose order or relief obtained under such challenge is vacated under such section, shall have the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered as that individual had on June 12, 1989.

(3) FINAL JUDGMENTS.--Pursuant to paragraphs (1) and (2), any final judgment entered prior to the date of the enactment of this Act as to which the rights of any of the parties thereto have become fixed and vested, where the time for seeking further judicial review of such judgment has otherwise expired pursuant to title 28 of the United States Code, the Federal Rules of Civil Procedure, and the Federal Rules of Appellate Procedure, shall be vacated in whole or in part if justice requires, pursuant to rule 60(b)(6) of the Federal Rules of Civil Procedure or other appropriate authority, and consistent

with the constitutional requirements of due process of law.

(c) PERIOD OF LIMITATIONS.—The period of limitations for the filing of a claim or charge shall be tolled from the applicable effective date described in subsection (a) until the date of enactment of this Act, on a showing that the claim or charge was not filed because of a rule or decision altered by the amendments made by sections 102, 103, 105(a)(2), or 110.

SEC. 114. COVERAGE OF CONGRESS AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) COVERAGE OF THE SENATE.—

(1) COMMITMENT TO RULE XLII.—The Senate reaffirms its commitment to Rule XLII of the Standing Rules of the Senate which provides as follows:

"No member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof—

"(a) fail or refuse to hire an individual;

"(b) discharge an individual; or

"(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment;

on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.''.

(2) APPLICATION TO SENATE EMPLOYMENT.--The rights and protections provided pursuant to this Act, the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973 shall apply with respect to employment by the United States Senate.

(3) INVESTIGATION AND ADJUDICATION OF CLAIMS.--All claims raised by any individual with respect to Senate employment, pursuant to the Acts referred to in paragraph (2), 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.

(4) RIGHTS OF EMPLOYEES.--The Committee on Rules and Administration shall ensure that Senate employees are informed of their rights under the Acts referred to in paragraph (2).

(5) APPLICABLE REMEDIES.--When assigning remedies to individuals found to have a valid claim under the Acts referred to in paragraph (2), the Select Committee on Ethics, or such other entity as the Senate may designate, should to the extent practicable apply the same remedies applicable to all other employees covered by the Acts referred to in paragraph (2). Such remedies shall apply

exclusively.

(6) MATTERS OTHER THAN EMPLOYMENT.--

(A) IN GENERAL.--The rights and protections under the Americans with Disabilities Act of 1990 shall, subject to subparagraph (B), apply with respect to the conduct of the Senate regarding matters other than employment.

(B) REMEDIES.--The Architect of the Capitol shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to subparagraph (A). Such remedies and procedures shall apply exclusively, after approval in accordance with subparagraph (C).

(C) PROPOSED REMEDIES AND PROCEDURES.--For purposes of subparagraph (B), the Architect of the Capitol shall submit proposed remedies and procedures to the Senate Committee on Rules and Administration. The remedies and procedures shall be effective upon the approval of the Committee on Rules and Administration.

(7) EXERCISE OF RULEMAKING POWER.--Notwithstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in paragraphs (2) and (6)(A) shall be within the exclusive jurisdiction of the United States Senate. The provisions of paragraphs

(1), (3), (4), (5), (6)(B), and (6)(C) are enacted by the Senate as an exercise of the rule-making 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 provision of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or of other law, the purposes of such title shall, subject to paragraph (2), apply in their entirety to 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.) 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 the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988), as incorporated into the Rules of the House of Representatives of the One Hundred Second Congress as Rule LI, or any other provision that continues in effect the provisions of such resolution.

(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 this Act and title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(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 following: 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 title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16).

SEC. 115. DISCRIMINATORY USE OF TESTS.

The first sentence of section 703(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(h)) is amended--

(1) by striking ''to give and to'' and inserting '', labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training

programs) to give, use, or'',

(2) by striking ``test provided that'' and inserting ``test provided that (1)''; and

(3) by striking the period at the end and inserting the following:

``and (2) such test validly and fairly predicts without regard to the race, color, religion, sex, or national origin of such test takers, the ability of such test takers to perform the job with respect to which such test is used. If such test does not meet the criteria specified in paragraphs (1) and (2) of the preceding sentence, an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) may develop, give, use, or act upon the results of a test which satisfies such criteria or may use other non-discriminatory selection criteria, in a manner consistent with this title, which measure qualifications to perform the job.''.

SEC. 116. PROHIBITION OF DISCRIMINATORY USE OF TEST SCORES.

Section 704 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-3) is amended by adding at the end the following:

``(c) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) in connection with the selection or referral of applicants or candidates for employment or promotion to adjust test scores of, or use different cut-off scores for, a written employment test on the basis of the race, color, religion, sex, or national origin of individual test takers.''.

SEC. 117. ADEA STATUTE OF LIMITATIONS; NOTICE OF RIGHT TO SUE.

(a) STATUTE OF LIMITATIONS.--Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended--

(1) in paragraph (1)--

(A) by striking out ''180 days'' and inserting in lieu thereof ''540 days'', and

(B) by inserting ''or has been applied to affect adversely the person aggrieved, whichever is later'' after ''occurred''; and

(2) in paragraph (2), by striking out ''within 300 days'' and all that follows through ''whichever is earlier'' and inserting in lieu thereof ''a copy of such charge shall be filed by the Commission with the State agency''.

(b) NOTICE OF RIGHT TO SUE.--Section 7(e) of such Act (29 U.S.C. 626(e)) is amended--

(1) by striking out paragraph (2);

(2) by striking out the paragraph designation in paragraph (1);

(3) by striking out ''Sections 6 and'' and inserting ''Section''; and

(4) by adding at the end thereof the following: ''If a charge filed with the Commission is dismissed by the Commission, the Commission shall so notify the person aggrieved and within 90 days after the giving of such notice a civil action may be brought against the respondent named in the charge by a person defined in section 11.''.

**SEC. 118. 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, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts amended by this Act.

**SEC. 119. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.**

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

(b) EXEMPTION.--Section 702 of the Civil Rights Act of

1964 (42 U.S.C. 2000e-1) is amended--

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

(2) by adding at the end the following:

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

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

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

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

''(A) the interrelation of operations;

''(B) the common management;

''(C) the centralized control of labor relations; and

''(D) the common ownership or financial control; of the employer and the corporation.''.

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

SEC. 120. CLARIFYING OTHER ATTORNEY'S FEES PROVISION.

The last sentence of section 722 of the Revised Statutes (42 U.S.C. 1988) is amended--

(1) by inserting ''(including expert fees and other litigation expenses) and'' after ''attorney's fee''; and

(2) by striking out ''as part of the''.

TITLE II

SEC. 201. GLASS CEILING COMMISSION.

(a) FINDINGS AND PURPOSE.--

(1) FINDINGS.--Congress finds that--

(A) despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in executive, management and senior decisionmaking positions in business;

(B) artificial barriers exist to the advancement of women and minorities in employment;

(C) enforcement of Federal equal employment opportunity laws by Federal agencies has nc effectively addressed such underrepresentat eliminated such artificial barriers;

(D) the ''Glass Ceiling Initiative'' r undertaken by the Department of Labor has k instrumental in raising public awareness of

(i) the underrepresentation of wome minorities at the executive, management senior decisionmaking levels in the Uni work force; and

(ii) the desirability of eliminatin artificial barriers to the advancement and minorities to such levels;

(E) the establishment of a commission t issues raised by the Glass Ceiling Initiati

advancement of women and minorities to management and senior decisionmaking po business; and

(ii) promote work force diversity; a

(F) a comprehensive study that includes of the manner in which executive, management senior decisionmaking positions are filled, developmental and skill-enhancing practices used to foster the necessary qualifications for advancement, and the compensation programs and reward structures utilized in the corporate sector would assist in the establishment of practices and policies promoting opportunities for, and eliminating artificial barriers to, the advancement of women and minorities to executive, management and senior decisionmaking positions.

(2) PURPOSE.--The purpose of this section is to establish a Glass Ceiling Commission to study--

(A) the manner in which business fills executive, management and senior decisionmaking positions;

(B) the developmental and skill-enhancing [illegible] used to foster the necessary qualifications for advancement into such positions; and

(C) the compensation programs and reward [illegible] currently utilized in the workplace.

