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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

OA/ID Number: 29146
Folder ID Number: 29146-007

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

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

DRAFT

"Civil Rights Act of 1991."

Signing Statement

Today, I am pleased to sign S. 1745, the "Civil Rights Act of 1991." This historic legislation strengthens our employment discrimination laws without fostering quotas or creating incentives for frivolous litigation.

Employment discrimination law should seek to prevent improper conduct and foster the speedy resolution of conflicts. This Act, a bipartisan consensus, reflects a balance of the goals of ridding the workplace of discrimination on the basis of race, color, sex, religion, national origin or disability, ensuring that employers can hire on the basis of merit and abilities without the fear of unwarranted litigation, and ensuring that aggrieved parties have effective remedies.

Much of the long effort to build the consensus behind this bill focused on only a few provisions. But most of the Act's major provisions have never been the subject of serious disagreement. I have long advocated revision of the statute of limitations for challenges to discriminatory seniority systems; expansion of the statutory prohibition against racial discrimination in connection with employment contracts; and the creation of meaningful monetary remedies for all forms of workplace harassment prohibited by Title VII of the Civil Rights Act of 1964. Similarly, my Administration has long

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concurred in proposed changes to authorize expert witness fees in Title VII cases; to extend the statute of limitations and authorize the award of interest against the U.S. Government; and to cure technical defects with respect to providing notice of the statute of limitations under the Age Discrimination in Employment Act of 1967. I am happy to note that each of these issues is addressed in the Act that today becomes law.

Perhaps the most difficult issue on which to find a consensus was the treatment to be given cases alleging "disparate impact." Disparate impact cases arise from employment practices that tend to screen out employees from an employer's workforce on the basis of race, sex or other impermissible criteria even though the employer did not intend to discriminate. Because employers can insulate themselves from such lawsuits by making sure that their numbers come out "right," it is critically important that employers believe that their employment practices can be defended and hiring by the numbers is not necessary. Indeed, such hiring turns the law on its head by encouraging employers to make decisions using the very criteria that the law prohibits.

Until now, the law of disparate impact has been developed by the Supreme Court in a series of cases stretching from the 1971 Griggs decision to the Watson and Wards Cove decisions in 1988 and 1989. In opinions by Justices Sandra Day O'Connor and Byron White, the Court has explained the safeguards against

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quotas and preferential treatment that have been included in the jurisprudence of disparate impact. S. 1745 codifies this theory of discrimination, while including a compromise provision that overrules Wards Cove by shifting to the employer the burden of persuasion on the "business necessity" defense. This change in the burden of proof, combined with the inherent tendencies of this kind of legal analysis, means it is especially important to ensure that all the legislation's other safeguards against unfair application of disparate impact law are carefully observed. These highly technical matters are addressed in detail in the analyses of S. 1745 placed in the legislative record by Senator Dole on behalf of himself and several other Senators and of the Administration. See 137 Cong. Rec. S15472-S15478 (daily ed. October 30, 1991); 137 Cong. Rec. S15953 (daily ed. November 5, 1991). The Executive Branch will refer to this history for guidance in matters related to disparate impact and the other issues addressed in the documents.

Among the other provisions of the bill that generated lengthy debate were the issues of monetary damages for unlawful discrimination under Title VII and the Americans with Disabilities Act through incorporation, punitive damages, and jury trials. S. 1745 adopts a compromise under which "caps" have been placed on the amount that juries may award in such cases. The adoption of these limits is troublesome to some insofar as it creates questions of equal treatment and

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troublesome to others because the caps are viewed as being too high. But employment discrimination cases are unique. They strike at the very ability of a person to be an independent and contributing member of society and revolve around ongoing relationships. For that reason, they cannot be modeled on tort law. Employment discrimination law should promote prevention of unlawful practices, conciliation, and prompt and fair resolution. Unlimited damages undermines these goals. Both parties have incentives to fight on rather than resolve their dispute.