(b) ESTABLISHMENT.--There is established a Glass Ceiling [illegible] (referred to in this section as the "Commission"), to conduct a study and prepare recommendations concerning--

(1) eliminating artificial barriers to the advancement of women and minorities in employment; and

(2) increasing the opportunities and developmental

... of women and minorities to foster advancement of women and minorities to executive, management and senior decisionmaking positions in business.

(c) MEMBERSHIP.--

(1) COMPOSITION.--The Commission shall be composed of 19 members--

(A) 3 individuals appointed by the President;

(B) 4 individuals appointed jointly by the Speaker of the House of Representatives and the majority leader of the Senate;

(C) 2 individuals appointed by the majority leader of the House of Representatives;

(D) 1 individual appointed by the minority leader of the House of Representatives;

(E) 2 individuals appointed by the majority leader of the Senate;

(F) 1 individual appointed by the minority leader of the Senate;

(G) 2 Members of the House of Representatives appointed jointly by the majority leader and the minority leader of the House ...

(H) 2 Members of the Senate appointed jointly by the majority leader and the minority leader of the Senate;

(I) the Secretary of Labor; and

(J) the Chairman of the Equal Employment Opportunity Commission.

(2) CONSIDERATIONS.--In making appointments under subparagraphs (A) and (B) of paragraph (1), the appointing authority shall consider the background of the individuals, including whether the individuals--

(A) are members of organizations representing women and minorities, and other related interest groups;

(B) hold executive, management or senior decisionmaking positions in corporations or other business entities; and

(C) possess academic expertise or other recognized ability regarding employment and discrimination issues.

(d) CO-CHAIRPERSONS.--The Secretary of Labor, and one individual appointed under subsection (c)(1)(B) who is designated jointly by the appointing authority, shall serve as the Co-chairpersons of the Commission.

(e) TERM OF OFFICE.--Members and Co-chairpersons shall be appointed for the life of the Commission.

(f) VACANCIES.--Any vacancy occurring in the membership of the Commission shall be filled in the same manner as the original appointment for the position being vacated. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(g) MEETINGS.--

(1) MEETINGS PRIOR TO COMPLETION OF REPORT.--The Commission shall meet not fewer than five times in connection with and pending the completion of the report described in subsection (j)(2). The Commission shall hold additional meetings if the Co-chairpersons or a majority of the members of the Commission request the additional meetings in writing.

(2) MEETINGS AFTER COMPLETION OF REPORT.--The Commission shall meet once each year after the completion of the report described in subsection (j)(2). The Commission shall hold additional meetings if the Co-chairpersons or a majority of the members of the Commission request the additional meetings in writing.

(h) QUORUM.--A majority of the Commission shall constitute a quorum for the transaction of business.

(i) COMPENSATION AND EXPENSES.--

(1) COMPENSATION.--Each member of the Commission who is not an employee of the Federal Government shall receive compensation at the daily equivalent of the rate specified for GS-18 of the General Schedule under section 5332 of title 5, United States Code, for each day the member is engaged in the performance of duties for the Commission, including attendance at meetings and

conferences of the Commission and travel.

(2) TRAVEL EXPENSES.--Each member of the Commission shall receive travel expenses, including per diem in lieu of subsistence, as authorized by sections 5702 and 5703 of title 5, United States Code.

(3) EMPLOYMENT STATUS.--A member of the Commission, who is not otherwise an employee of the Federal Government, shall not be deemed to be an employee of the Federal Government except for the purposes of--

(A) the tort claims provisions of chapter 171 of title 28, United States Code, and

(B) subchapter I of chapter 81 of title 5, United States Code, relating to compensation for work injuries.

(j) STUDIES OF ADVANCEMENT OF WOMEN AND MINORITIES TO EXECUTIVE, MANAGEMENT AND SENIOR DECISIONMAKING POSITIONS IN BUSINESS.--

(1) STUDY.--The Commission shall conduct a study of opportunities for, and artificial barriers to, the advancement of women and minorities to executive, management and senior decisionmaking positions in business. In conducting the study, the Commission shall--

(A) examine the preparedness of women and minorities to advance to executive, management and senior decisionmaking positions in business;

(B) examine the opportunities for women and minorities to advance to executive, management and senior decisionmaking positions in business;

(C) conduct basic research into the practices, policies, and manner in which executive, management and senior decisionmaking positions in business are filled;

(D) conduct comparative research of businesses and industries in which women and minorities are promoted to executive, management and senior decisionmaking positions, and businesses and [illegible] ities are not promoted to executive, management and senior decisionmaking positions;

(E) evaluate the efficacy of enforcement (including, but not limited to, such enforcement techniques as litigation, complaint investigations, compliance reviews, conciliation, administrative regulations, policy guidance, technical assistance, training, and public education) of Federal equal employment opportunity laws by Federal agencies as a means of eliminating artificial barriers to the advancement of women and minorities in employment;

(F) compile a synthesis of available research on programs and practices that have successfully led to the advancement of women and minorities to executive, management and senior decisionmaking positions in business, including [illegible] programs, [illegible] assignments, developmental programs, reward programs, employee benefit structures, and family leave policies; and

(C) examine any other issues and information relating to the advancement of women and minorities to executive, management and senior decisionmaking positions in business.

(2) REPORT.--Not later than 15 months after the date of the enactment of this Act, the Commission shall prepare and submit to the President and the appropriate committees of Congress a written report containing--

(A) the findings and conclusions of the Commission resulting from the study conducted under paragraph (1); and

(B) recommendations based on the findings and conclusions described in subparagraph (A) relating to the promotion of opportunities for, and elimination of artificial barriers to, the advancement of women and minorities to executive, management and senior decisionmaking positions in business, including recommendations for--

(i) policies and practices to fill vacancies at the executive, management and senior decisionmaking levels;

(ii) developmental practices and procedures to ensure that women and minorities have access to opportunities to gain the exposure, skills, and expertise necessary to assume executive, management and senior decisionmaking positions;

(iii) compensation programs and reward structures utilized to reward and retain key employees; and

(iv) strategies for enforcement of Federal equal employment opportunity laws by Federal agencies as a means of eliminating artificial barriers to the advancement of women and minorities in employment.

(3) ADDITIONAL STUDY.--The Commission may conduct such additional study of the advancement of women and minorities to executive, management and senior decisionmaking positions in business as a majority of the members of the Commission determines to be necessary.

(k) POWERS OF THE COMMISSION.--The Commission is authorized to--

(1) hold such hearings and sit and act at such times;

(2) take such testimony;

(3) have such printing and binding done;

(4) enter into such contracts and other arrangements in any fiscal year only to such extent or in such amounts as are provided in appropriations Acts;

(5) make such expenditures; and

(6) take such other actions;

as the Commission may determine to be necessary to carry out the duties of the Commission.

(l) OATHS.--Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission.

(m) OBTAINING INFORMATION FROM FEDERAL AGENCIES.--The Commission may secure directly from any Federal agency such information as the Commission may require to carry out its duties.

(n) VOLUNTARY SERVICE.--Notwithstanding section 1342 of title 31, United States Code, the Co-chairpersons of the Commission may accept for the Commission voluntary services provided by a member of the Commission.

(o) GIFTS AND DONATIONS.--The Commission may accept, use, and dispose of gifts or donations of property in order to carry out the duties of the Commission.

(p) USE OF MAIL.--The Commission may use the United States mails in the same manner and under the same conditions as Federal agencies.

(q) CONFIDENTIALITY OF INFORMATION.--

(1) INDIVIDUAL BUSINESS INFORMATION.--Except as provided in paragraph (2), and notwithstanding section 552 of title 5, United States Code, in carrying out the duties of the Commission, including the duties described in subsection (j), the Commission shall maintain the confidentiality of all information that concerns--

(A) the employment practices and procedures of individual businesses; or

(B) individual employees of the businesses.

(2) CONSENT.--The content of any information described in paragraph (1) may be disclosed with the prior written consent of the business or employee, as the case may be, with respect to which the information is maintained.

(3) AGGREGATE INFORMATION.--In carrying out the duties of the Commission, the Commission may disclose--

(A) information about the aggregate employment practices or procedures of a class or group of businesses; and

(B) information about the aggregate characteristics of employees of the businesses, and related aggregate information about the employees.

(r) STAFF AND CONSULTANTS.--

(1) STAFF.--

(A) APPOINTMENT AND COMPENSATION.--The Commission may appoint and determine the compensation of such staff as the Commission determines to be necessary to carry out the duties of the Commission.

(B) LIMITATIONS.--The rate of compensation for each staff member shall not exceed the daily equivalent of the rate specified for GS-18 of the General Schedule under section 5332 of title 5, United States Code for each day the staff member is engaged in the performance of duties for the Commission. The Commission may otherwise appoint and determine the compensation of staff without regard to the provisions of title 5, United States Code, that govern appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, that relate to classification and General Schedule pay rates.

(s) EXPERTS AND CONSULTANTS.--The Co-chairpersons of the Commission may obtain such temporary and intermittent services of experts and consultants and compensate the experts and consultants in accordance with section 3109(b) of title 5, United States Code, as the Commission determines to be necessary to carry out the duties of the Commission.

(t) DETAIL OF FEDERAL EMPLOYEES.--On the request of the Co-chairpersons of the Commission, the head of any Federal agency shall detail, without reimbursement, any of the personnel of the agency to the Commission to assist the Commission in carrying out its duties. Any detail shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(u) TECHNICAL ASSISTANCE.--On the request of the Co-chairpersons of the Commission, the head of a Federal agency shall provide such technical assistance to the Commission as the Commission determines to be necessary to carry out its duties.

(v) AUTHORIZATION OF APPROPRIATIONS.--There are authorized to be appropriated to the Commission such sums as may be necessary to carry out this section. Such sums shall remain available until expended, without fiscal year limitation.

(w) TERMINATION.--Notwithstanding section 14 of the Federal Advisory Committee Act (5 U.S.C. App.), the Commission shall terminate 4 years after the date of the enactment of this Act.

SEC. 202. PAY EQUITY TECHNICAL ASSISTANCE.

(a) STATEMENT OF PURPOSE.--Recognizing that the identification and elimination of discriminatory wage-setting practices and discriminatory wage disparities is in the public interest, the purpose of this section is to help eliminate such practices and disparities by--

(1) providing for the development and utilization of techniques that will promote the establishment of wage rates based on the work performed and other appropriate factors, rather than the sex, race, national origin, or ethnicity of the employee; and

(2) providing for the public dissemination of information relating to the techniques described in paragraph (1), thereby encouraging and stimulating public and private employers, through the use of such techniques, to correct wage-setting practices and eliminate wage disparities, to the extent that they are based on the sex, race, national origin, or ethnicity of the employee, rather than the work performed and other appropriate factors.

(b) PROGRAM SPECIFICATIONS.--In order to carry out the purpose of this section, the Secretary of Labor shall develop and carry out a continuing program relating to pay equity. Such program shall include--

(1) the dissemination of information on efforts being made in the private and public sectors to reduce or eliminate wage disparities, to the extent that they are based on the sex, race, national origin, or ethnicity of the employee, rather than the work performed and other appropriate factors;

(2) the undertaking and promotion of research into

the development of techniques to reduce or eliminate wage disparities, to the extent that they are based on the sex, race, national origin, or ethnicity of the employee, rather than the work performed and other appropriate factors; and

(3) the provision of appropriate technical assistance to any public or private entity requesting such assistance to correct wage-setting practices or to eliminate wage disparities, to the extent that they are based on the sex, race, national origin, or ethnicity of the employee, rather than the work performed and other appropriate factors.

(c) DEFINITION.--For the purpose of this section, the term ''other appropriate factors'' includes factors such as--

(1) the skill, effort, responsibilities, and qualification requirements for the work involved, taken in their totality;

(2) geographic location and working conditions; and

(3) seniority, merit, productivity, education, and work experience.

**SEC. 203. SUBMISSION OF EEOC SUMMARY AND ANALYSIS OF EQUAL EMPLOYMENT OPPORTUNITY DATA.**

Section 705(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4(e)) is amended by inserting after the first sentence the following: ''The Commission shall include in each such report a summary and analysis of data submitted by employers concerning employment opportunities by sex, race, national origin, or ethnicity occurring among and within industries and occupational groups.''.

SEC. 204. EDUCATION AND OUTREACH.

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

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

(2) by adding at the end the following:

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

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

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

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

''(B) As one means of satisfying the requirements specified in subparagraph (A), the Commission may make grants to State or local governmental entities, or public or nonprofit private organizations.''.

**SEC. 205. ANNUAL REPORT BY OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS.**

Section 718 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-17) is amended--

(1) by inserting ''Programs'' after ''Compliance''; and

(2) by adding at the end the following:

''At the close of each fiscal year, the Office of Federal Contract Compliance Programs shall submit to the Congress and to the President a report that includes--

''(1) a summary and analysis of affirmative action reports submitted to such Office by employers who enter into Government contracts; and

''(2) an analysis of employment opportunities and wage differentials by sex, race, national origin, or ethnicity occurring among and within industries, occupations, job groups, and job titles.''.

N·A·W

May 28, 1991

Mr. R.P. O'Connell
Division Manager, Public Relations
AT&T
295 N. Maple Ave #2353G3
Basking Ridge, NJ 07920

Dear Mr. O'Connell:

Thank you for your letter of May 16th, which I assume is in response to my letter of April 15 to Mr. Allen.

Not to prolong the debate unnecessarily, I do nonetheless think it important to emphasize two points which your letter "glides" by, since these are fundamental to the reaction which AT&T's actions in this matter engendered.

- AT&T, BRT and other large business entities need to understand that small business is fully capable and desirous of speaking for itself. We do not wish others to represent us, let alone without consultation with us.

- By negotiating in secret while remaining a member of the prime coalition opposing the so-called civil rights bill, AT&T's representatives breached both the etiquette and ethics of coalition participation in a most egregious manner. Individual participants in a coalition are free, obviously, to pursue their own self-interest at all times. But, there are rules by which such relationships are conducted in this town, and AT&T violated them.

I sincerely hope that Mr. Allen, you, and others involved do not really believe the "spin" which your letter attempts to place on this matter.

Blaming the media in this matter does not wash. They did, in fact, "get it right." They did not create the story; they reported it. The entire town well understood what was happening prior to the articles to which I surmise your letter refers.

Sincerely,

Dirk Van Dongen
President

cc: NAW Board of Directors

DVD/jg

bcc: The Honorable Nick Calio
The Honorable Bobbi Kilberg
The Honorable William Kristol
Mr. Sam Maury
Mr. John Motley
Mr. Jeff Vogt

**NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS**
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R. P. O'Connell
Division Manager
Public Relations

Room 2353G3
295 N. Maple Avenue
Basking Ridge, NJ 07920
201 221-5102

May 16, 1991

Mr. Dirk Van Dongen
President
National Association of Wholesaler-Distributors
1725 K Street, N.W., Suite 710
Washington, DC 20006

Dear Mr. Van Dongen:

All of us at AT&T deeply regret the inaccurate and unfair way our chairman's role in the current debate on civil rights has been characterized in many recent media reports.

Like you, AT&T has been and is opposed to any legislation that would impose a de facto quota requirement for hiring or promoting. At the same time, we recognize that some legislation is needed to insure that women and minorities are fully in the mainstream of our business -- an essential ingredient, we believe, for AT&T to compete successfully in an increasingly global economy and in an increasingly diverse society.

That is precisely why Mr. Allen accepted the request to head a Business Roundtable group in meetings with several key civil rights leaders -- an initiative of the civil rights community, not the Roundtable. Their goal was to candidly discuss all views on the key issues and attempt to find areas of agreement. At no time has the Roundtable presumed to speak for all business. The intent was simply to seek out points of consensus and offer the results of the talks to others -- in government, in small business and in the civil rights community -- for their consideration.

Those meetings produced some consensus on critical matters -- including a potential framework for resolving the quota question. They did not produce agreement on other issues, including damages.

As you know, the talks have been suspended. Parties on all sides of the issue made it clear that the results of the discussions would not be useful in advancing the debate. The Roundtable, consequently, has withdrawn to the sidelines, and will remain there until there is a clear bi-partisan indication that continuing talks would be helpful to the legislative process. In the meantime, the issue will obviously continue to be debated in Congress.