Yet, despite the "caps," introducing remedies of this kind into the law of employment relations may lead to a variety of undesirable collateral effects, including reliance on litigation in circumstances where other forms of dispute resolution would be more appropriate. Fortunately, section 118 of the Act encourages voluntary agreements between employers and employees to rely on alternative mechanisms such as mediation and arbitration. This provision is among the most valuable in the Act because of the important contribution that voluntary private arrangements can make in conserving the scarce resources of the Federal judiciary and in resolving employment disputes promptly and more amicably.

Whether or not S. 1745 produces an undesirable increase in employment-related litigation, however, there can be no doubt that unlawful discrimination will now expose American employers

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to more substantial sanctions than they have faced before. As we have properly armed complaining parties with powerful new legal tools, so must we redouble our efforts to educate employers and employees of the evil of employment discrimination and ensure that government plays a positive role in this effort, not a negative one through indifference or by creating inappropriate incentives.

Finally, although I am pleased that Congress has applied the substance of this Act to both Houses, I would have preferred that the bill provide the same right to a day in court for congressional employees as other employees enjoy.

Since the Civil Rights Act was enacted in 1964, our Nation has made great progress toward the elimination of employment discrimination. I hope and expect that this legislation will carry that progress further. Even if such discrimination were eliminated, however, we would have much work to do to advance the American dream of equal opportunity for all. Achieving that dream will require bold action and unmatched cooperation to reform our education system, reclaim our inner cities from violence and drugs, stimulate job creation and economic growth and to nurture the American spirit of service to others. My Administration is strongly committed to action in all these areas and I look forward to continuing the effort we celebrate here today.

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Close, but a little less technical

Perhaps the most difficult issue on which to find a consensus was the treatment to be given cases alleging "disparate impact." Disparate impact cases arise from employment practices that tend to screen out employees from an employer's workforce on the basis of race, sex or other impermissible criteria even though the employer did not intend to discriminate. Because employers can insulate themselves from such lawsuits by making sure that their numbers come out "right," it is critically important that employers believe that their employment practices can be defended and hiring by the numbers is not necessary. Indeed, such hiring turns the law on its head by encouraging employers to make decisions using the very criteria that the law prohibits.

Until now, the law of disparate impact has been developed by the Supreme Court in a series of cases stretching ^{from} ~~from~~ the 1971 Griggs decision to the Watson and Wards Cove decisions in 1988 and 1989. S. 1745 codifies the theory of disparate impact developed in this line of cases, while overruling Wards Cove in part to reflect congressional intent. Once a prima facie case

has been established by the plaintiff, the Act shifts the burden of proof to the employer to demonstrate that the practice in question is job related and justified by business necessity.

*not included
in Counsel's draft*

The Act also makes clear that the plaintiff must identify the particular employment practice that resulted in the disparate impact. Because of the shift in the burden of proof, it would be unfair and unworkable to make a defendant defend every employment practice, even those that plaintiff knows are not responsible for any disparity. Yet, there may be cases in which certain employment practices are so interwoven that they cannot be separated. In those cases, the Act provides that the plaintiff may treat the inseparable practices as one.

Because of the complexity of these cases and the possibility that employers, to avoid litigation, may engage in the very behavior sought to be avoided, it is extremely important that the statute be properly interpreted. The agreement reached in the Senate, and ratified by the House, was carefully crafted and addressed many technical aspects of the application of the Act's language. Legislative history reflecting this agreement was entered in the legislative record by Senator Dole on behalf of himself and several other Senators and the Administration. See 137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991). It is vitally important to guide employers, employees, government and the courts in the enforcement of the

Act. The Executive branch will refer to this history for guidance in matters related to disparate impact and the other issues addressed in the documents.