It remains probable that some form of civil rights legislation will be enacted regardless of the suspension of Roundtable talks. But we continue to believe that a reasonable compromise would be in the best interest of American business.

Thank you for allowing me to give you this brief overview.

Sincerely,

R P O'Connell

R. P. O'Connell
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Samuel L. Maury
Executive Director

May 17, 1991

The Honorable Neil Abercrombie
United States House of Representatives
Washington, DC 20515

RE: Civil Rights Legislation

Dear Representative Abercrombie:

I understand various documents representing potential agreements between civil rights groups and the business community are being circulated on the Hill. To the extent that these documents are perceived to reflect the outcome of recent discussions between The Business Roundtable and civil rights groups, we would emphasize that no definitive conclusions were reached in the discussions.

We expect that there will be other such documents, and we do not intend to comment on the specifics of each document other than to reiterate a fundamental point. We agreed with the civil rights groups that a basic understanding had to be reached on all issues before we could proceed with any specific issues. We did not reach a basic understanding on all of the issues, and, because the issues are so interrelated, we cannot support piecemeal amendments to the bill.

We continue to believe the best way to lead to resolution of the difficult issues involved in this legislation would be passage by the House of H.R. 1375 as an alternative to H.R. 1.

Sincerely,

Sam Maury

Samuel L. Maury

AT&T

**R. P. O'Connell**
Division Manager
Public Relations

Room 2353G3
295 N. Maple Avenue
Basking Ridge, NJ 07920
201 221-5102

May 16, 1991

Mr. Dirk Van Dongen
President
National Association of Wholesaler-Distributors
1725 K Street, N.W., Suite 710
Washington, DC 20006

Dear Mr. Van Dongen:

All of us at AT&T deeply regret the inaccurate and unfair way our chairman's role in the current debate on civil rights has been characterized in many recent media reports.

Like you, AT&T has been and is opposed to any legislation that would impose a de facto quota requirement for hiring or promoting. At the same time, we recognize that some legislation is needed to insure that women and minorities are fully in the mainstream of our business -- an essential ingredient, we believe, for AT&T to compete successfully in an increasingly global economy and in an increasingly diverse society.

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Sincerely,

R P O'Connell

R. P. O'Connell
Division Manager
Public Relations

THE WHITE HOUSE
WASHINGTON

Date: 3/27/91

TO: Katy / For Governor Sununu

FROM: ROBERT J. PORTMAN Rob
Deputy Assistant to the President and
Director, Office of Legislative Affairs

☐ Action

☐ Comments re: Civil Rights package

☒ FYI

Attached per your request:

(1) FACT SHEET (can double as talking points – prepared by Justice).

(2) Section-by-Section analysis of our bill.

(3) Our bill.

(4) A useful side by side comparison of the bills (prepared by the Hill)

Let me know if you need more.

CIVIL RIGHTS ACT COMPARISON
(March 6, 1991)

| Section | H.R. 1 (as introduced) | Administration Bill | Michel/LaFalce | Comments |
|---|---|---|---|---|
| Wards Cove | Defines "business necessity" (two-pronged)<br><br>o Selection practices: bear a significant relationship to successful performance of the job<br><br>o Non-selection practices: have a significant relationship to a significant business objective of the employer | Defines "business necessity"<br><br>o having a manifest relationship to the employment in question or legitimate employment goals are significantly served by, even if they do not require, the challenged practice | Same as Administration | H.R. 1 definition unprecedented: first prong language from Griggs but not holding, never used in other Supreme Court decisions; Administration bill and Michel/LaFalce from 1979 Beazer case, also in Wards Cove |
| | Shifts burden of proof to employer to justify practice when disparate impact is established | Also shifts burden of proof to employer when disparate impact is established | Also shifts burden of proof to employer when disparate impact is established | H.R. 1, Administration bill and Michel/LaFalce all reverse Wards Cove on this issue |
| | Allows grouping of practices without requiring plaintiff to identify specific practices within the group which caused the impact | Does not allow grouping of practices | Allows grouping of practices, but plaintiff must show that each practice grouped contributed to the disparate impact | Administration bill would preserve long standing case law requiring identification of specific practice by plaintiff |
| | *Per se* violation of Title VII when an alternative employment practice exists which does not have a disparate impact | *Per se* violation only when alternative employment practice is comparable in cost and effectiveness to that causing disparate impact and employer still refuses to adopt it | No similar provision; would, therefore, retain case law which is reflected in Administration bill | H.R. 1 creates new rule on this issue |

| Section | H.R. 1 (as introduced) | Administration Bill | Michel/LaFalce | Comments |
|---|---|---|---|---|
| | Existence of statistical imbalance does not prove disparate impact | No similar provision | Same as H.R. 1 | Provision is irrelevant, merely codifies existing rule that workforce comparisons must be between relevant labor pools |
| | Drug use rules are only unlawful when adopted for intentionally discriminatory purposes | No similar provision | Same as H.R. 1 | Exclusion from impact analysis is necessary under H.R. 1 because of the onerous nature of the business necessity definition |
| Price Waterhouse | Overturns Supreme Court decision by Justice Brennan<br><br>o Establishes a cause of action when discriminatory motive was a contributing factor in decision; if employer proves he/she would have made the same decision anyway, he/she is still liable for punitive and compensatory damages | No provision | Overturns Supreme Court decision<br><br>o Establishes a cause of action when discriminatory motive was a major contributing factor in decision<br><br>o Allows up to $100,000 damages even where employer shows he/she would have made the same decision regardless of improper bias | Administration bill would leave case law intact, i.e., no cause of action in "mixed motive" cases if the employer can prove he/she would have made the same decision regardless of improper bias. DOJ study shows few employers win these cases. |
| Martin v. Wilkes | Imposes broad limitation on ability to challenge consent decrees | Codifies Supreme Court decision allowing challenges to consent decrees according to Federal Rules of Civil Procedure (must join a party to the original suit to prevent challenge by that party) | Imposes narrow limitation on ability to challenge consent decrees; only applicants or employers with actual notice that the proceedings would likely effect their interests and who have reasonable opportunity to challenge would be barred | These cases typically involve reverse discrimination issues. Wilkes simply held that victims of such discrimination should be allowed to challenge such decrees to determine if they were properly issued, unless they were parties to the original case |

| Section | H.R. 1 (as introduced) | Administration Bill | Michel/LaFalce | Comments |
|---|---|---|---|---|
| Lorance | Overturns Supreme Court decision<br>o Statute of limitations begins to run when the violation occurred or when it applies to the plaintiff | Overturns Supreme Court decision<br>o Same | Overturns Supreme Court decision<br>o Same | H.R. 1 goes further than overturning case, but there are few issues here |
| Patterson | Overturns Supreme Court decision<br>o Restores expansive reading of Section 1981 to prohibit discrimination in all aspects of a contract, i.e., covers all aspects of employment | Overturns Supreme Court decision<br>o Same | Overturns Supreme Court decision<br>o Same | No issues except that proponents of H.R. 1 claim that Administration's reversal of Patterson is inconsistent with refusal to amend Title VII to include punitive and compensatory damages |
| Damages | Allows unlimited punitive and compensatory damages for intentional discrimination (punitive where there is malice or reckless or callous indifference to "Federally protected rights of others")<br>o Jury trials | Retains existing Title VII remedies with the addition of a new remedy for harassment<br>o Employee must use employer's procedures first<br>o Allows immediate injunctive relief<br>o Allows $150,000 remedy, trial before a judge, but if courts find that the 7th Amendment requires juries to hear the issue of liability, the judge will still determine the damages | Allows "equitable" remedy for intentional discrimination, capped at $100,000 where no back pay is available<br>o Allows immediate injunctive relief<br>o Drafted to attempt to preclude jury trials | |