Among the other provisions of the bill that generated lengthy debate were the issues of monetary damages for unlawful discrimination under Title VII and the Americans with Disabilities Act through incorporation, punitive damages, and jury trials. S. 1745 adopts a compromise under which "caps" have been placed on the amount that juries may award in such cases. The adoption of these limits is troublesome to some insofar as it creates questions of equal treatment and troublesome to others because the caps are viewed as being too high. But employment discrimination cases are unique. They strike at the very ability of a person to be an independent and contributing member of society and revolve around ongoing relationships. For that reason, they cannot be modeled on tort law. Employment discrimination law should promote prevention of unlawful practices, conciliation, and prompt and fair resolution. Unlimited damages undermines these goals. Both parties have incentives to fight on rather than resolve their dispute.

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Whether or not S. 1745 produces an undesirable increase in employment-related litigation, however, there can be no doubt that unlawful discrimination will now expose American employers to more substantial sanctions than they have faced before. As we have properly armed complaining parties with powerful new legal tools, so must we redouble our efforts to educate employers and employees of the evil of employment discrimination and ensure that government plays a positive role in this effort, not a negative one through indifference or by creating inappropriate incentives.

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Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From Roger Porter to C. Boyden Gray Re: Signing Statement S. 1745, "Civil Rights Act of 1991" (1 pp.)	11/20/91	P5	

Collection:

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

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

Date Closed: 1/3/2005	OA/ID Number: 29146-007
FOIA/SYS Case #: 1998-0004-F[2]	Appeal Case #:
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P-2/P-5 Review Case #:	Disposition Date:
AR Case #:	MR Case #:
AR Disposition:	MR Disposition:
AR Disposition Date:	MR Disposition Date:

RESTRICTION CODES

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

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 (b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
 (b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE

WASHINGTON

November 20, 1991

MEMORANDUM FOR C. BOYDEN GRAY

FROM: ROGER B. PORTER *RBP*

SUBJECT: Signing Statement - S. 1745, "Civil Rights Act of 1991"

I have reviewed the proposed signing statement for S. 1745, the Civil Rights Act of 1991. I am concerned about the first paragraph on page 3 and recommend deleting the last two sentences.

These sentences could be read as a challenge to the Executive Order on Affirmative Action. We may wish to do this, but I question why we would want to do it in this context. Rather than focusing on conciliation with respect to civil rights and the signing of a bill that will not cause quotas, the press coverage will almost certainly be on this Presidential directive.

Moreover, to be consistent with the thrust of this paragraph, the Administration would be expected to send legislation to the Hill to eliminate the section 8(a) set-aside program under the Small Business Administration. This would be a highly charged action and one that should not be undertaken lightly. Yet under the language of the signing statement, I do not see how the President could propose otherwise.

This is not a question of what we ultimately may want to achieve in substance. It is a question of what civil rights story will appear on the front page of the Washington Post and New York Times on Friday. For these reasons, I recommend deleting these sentences from the signing statement.

cc: Phillip Brady

WHITE HOUSE STAFFING MEMORANDUM

DATE: 11/20/91 ACTION/CONCURRENCE/COMMENT DUE BY: TODAY, 11/20/91 5:00pm

SUBJECT: DRAFT SIGNING STATEMENT - S. 1745, "CIVIL RIGHTS ACT OF 1991"

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☒	HORNER	☐	☐
SUNUNU	☒	☐	MCCLURE	☒	☐
SCOWCROFT	☒	☐	PETERSMEYER	☐	☐
DARMAN	☒	☐	PORTER	☐	☐
BRADY	☐	☒	ROGICH	☐	☐
BROMLEY	☐	☐	SMITH	☐	☐
CARD	☐	☒	CLERK	☐	☒
DEMAREST	☒	☐		☐	☐
FITZWATER	☐	☒		☐	☐
GRAY	☐	☒		☐	☐
HOLIDAY	☒	☐		☐	☐

REMARKS:

Please forward your comments directly to Boyden Gray, 2nd Fl, WW, x2632, no later than 5:00 p.m., TODAY, WEDNESDAY, NOV. 20, with a copy to this office. Thank you.