| Section | H.R. 1 (as introduced) | Administration Bill | Michel/LaFalce | Comments |
|---|---|---|---|---|
| Attorney and Expert Witness Fees | Prohibits waiver of attorneys' fees as part of settlement, reversing Jeff D. | No similar provision | No similar provision | H.R. 1, in one fell swoop, reverses 4 Supreme Court decisions to effectively expand grounds for recovery of attorneys' fees |
| | Allows recovery of expert witness fees and other litigation expenses, reversing Crawford Fittings | Allows recovery of expert witness fees of up to $300 per day | Same as H.R. 1 on witness fees | |
| | Allows prevailing party in a consent challenge to collect attorneys' fees from original losing party, new challenger or both, reversing Zipes | No similar provision | No similar provision | |
| | Allows recovery of attorneys' fees for time spent after rejection of settlement offer, even though amount ultimately won is less than such offer, reversing Marek | No similar provision | No similar provision | |
| Cases Against Fed'l Gov't | Extends the statute of limitations in cases against the Fed'l Gov't from 30 days to 90 days | Same as H.R. 1 | No similar provision | No issues |
| Anti-Quota Language | States that nothing in this Act shall be construed to encourage or require an employer to adopt quotas, provided that current court-ordered remedies are not affected | No similar provision | No similar provision | Pure fig leaf, provision does nothing |

| Section | H.R. 1 (as introduced) | Administration Bill | Michel/LaFalce | Comments |
|---|---|---|---|---|
| Coverage of Congress | Applies these amendments to Congress | Applies these amendments to Congress (broader language, also encompasses offices such as GAO, OTA, etc.) | Applies these amendments to Congress | |
| | No private cause of action | Provides for private cause of action | No private cause of action | |
| Alternative Dispute Resolution | Encourages use of alternative dispute resolution | Encourages use of alternative dispute resolution, including binding arbitration, where knowing and voluntary | No similar provision | Administration bill subject to interpretation that employee could be asked to sign agreement as term and condition of employment; potential problem |
| Amendment to ADEA | Amends Age Discrimination in Employment Act to allow 2-year statute of limitations and other changes to reflect those made to Title VII. | No similar provision | No similar provision | |
| | Adds "right to sue" notice | No similar provision | No similar provision | |
| Severability | Should any part of the Act be invalid, the rest is not affected. | Same provision | Same provision | |
| Effective Dates | Applies amendments retroactively to the dates of the original cases overturned by the legislation | Applies to factual situations occuring after date of enactment; purely prospective | Same as Administration | |

# SECTION-BY-SECTION ANALYSIS

## SECTION 1. SHORT TITLE

The legislation may be cited as the "Civil Rights Act of 1991."

## SECTION 2. FINDINGS AND PURPOSE

The Congress finds that this legislation is necessary to provide additional protections and remedies against unlawful discrimination in employment. The purpose of this Act is to strengthen existing protections and remedies in order to deter discrimination more effectively and provide meaningful relief for victims of discrimination.

## SECTION 3. DEFINITIONS

Section 3 adds definitions to those already in Title VII.

The definition of "demonstrates" requires that a party bear the burden of production and persuasion when the statute requires that he or she "demonstrate" a fact.

The definition of the term "justified by business necessity" is meant to codify the meaning of business necessity as used in _Griggs_ v. _Duke Power Co._, 401 U.S. 424, 432 (1971), and subsequent cases including _New York City Transit Authority_ v. _Beazer_, 440 U.S. 568, 587 n. 31 (1979). Such a definition was reaffirmed by the Court in _Wards Cove Packing Co., Inc._ v. _Atonio_, 109 S. Ct. 2115, 2125-2126 (1989). Even the dissent in _Wards Cove_ acknowledged that "_Griggs_ made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if its serves a _valid business purpose_." See 109 S. Ct., at 2129 (Stevens, J., dissenting) (emphasis added).

The terms "complaining party" and "respondent" are defined to include those persons and entities listed in the Act. The definition of the term "harass" is explained in the analysis of Section 8 below.

## SECTION 4. DISPARATE IMPACT CLAIMS

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court ruled that Title VII of the Civil Rights Act of 1964 prohibits hiring and promotion practices that unintentionally but disproportionately exclude persons of a particular race, color, religion, sex, or national origin unless these practices are justified by "business necessity." Law suits challenging such practices are called "disparate impact" cases, in contrast to "disparate treatment" cases brought to challenge intentional discrimination.

In a series of cases decided in subsequent years, the Supreme Court refined and clarified the doctrine of disparate impact. In 1988, the Court greatly expanded the scope of the doctrine's coverage by applying it to subjective hiring and promotion practices (the Court had previously applied it only in cases involving objective criteria such as diploma requirements and height-and-weight requirements). Justice O'Connor took this occasion to explain with great care both the reasons for the expansion and the need to be clear about the evidentiary standards that would operate to prevent the expansion of disparate impact doctrine from leading to quotas. In the course of her discussion, she pointed out:

> "[T]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. . . . [E]xtending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met." Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2787-2788 (1988) (plurality opinion).

The following year, in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989), the Court considered whether the plaintiff or the defendant had the burden of proof on the issue of business necessity. Resolving an ambiguity in the prior law, the Court placed the burden on the plaintiff.

Under this Act, a complaining party makes out a prima facie case of disparate impact when he or she identifies a particular employment practice and demonstrates that the practice has caused a disparate impact on the basis of race, color, religion, sex, or national origin. The burden of proof then shifts to the respondent to demonstrate that the practice is justified by business necessity. It is then open to the complaining party to rebut that defense by demonstrating the availability of an alternative employment practice, comparable in cost and equally effective in measuring job performance or achieving the respondent's legitimate employment goals, that will reduce the disparate impact, and that the respondent refuses to adopt such alternative.

The burden-of-proof issue that Wards Cove resolved in favor of defendants is resolved by this Act in favor of plaintiffs. Wards Cove is thereby overruled. On all other issues, this Act leaves existing law undisturbed.

As Justice O'Connor emphasized in her Watson opinion, the use of disparate impact analysis creates a very real risk that Title VII will lead to the use of quotas. Indeed, there is evidence that the adoption of disparate impact analysis by the courts has led to the use of quotas, although the extent of this phenomenon is for obvious reasons not measurable. See, e.g., Hearings on H.R. 1, "Civil Rights Act of 1991," before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives, 102d Cong., 1st Sess., February 7, 1991 (testimony of Assistant Attorney General John R. Dunne); Hearings on S. 2104, "Civil Rights Act of 1990," before the Committee on Labor and Human Resources, U.S. Senate, 101st Cong., 2d Sess., February 23, 1990 (testimony of Professor Charles Fried); Joint Hearings on H.R. 4000, "Civil Rights Act of 1990," before the Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives, 101st Cong., 2d Sess., March 20, 1990, vol. 2, pp. 516, 625, 633 (testimony of Glen D. Nager, Esq.); Fortune, March 13, 1989, at 87-88 (reporting a poll of 202 CEOs of Fortune 500 and Service 500 companies, in which 18% of the CEOs admitted that their companies have "specific quotas for hiring and promoting"). The use of quotas, however, represents a perversion of Title VII and of disparate impact law. As the Court noted in Griggs, 401 U.S., at 431: "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

Because of the serious dangers inherent in the use of disparate impact analysis, any codification of a cause of action under the disparate impact theory must include evidentiary safeguards recognized in Justice O'Connor's Watson opinion and in Justice White's opinion for the Court in Wards Cove. The codification adopted in Sections 3 and 4 of this Act does so, and it is vital that courts and employers construe this Act in a manner that neither makes it possible to defend or justify the use of employment quotas nor encourages their use.

If an ability test, for example, has a disparate impact and the test is not justified by business necessity as defined in

Section 3 of this Act, the test should not be used. If business necessity can be shown, then the disparate impact need not be reduced or eliminated unless the complaining party demonstrates the availability of an alternative employment practice as required by Section 4 of this Act and the respondent refuses to adopt such alternative. In neither event is an employer required or permitted to adjust test scores, or to use different cut-offs for members of different groups, or otherwise to use the test scores in a discriminatory manner. Manipulating test results in such a fashion is not an alternative employment practice of the kind that an employer must adopt to avoid liability at the surrebuttal phase of a disparate impact case. On the contrary, such discrimination violates Title VII, whether practiced by an employer, an employment agency, or any other "respondent" as defined in Section 3 of this Act. Similarly, a discriminatory practice could not be defended under Title VII on the ground that the practice was necessary or useful in avoiding the possibility of liability under the disparate impact theory. Cf. Civil Rights Act of 1964, sec. 703(j), 42 U.S.C. 2000e-2(j).

It should be noted that in identifying the particular employment practice alleged to cause disparate impact, it is not intention of this Act to require the plaintiff to do the impossible in breaking down an employer's practices to the greatest conceivable degree. Courts will be permitted to hold, for example, that vesting complete hiring discretion in an individual guided only by unknown subjective standards constitutes a single particular employment practice susceptible to challenge.

This approach is consistent with Wards Cove, see 109 S. Ct., at 2125, and has been employed since Wards Cove in Sledge v. J.P. Stevens & Co., 52 EPD para. 39,537 (E.D.N.C. Nov. 30, 1989). The Sledge court alluded to the difficulty of "delving into the workings of an employment decisionmaker's mind" and noted that the defendant's personnel officers reported having no idea of the basis on which they made their employment decisions. The court held that "the identification by the plaintiffs of the uncontrolled, subjective discretion of defendant's employing officials as the source of the discrimination shown by plaintiff's statistics sufficed to satisfy the causation requirements of Wards Cove." This Act contemplates that the use of such uncontrolled and unexplained discretion is properly treated, as it was in the Sledge case, as one employment practice that need not be divided by the plaintiff into discrete sub-parts.

SECTION 5. FINALITY OF JUDGMENTS OR ORDERS

In Hansberry v. Lee, 311 U.S. 32, 40-41 (1940) (citations omitted), the Supreme Court held:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in which he is not designated as a party or to which he has not been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statutes of the United States . . . prescribe, . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.

In Hansberry, Carl Hansberry and his family, who were black, were seeking to challenge a racial covenant prohibiting the sale of land to blacks. One of the owners who wanted the covenant enforced argued that the Hansberrys could not litigate the validity of the covenant because that question had previously been adjudicated, and the covenant sustained, in an earlier lawsuit, although the Hansberrys were not parties in that lawsuit. The Illinois court had ruled that the Hansberrys' challenge was barred, but the Supreme Court found that this ruling violated due process and allowed the challenge.

In Martin v. Wilks, 109 S. Ct. 2180 (1989), the Court confronted a similar argument. That case involved a claim by Robert Wilks and other white fire fighters that the City of Birmingham had discriminated against them by refusing to promote them because of their race. The City argued that their challenge was barred because the City's promotion process had been sanctioned in a consent decree entered in an earlier case between the City and a class of black plaintiffs, of which Wilks and the white fire fighters were aware, but in which they were not parties. The Court rejected this argument. Instead, it concluded that the Federal Rules of Civil Procedure required that persons seeking to bind outsiders to the results of litigation have a duty to join them as parties, see Fed. R. Civ. P. 19, unless the court certified a class of defendants adequately represented by a named defendant, see Fed. R. Civ. P. 23. The Court specifically rejected the defendants' argument that a different rule should obtain in civil rights litigation.

This Section codifies that holding. Had the rule advocated by the City of Birmingham in Wilks been adopted in Hansberry, one judicial decree in one case between one plaintiff and one defendant would have prevented an attack on the racial covenant by anyone who had ever heard of the original case. That is not how the Federal Rules of Civil Procedure operate. And there is no reason why a different rule should be devised to prevent civil rights plaintiffs, as opposed to persons bringing all other kinds of cases, from bringing suit.

## SECTION 6. PROHIBITION AGAINST RACIAL DISCRIMINATION IN THE MAKING AND PERFORMANCE OF CONTRACTS

Under 42 U.S.C. 1981, persons of all races have the same right "to make and enforce contracts." In Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), the Supreme Court held: "The most obvious feature of the provision is the restriction of its scope to forbidding discrimination in the 'mak[ing] and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, [sec.] 1981 provides no relief."

As written, therefore, section 1981 provides insufficient protection against racial discrimination in the context of contracts. In particular, it provides no relief for discrimination in the performance of contracts (as contrasted with the making and enforcement of contracts). Section 1981, as amended by this Act, will provide a remedy for individuals who are subjected to discriminatory performance of their employment contracts (through racial harassment, for example) or are dismissed or denied promotions because of race. In addition, the discriminatory infringement of contractual rights that do not involve employment will be made actionable under section 1981. This will, for example, create a remedy for a black child who is admitted to a private school as required pursuant to section 1981, but is then subjected to discriminatory treatment in the performance of the contract once he or she is attending the school.

In addition to overruling the Patterson decision, this Section of the Act codifies the holding of Runyon v. McCrary, 427 U.S. 160 (1976), under which section 1981 prohibits private, as well as governmental, discrimination.

## SECTION 7. EXPANSION OF RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS

Section 7 overrules the holding in Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), in which female employees challenged a seniority system pursuant to Title VII, claiming that it was adopted with an intent to discriminate against women. Although the system was facially nondiscriminatory and treated all similarly situated employees alike, it produced demotions for the plaintiffs, who claimed that the employer had adopted the seniority system with the intention of altering their contractual rights. The Supreme Court held that the claim was barred by Title VII's requirement that a charge must be filed within 180 days (or 300 days if the matter can be referred to a state agency) after the alleged discrimination occurred.

The Court held that the time for plaintiffs to file their complaint began to run when the employer adopted the allegedly discriminatory seniority system, since it was the adoption of the system with a discriminatory purpose that allegedly violated their rights. According to the Court, that was the point at which plaintiffs suffered the diminution in employment status about which they complained.

The rule adopted by the Court is contrary to the position that had been taken by the Department of Justice and the EEOC. It shields existing seniority systems from legitimate discrimination claims. The discriminatory reasons for adoption of a seniority system may become apparent only when the system is finally applied to affect the employment status of the employees that it covers. At that time, the controversy between an employer and an employee can be focused more sharply.

In addition, a rule that limits challenges to the period immediately following adoption of a seniority system will promote unnecessary, as well as unfocused, litigation. Employees will be forced either to challenge the system before they have suffered harm or to remain forever silent. Given such a choice, employees who are unlikely ever to suffer harm from the seniority system may nonetheless feel that they must file a charge as a precautionary measure -- an especially difficult choice since they may be understandably reluctant to initiate a lawsuit against an employer if they do not have to.

Finally, the Lorance rule will prevent employees who are hired more than 180 (or 300) days after adoption of a seniority system from ever challenging the adverse consequences of that system, regardless of how severe they may be. Such a rule fails to protect sufficiently the important interest in eliminating employment discrimination that is embodied in Title VII.

Likewise, a rule that an employee may sue only within 180 (or 300) days after becoming subject to a seniority system would be unfair to both employers and employees. The rule fails to protect seniority systems from delayed challenge, since so long as employees are being hired someone will be able to sue. And, while this rule would give every employee a theoretical opportunity to challenge a discriminatory seniority system, it would do so, in most instances, before the challenge was sufficiently focused and before it was clear that a challenge was necessary. Finally, most employees would be reluctant to begin their jobs by suing their employers.

This change in the law, therefore, is warranted. Indeed, it is necessary to safeguard the same principles upheld by the Supreme Court in Martin v. Wilks, 109 S. Ct. 2180 (1989), which guarantees civil rights complainants a fair opportunity to present their claims in court.

SECTION 8. PROVIDING FOR ADDITIONAL REMEDIES FOR HARASSMENT IN THE WORKPLACE BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

This provision is designed to redress an anomaly in current law. Title VII prohibits discrimination in employment, but provides inadequate remedies for harassment in the workplace, including sexual harassment, which the Supreme Court has recognized as actionable under Title VII. See, e.g., Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). Such harassment frequently will not be so intolerable that an employee subjected to it immediately leaves. In such circumstances, the only remedy the victim of harassment can obtain under Title VII's remedial scheme as currently drafted is declaratory and injunctive relief against continuation of the harassment.

Such a rule is plainly inequitable. It effectively tells employers that the only consequence of creating an environment so hostile to an employee that he or she is forced to sue to obtain relief is a directive to refrain in the future. This defect must be corrected.

At the same time, Title VII's existing framework, with its emphasis on conciliation and mediation, has served the country well for more than a quarter of a century as a tool for combatting discrimination. It would be most unwise to jettison or rewrite this basic statute in favor of a tort-style approach including compensatory and punitive damages at a time when our tort system is widely recognized to be in crisis. President Bush has made it clear that our civil rights laws "should not be turned into some lawyer's bonanza, encouraging litigation at the expense of conciliation, mediation, or settlement."