RESPONSE:

PHILLIP D. BRADY
Assistant to the President
and Staff Secretary
Ext. 2702

Signing Statement - S. 1745, "Civil Rights Act of 1991."

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Most of this Act's major provisions have been the subject of a strong bipartisan consensus. Along with most members of the Congress, for example, I have long advocated revision of the statute of limitations for challenges to discriminatory seniority systems; expansion of the statutory prohibition against racial discrimination in connection with employment contracts; and the creation of meaningful monetary remedies for all forms of workplace harassment outlawed under Title VII of the Civil Rights Act of 1964. Similarly, my Administration has long concurred in proposed changes to authorize expert witness fees in Title VII cases; to extend the statute of limitations and authorize the award of interest against the U.S. Government; and to cure technical defects with respect to providing notice of the statute of limitations under the Age Discrimination in Employment Act of 1967. I am happy to note that every one of these issues is addressed in the Act that becomes law today.

It is regrettable that enactment of these worthwhile measures has been substantially delayed by controversies over other proposals. S. 1745 resolves the most significant of these controversies, involving the law of "disparate impact," with provisions designed to avoid creating incentives for employers to adopt quotas or unfair preferences. It is extremely important that the statute be properly interpreted -- by Executive branch officials, by the courts, and by America's employers -- so that no incentives to engage in such illegal conduct are created.

As is by now well-known, "disparate impact" cases arise from employment practices that lead to statistical disparities in an employer's workforce even when the employer did not intend to discriminate on the basis of race, sex, or other impermissible criteria. Because employers can insulate themselves from such lawsuits by making sure that their numbers come out "right," such an approach to discrimination inherently has some tendency to turn the law on its head by encouraging employers to make decisions based on the very criteria that the law declares unlawful.

Until now, the law of disparate impact has been developed by the Supreme Court in a series of cases stretching from the Griggs decision in 1971 to the Watson and Wards Cove decisions in 1988 and 1989. In opinions by Justices Sandra Day O'Connor and Byron White, the Court has explained the safeguards against quotas and preferential treatment that have been included in the jurisprudence of disparate impact. S. 1745 codifies this theory of discrimination, while including a compromise provision that

overrules Wards Cove by shifting to the employer the burden of persuasion on the "business necessity" defense. This change in the burden of proof, combined with the inherent tendencies of this kind of legal analysis, means it is especially important to ensure that all the legislation's other safeguards against unfair application of disparate impact law are carefully observed. These highly technical matters are addressed in detail in the analyses of S. 1745 placed in the legislative record by Senator Dole on behalf of himself and several other Senators and of the Administration. See 137 Cong. Rec. S15472-S15478 (daily ed. Oct. 30, 1991); 137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991). I direct that these documents be treated as authoritative interpretive guidance by all officials in the Executive branch with respect to the law of disparate impact as well as the other matters covered in the documents.

The codification of disparate impact theory also requires that Executive branch agencies immediately terminate all regulations, rules, and programs of whatever nature that may be inconsistent with the new law or with the principle of discouraging quotas and unfair preferences. So-called "race norming" of the General Aptitude Test Battery, for example, is plainly forbidden by section 106 of the new Act. The Uniform Guidelines on Employee Selection Procedures, which, among other problems, permit and even encourage conduct that is illegal under Title VII and embody an approach to disparate impact analysis not adopted in S. 1745, are also to be terminated as soon as is legally feasible; the relevant Federal agencies will begin work on new guidelines, established under section 105 and other provisions of the Act, designed to protect fully against the risks of quota hiring and other unfair preferences.

Another important source of the controversy that delayed enactment of this legislation was a proposal to authorize jury trials and punitive damages in cases arising under Title VII. S. 1745 adopts a compromise under which "caps" have been placed on the amount that juries may award in such cases. The adoption of these limits on jury awards sets an important precedent, and I hope to see this model followed as part of an initiative to reform the Nation's tort system.