Section 8 is designed to meet both of these concerns. It creates a new remedy for on-the-job harassment, allowing courts to make a monetary award in addition to granting declaratory and injunctive relief. The new remedy is available on the same terms for all forms of on-the-job harassment, whether based on race, color, religion, sex, or national origin.

The new remedy created by this Section is capped at $150,000. Courts are directed to make a monetary award when an additional equitable remedy is justified by the equities, is consistent with the purposes Title VII, and is in the public interest. In weighing the equities and determining the amount of any award, courts are instructed to consider the nature of compliance programs implemented by the employer; the nature of the employer's complaint procedures, if any, used to resolve claims of harassment; whether the employer took prompt and effective remedial action upon learning of the harassment; the employer's size and the effect of the award on its economic viability (so that the maximum award would be available only against very large and financially secure employers); whether the harassment was willful or egregious; and the need, if any, to provide restitution for the complaining party.

This Section allows a court to make a monetary award "up to but not exceeding a total of $150,000." This language is intended to make clear that where there are several related incidents that could arguably be subdivided into distinct unlawful employment practices, the award that can be obtained under this new provision for all of them combined is limited to $150,000. Otherwise, plaintiffs and their lawyers will have incentives to spend resources on hair-splitting litigation over how many unlawful employment practices have occurred. $150,000 is a large enough amount to be an adequate and effective remedy for the type of conduct sought to be prevented, and no good purpose would be served by encouraging lawyers to use their inventiveness to circumvent the limitation of $150,000.

The substantive definition of harassment set out in Section 3 of this Act makes it an offense for an employer or its agents to harass any employee because of race, color, religion, sex, or national origin. The term "harass" encompasses "the subjection of an individual to conduct that creates a working environment that would be found intimidating, hostile or offensive by a reasonable person." The definition also explicitly defines sexual harassment to include certain conduct involving unwelcome sexual advances. The definition is intended to codify current law as stated by the Supreme Court. See Meritor Savings Bank, supra, 477 U.S., at 66 ("Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

The new provisions of Title VII established in this Section are designed to deter and provide restitution for harassment, and to encourage employers to adopt meaningful complaint procedures to redress harassment and to encourage employees to use them. The employer will not be found liable if the complaining party failed to avail himself or herself of an effective complaint procedure. In determining the appropriate remedy, moreover, courts will consider whether an employer took prompt and effective remedial action. The effect of these requirements will be to encourage preventive measures and prompt remedial action by employers and to minimize litigation, thus maximizing the speed and efficacy of relief.

This provision of the Act protects employers from liability only when they have established a procedure "for resolving complaints of harassment <u>in an effective fashion</u> within a period not exceeding 90 days." Procedures under which victims of harassment are required to seek relief from the same supervisor who has engaged in the harassing conduct, or under which victims would otherwise reasonably expect their complaints to result in retaliation against them rather than in a fair investigation and effective resolution of their complaint, will not insulate the employer from liability. The new provisions of Title VII allow an employee, moreover, to petition a court for emergency relief, and they provide that the continued suffering of harassment shall be assumed to be sufficient irreparable harm to warrant judicial relief, whether or not the employee has fully exhausted a complaint procedure, so long as the employee has initiated a complaint.

This Section includes a provision reaffirming that Congress intends all issues to be decided by judges, as has always been the case under Title VII. Such a provision is important in avoiding the creation of an inefficient tort-style litigation system that is foreign to the purposes of employment law. Because the courts have relatively limited experience with harassment cases, because particular cases will undoubtedly raise issues requiring clarification, and because employers therefore require the information contained in written judicial opinions to assist them in conforming their conduct with the law, it is particularly important to avoid a profusion of unexplained and inconsistent jury verdicts if possible.

Because the monetary relief authorized in these amendments to Title VII is characterized as equitable, the courts should find that bench trials are consistent with the Seventh Amendment. Because the question of constitutionality is not free from doubt, however, this Section also provides that should a court hold that a jury trial with respect to issues of liability is constitutionally required, it may empanel a jury to hear those issues and no others. This ensures that the additional relief this scheme makes available will not become a dead letter should the courts conclude that the Seventh Amendment requires a jury trial on liability. See <u>Tull</u> v. <u>United States</u>, 107 S. Ct. 1831 (1987).

## SECTION 9. ALLOWING THE AWARD OF EXPERT FEES

Section 9 authorizes the recovery of expert witness fees (up to but not exceeding $300 per day) by prevailing parties according to the same standards that govern awards of attorney fees under Title VII. <u>Cf</u>. <u>Crawford Fitting Co.</u> v. <u>J.T. Gibbons, Inc.</u>, 482 U.S. 437 (1987). The provision is intended to allow recovery for work done in preparation for trial as well as after trial has begun, with the cap applying to each witness.

## SECTION 10. PROVIDING FOR INTEREST AND EXTENDING THE STATUTE OF LIMITATIONS, IN ACTIONS AGAINST THE FEDERAL GOVERNMENT

Section 10 extends the period for filing a complaint against the Federal government pursuant to Title VII from 30 days to 90 days. It also authorizes the payment of interest to compensate for delay in the payment of a judgment according to the same rules that govern such payments in actions against private parties.

## SECTION 11. PROVIDING CIVIL RIGHTS PROTECTIONS TO CONGRESSIONAL EMPLOYEES

Section 11 extends the protections of Title VII to congressional employees on the same basis that they extend to Executive branch employees. The Executive branch, like private employers and state and local governments, is forbidden by law to discriminate on the basis of race, color, religion, sex, or national origin. The Congress, however, has exempted itself from the law. President Bush has stated that Congress "should live by the same requirements it prescribes for others" and that Congress "should join the Executive branch in setting an example for these private employers."

In addition to setting a helpful example, and providing congressional employees with the same rights enjoyed by other Americans, coverage under Title VII will provide the Congress with the valuable experience of living under the same rules that it imposes on other employers. This experience should prove useful in encouraging the Congress to give prompt and serious consideration to proposals for improving the law and in enabling the Congress to resist ill-considered proposals -- like the bill that President Bush vetoed on October 22, 1990 -- that would undermine the cause of civil rights and impose completely unjustified burdens on the employers of this nation.

It should be emphasized that this Section allows the Congress to create its own internal mechanisms for enforcing Title VII in the legislative branch. Like Executive branch employees, congressional employees would retain the right to judicial relief, but the Executive branch would have absolutely no role in enforcing Title VII against the Congress. For that reason, any objection to this Section on separation-of-powers grounds would not be well-founded.

## SECTION 12. ALTERNATIVE MEANS OF DISPUTE RESOLUTION

This provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods.

In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums.

## SECTION 13. SEVERABILITY

Section 13 states that if a provision of this Act is found invalid, that finding will not affect the remainder of the Act.

## SECTION 14. EFFECTIVE DATE

Section 14 specifies that the Act and the amendments made by the Act take effect upon enactment, and will not apply to cases arising before the effective date of the Act.

* * * * *

# A BILL

To amend the Civil Rights Act of 1964 to strengthen protections against discrimination in employment, 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 Act of 1991".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.--Congress finds that additional protections and remedies under Federal law are needed to deter unlawful discrimination.

(b) PURPOSE.--The purpose of this Act is to strengthen existing protections and remedies available under Federal civil rights laws.

SEC. 3. 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 'justified by business necessity' means that the challenged practice has a manifest relationship to the employment in question or that the respondent's legitimate employment goals are significantly served by, even if they do not require, the challenged practice.

"(o) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs, or those Federal entities subject to the provisions of section 717 (or the heads thereof).

"(p)(1) The term 'harass' means, in cases involving discrimination because of race, color, religion, sex, or national origin, the subjection of an individual to conduct that creates a working environment that would be found intimidating, hostile or offensive by a reasonable person.

"(2) The term 'harass' also means, in cases involving discrimination because of sex, (i) making the submission to unwelcome sexual advances by an employer a term or condition of employment of the individual; or (ii) using the rejection of such advances as a basis for employment decisions adversely affecting the individual; or (iii) making unwelcome sexual advances that create a working environment that would be found intimidating, hostile or offensive by a reasonable person.".

SEC. 4. DISPARATE IMPACT CLAIMS.