Despite the "caps," introducing remedies of this kind into the law of employment relations may lead to a variety of undesirable collateral effects, including reliance on litigation in circumstances where other forms of dispute resolution would be more appropriate. Fortunately, section 118 of the Act encourages voluntary agreements between employers and employees to rely on alternative mechanisms such as mediation and arbitration. This provision is among the most valuable in the Act because of the important contribution that voluntary private arrangements can make in the effort to conserve the scarce resources of the Federal judiciary for those matters as to which no alternative forum would be possible or appropriate.

Whether or not S. 1745 produces an undesirable increase in employment-related litigation, there can be no doubt that unlawful discrimination will now expose American employers to much more substantial sanctions than they have ever faced before. When we arm complaining parties with these powerful new legal weapons, we must simultaneously redouble our efforts to ensure that the Government does not inadvertently induce any employer to violate the laws to which these sanctions are attached. I therefore direct the heads of all Federal departments and agencies to conduct an immediate review of their equal opportunity in employment programs. Any regulation, rule, enforcement practice, or other aspect of these programs that mandates, encourages, or otherwise involves the use of quotas, preferences, set-asides, or other similar devices, on the basis of race, color, religion, sex, or national origin, is to be terminated as soon as is legally feasible.

Finally, I must note my keen disappointment that the Congress has once again failed to subject itself to the same civil rights laws that it writes for others. Congressional employees, for example, are still not granted access to the same impartial judicial forums enjoyed by other Americans. Instead, employees of the House of Representatives have no access to the courts at all. Under Title III of S. 1745, Senate employees must have their claims of discrimination adjudicated under internal Senate procedures, with no jury trials or punitive damages and only the most limited form of judicial review. Moreover, certain provisions in Title III, involving particularly requirements that courts defer to the findings of fact of a congressional body, as well as some of the measures affecting individuals in the Executive branch and State governments, raise serious constitutional questions. Because of these constitutional issues, it is quite possible that Title III will never fully provide even the very limited legal rights for Senate employees that it purports to create.

Since the Civil Rights Act was enacted in 1964, our Nation has made great progress toward the elimination of employment discrimination. I hope and expect that this legislation will carry that progress further. Even if such discrimination were totally eliminated, however, we would not have done enough to advance the American dream of equal opportunity for all. Achieving that dream will require bold action to reform our educational system, to reclaim our inner cities from violence and drugs, to stimulate job creation and economic growth, and to nurture the American genius for voluntary community service. My Administration is strongly committed to action in all these areas, and I look forward to new accomplishments in the months ahead.

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Despite the "caps," introducing remedies of this kind into the law of employment relations may lead to a variety of undesirable collateral effects, including reliance on litigation in circumstances where other forms of dispute resolution would be more appropriate. Fortunately, section 118 of the Act encourages voluntary agreements between employers and employees to rely on alternative mechanisms such as mediation and arbitration. This provision is among the most valuable in the Act because of the important contribution that voluntary private arrangements can make in the effort to conserve the scarce resources of the Federal judiciary for those matters as to which no alternative forum would be possible or appropriate.

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

OCT 30 1991

Office of
the Chairman

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

Dear Jack:

For the reasons explained below, an amendment is needed to the portion of Section 5 of S.1745 identified as §1977A(b)(3)(A). As you know, Section 5 provides that a Title VII complainant is entitled to compensatory and punitive damages against a respondent who intentionally engaged in an unlawful employment practice. The limitations on damages provision, subsection (b)(3), places a cap on the amount of punitive and speculative compensatory damages that can be awarded against respondents. That cap is based on Respondent's size with the smallest respondents, of course, being subject to the least damages. The group subject to the smallest (\$50,000) cap is defined, in subsection (b)(3)(A), as respondents who have "16 - 100 employees." This definition appears to contain a technical error.

Title VII applies, to employers who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. While Title VII applies to employers who have exactly fifteen employees, the new Bill's limitations on damages provision does not apply to them. Thus, the bill appears to say that employers of exactly 15 employees are subject to unlimited damages.