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) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.--Under this Title, an unlawful employment practice based on disparate impact is established only when a complaining party demonstrates that a particular employment practice causes a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is justified by business necessity; provided, however, that an unlawful employment practice shall nonetheless be established if the complaining party demonstrates the availability of an alternative employment practice, comparable in cost and equally effective in predicting job performance or achieving the respondent's legitimate employment goals, that will reduce the disparate impact, and the respondent refuses to adopt such alternative.".

SEC. 5. FINALITY OF JUDGMENTS OR ORDERS.

For purposes of determining whether a litigated or consent judgment or order resolving a claim of employment discrimination because of race, color, religion, sex, national origin, or disability shall bind only those individuals who were parties to the judgment or order, the Federal Rules of Civil Procedure shall apply in the same manner as they apply with respect to other civil causes of action.

SEC. 6. PROHIBITION AGAINST RACIAL DISCRIMINATION IN THE MAKING AND PERFORMANCE OF CONTRACTS.

Section 1977 of the Revised Statutes of the United States (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 right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contract.

"(c) The rights protected by this section are protected against impairment by non-governmental discrimination as well as against impairment under color of State law.".

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

Subsection 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended by adding at the end the following sentence:

"For purposes of this section, an alleged unlawful employment practice occurs 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 thereof, that 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. PROVIDING FOR ADDITIONAL REMEDIES FOR HARASSMENT IN THE WORKPLACE BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

(a) Subsection 703(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(a)) is amended by deleting the period at the end and inserting in lieu thereof "; or" and by adding at the end the following new paragraph:

"(3) to harass any employee or applicant for employment because of that individual's race, color, religion, sex, or national origin; provided, however, that no such unlawful employment practice shall be found to have occurred if the complaining party failed to avail himself or herself of a procedure, of which the complaining party 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."

(b) Section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) is amended by adding at the end the following new subsections:

"(l) EMERGENCY RELIEF IN HARASSMENT CASES.--An employee or other complaining party alleging a violation of section

703(a)(3) of this Title may petition the court for temporary or preliminary relief. If the complaining party establishes a substantial probability of success on the merits of such harassment claim, the continued submission to the harassment shall be deemed injury sufficiently irreparable to warrant the entry of temporary or preliminary relief. A court having jurisdiction over a request for temporary or preliminary relief pursuant to this paragraph shall assign the case for hearing at the earliest practicable date and cause such case to be expedited in every way practicable.

"(m) EQUITABLE MONETARY AWARDS IN HARASSMENT CASES.--

"(1) In ordering relief for a violation of section 703(a)(3) of this Title, the court may, in addition to ordering appropriate equitable relief under subsection (g) of this section, exercise its equitable discretion to require the employer to pay the complaining party an amount up to but not exceeding a total of $150,000.00, if the court finds that an additional equitable remedy beyond those available under subsection (g) of this section is justified by the equities, is consistent with the purposes of this Title, and is in the public interest. In weighing the equities and fixing the amount of any award under this paragraph, the court shall give due consideration, along with any other relevant equitable factors, to (i) the nature of compliance programs, if any, established by the employer to ensure that unlawful harassment does not occur in the workplace; (ii) the nature of procedures, if any, established by the employer for resolving complaints of harassment in an effective fashion; (iii) whether the employer took prompt and reasonable corrective action upon becoming aware of the conduct complained of; (iv) the employer's size and the effect of the award on its economic viability; (v) whether the harassment was willful or egregious; and (vi) the need, if any, to provide restitution for the complaining party.

"(2) All issues in cases arising under this Title, including cases arising under section 703(a)(3) of this Title, shall be heard and determined by a judge, as provided in subsection (f) of this section. If, however, the court holds that a monetary award pursuant to paragraph (1) of this subsection is sought by the complaining party and that such an award cannot constitutionally be granted unless a jury determines liability on one or more issues with respect to which such award is sought, a jury may be empaneled to hear and determine such liability issues and no others. In no case arising under this Title shall a jury consider, recommend, or determine the amount of any monetary award sought pursuant to paragraph (1) of this subsection."

(c) Subsection 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) (as amended by section 7 of this Act) is further amended by adding at the end the following sentence:

"For purposes of actions involving harassment under section 703(a)(3) of this Title, the period of limitations established under this subsection shall be tolled during the time (not exceeding 90 days) that an employee avails himself or herself of a procedure established by the employer for resolving complaints of harassment."

SEC. 9. ALLOWING THE 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 reasonable expert fees up to but not exceeding $300 per day)" after "attorney's fee".

SEC. 10. 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 717(c), by striking out "thirty days" and inserting in lieu thereof "ninety days"; and

(2) in subsection 717(d), by inserting before the period ", and the same interest to compensate for delay in payment shall be available as in cases involving non-public parties".

SEC. 11. PROVIDING CIVIL RIGHTS PROTECTIONS TO CONGRESSIONAL EMPLOYEES.

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) (as amended by section 10 of this Act) is further amended--

(1) in subsection 717(a), by striking "legislative and judicial branches" and inserting in lieu thereof "judicial branch".

(2) in subsection 717(a), by striking "in the Library of Congress" and inserting in lieu thereof:

"in the Congress of the United States, or its Houses, committees, offices or instrumentalities, or the offices of any of its Members".

(3) in subsection 717(b), by striking the last sentence and inserting in lieu thereof:

"With respect to the Congress of the United States, its Houses, committees, offices, and instrumentalities, and the offices of its Members, authorities granted in this subsection to the Commission shall be exercised in each House of Congress as determined by that House of Congress, and in offices and instrumentalities not within a House of Congress as determined by the Congress."

(4) in subsection 717(c), by inserting, after "Equal Employment Opportunity Commission" each time it appears, ", or a congressional entity exercising the authorities of the Commission pursuant to subsection (b) of this section,".

SEC. 12. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

Where knowingly and voluntarily agreed to by the parties, reasonable alternative means of dispute resolution, including binding arbitration, shall be encouraged in place of the judicial resolution of disputes arising under this Act and the Acts amended by this Act.

SEC. 13. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision or amendment 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 provisions of this Act to other persons and circumstances, shall not be affected thereby.

SEC. 14. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect upon enactment. The amendments made by this Act shall not apply to any claim arising before the effective date of this Act.

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## FACT SHEET ON ADMINISTRATION CIVIL RIGHTS BILL

- The Administration is committed to strengthening the strong employment discrimination laws that now exist. These improvements will operate to obliterate consideration of factors such as race, religion, sex, or national origin from employment decisions.

- A major objective of the Administration is to ensure that Federal law provides strong new remedies for harassment based on race, sex, religion, or national origin. The Administration proposes to create a new monetary remedy, up to $150,000, for these forms of discrimination.

- In addition, the Administration proposes to extend 42 U.S.C. 1981 to outlaw racial discrimination in the performance of contracts, overruling Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

- The Administration also proposes legislation overturning the Supreme Court's decision in Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), which unfairly limits the time for challenging discriminatory seniority systems.

- The administration also proposes to codify the "disparate impact" cause of action for employment practices that unintentionally exclude disproportionate numbers of certain groups from some jobs. This codifies Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Administration bill shifts the burden of proof to the employer to justify practices having a disparate impact under the rule of "business necessity." This overrules the contrary decision in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989).

- In order to help curtail unnecessary litigation, the use of alternative dispute resolution mechanisms will be encouraged.

- The time has come for Congress to bring itself under the same antidiscrimination requirements it prescribes for others. This will promote both fair treatment for congressional employees and a greater appreciation by Congress of the consequences of new legislative initiatives.

- Other improvements, including changes in certain provisions affecting the statute of limitations and expert witness fees, will also enhance the administration of Title VII of the 1964 Civil Rights Act.

- The Administration bill strengthens our civil rights laws without encouraging the use of quotas or unfair preferences, without departing from the fundamental principles of fairness that apply throughout our legal system, and without creating a litigation bonanza that brings more benefits to lawyers than to victims.

- The Administration recognizes that equal opportunity can never be a reality unless there are decent schools, safe streets, and revitalized local economies. Therefore, in addition to this bill it seeks Congressional action to promote choice and opportunity on several fronts: educational choice and flexibility; home-ownership opportunity; enterprise zones and community opportunity areas; and heightened anti-crime efforts.