Similarly, Title VII also applies to employment agencies and to labor organizations. Those entities are covered by Title VII without respect to their own size if, for example, they deal with Title VII covered employers. Thus, under the current bill, very small employment agencies and labor organizations, like employers of fifteen employees, appear to be subject to unlimited damages.

The Honorable John C. Danforth
Page Two

Accordingly, we recommend that subsection (A) be amended to provide that:

in the case of a respondent who has 100 or fewer employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000.

Sincerely,

Evan

Evan J. Kemp, Jr.
Chairman

cc: The Honorable William P. Barr
The Honorable Robert J. Dole
The Honorable John R. Dunne
The Honorable C. Boyden Gray
The Honorable Nelson Lund
The Honorable George J. Mitchell
The Honorable John Sununu

FOR REPUBLICAN CAUCUS AT 1:PM

TALKING POINTS ON CIVIL RIGHTS COMPROMISE

-- This is a fair civil rights bill that I can support. I think we as Republicans owe a great deal to the President, Senator Danforth, and Senator Dole.

-- We have come a long way during the year and one half we have debated this legislation. In fact, only five months ago, the House overwhelmingly passed H.R. 1, a terrible bill, miles to the left of the compromise reached last night.

-- I'd say the principal issue for many of us has long been the effort by proponents to overturn the Wards Cove case dealing with the standards and requirements for disparate impact cases under Title VII. In my view, the compromise worked out yesterday alleviates the principal concerns in this area. The concept of "business necessity" is relatively straightforward. No definition of the term is included in the bill. But the legislative history clearly preserves caselaw that provides flexibility to employers and will not compel employers to hire by the numbers to avoid lawsuits. Further, the issue of "particularity" (involving the extent to which plaintiffs can blanketly challenge groups of employment practices as opposed to specific ones) is in my view resolved in the President's favor.

-- The issue of expanding damages under Title VII (and allowing compensatory and punitive damages under that statute for the first time) was the second major area of contention. As you all know, we had the business community coming unglued over this issue. Moreover, I don not think any of us in this room wanted to create a litigation boom under Title VII. On the other side, we faced a forceful case for parity for women with minorities who have long had unlimited damages and jury trials available to them under Section 1981. The compromise last night caps such damages and permits jury trials. It will likely make neither side completely happy, but it is the best deal that could be reached under these circumstances.

(The actual caps are similar to the Danforth bill. However, we have gone for the Danforth three tier system based on the size of the business, to a four tier system ranging from \$50,000 to \$300,000).

-- There were, of course, other details worked out. Martin v. Wilks, a decision I felt strongly about preserving, has been overturned, but at least not in the wholesale manner of earlier versions of this legislation. (I am hopeful the Supreme Court will throw this provision out as unconstitutional. That is one reason I have focused more of my attention of Wards Cove).

-- We started with legislation last year which was a grab bag for the legal profession. A number of provisions overturning cases which rein in lawyers have been dropped.

U.S. Chamber of Commerce

LEGISLATIVE AND PUBLIC AFFAIRS

COPY

1615 H Street, N.W. Washington, D.C. 20062 202/463-5406 Fax 202/463-3173

October 23, 1991

Donald J. Kroes
Vice President

MEMBERS OF THE UNITED STATES SENATE:

The U.S. Senate is considering S. 1745, a "civil rights" bill promoted by Senator John Danforth (R-MO). This proposal would harm the cause of true civil rights by drastically revising current civil rights laws to encourage litigation against employers, thus fostering hiring and promotion by the numbers -- i.e., by a quota system. It should also be noted that S. 1745 does not address the issue of harassment whereas the President's civil rights bill, S. 611, specifically addresses sexual harassment and provides additional monetary relief to victims of unlawful harassment.

Since the June House vote, Senator Danforth has been trying to find a way to modify the H.R. 1 approach to make it acceptable to a larger majority of legislators and the President. Despite Senator Danforth's admirable efforts to forge a compromise on this difficult issue, all his proposals, including S. 1745, share a basic weakness -- their roots lie in the counterproductive provisions of H.R. 1. The latest Danforth proposal, S. 1745, has the following fundamental deficiencies:

- Jury trials would be available. Punitive and compensatory damages of up to \$300,000 (depending on the size of the company) could be awarded to *each plaintiff*, plus attorney's fees. Medical malpractice cases have shown what happens when such options are offered to juries: they tend to view the damages limits as "floors" or as legally *recommended* amounts to be awarded in every trial.

- It would allow plaintiffs to allege in a general way that all or some of an employer's hiring or promotion practices produced a discriminatory result, placing the burden of proof on the employer to justify its practices. This turns "innocent until proven guilty" on its head, and violates the basic tenet of American jurisprudence that the plaintiff must show not only that a harm was suffered, but also what in particular caused the harm.

- In trying to find a compromise in a technical (but critical) area known as the "business necessity" issue, Danforth's proposal would prevent employers from trying to learn virtually anything about a prospective employee's background which is not clearly, demonstrably, and directly related to the duties associated with the position in question. Employers would be prevented, for example, from requiring any information pertinent to a prospective employee's potential for advancement in the company (e.g., education or work experience not directly related to the immediate position).

- A last attempt to address the definition of "business necessity" by adopting language from the Americans With Disabilities Act (ADA) fails to correct any problems. First, the



ADA does not contain a definition of "business necessity" so the definition cannot be borrowed. Second, Title VII of the Civil Rights Act of 1964 and the ADA have fundamental differences. Title VII asks employers to disregard minority status -- the ADA asks employers to accommodate disability status if necessary.

- It exempts from full protection employees of Congress and its instrumentalities. Instead, the rights of these employees would be enforced by designated organs of Congress such as the Senate Ethics Committee.

- It would result in employers, in order to avoid the threat of lawsuits, making hiring and promotion decisions by a quota system based on race, gender, and religion. While this legislation would not require quotas, quotas would be the cumulative result of its provisions. Forced to choose between 1) hiring and promoting under a de facto quota system, and 2) facing the prospect of extended, frequent, and expensive lawsuits, employers will opt for quotas every time -- and understandably so.

The Danforth proposal makes it easier for employers to be sued and more difficult to defend against a suit. The mere availability of compensatory and punitive damages would encourage litigation, undermine EEOC conciliation efforts, embolden plaintiffs' lawyers, essentially force businesses to seek the advice of attorneys whenever a hiring or promotion decision is made, and most importantly -- would discourage settlements and quick resolution of disputes.

In short, Senator Danforth's bill is too fundamentally flawed to ever be truly improved. This is why we support, instead, the President's civil rights package, S. 611.

S. 611 would create new, equitable remedies for intentional harassment based on race, sex, religion, color, national origin, or disability. Decisions on award amounts would be made by a judge (as opposed to, under the Danforth proposal, all such decisions being made by jury), and available equitable remedies would be capped at \$150,000. S. 611 would require plaintiffs to specify the employment practice they believe to be causing a disparate employment impact, rather than allowing plaintiffs to allege simply that a "group of practices" caused the impact.

Although S. 611 provides that once a plaintiff has shown that a practice has caused a disparate impact, the employer must prove its innocence -- the employer may do so by showing that the particular employment practice in question is required by "business necessity" as defined under the traditional legal method in use since 1971 (Griggs v. Duke Power), or by showing the practice is "manifestly related to the employment in question."

Thank you for your consideration of our views.

Sincerely,



Donald J. Kroes

Dole recommendation

Business Necessity (Amendments to S. 1745)

On page 8, strike lines 17-24.

On page 9, strike lines 1-9.

On page 9, strike lines 16-24, on page 10, strike lines 1-5, and substitute the following:

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

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

(i) a complaining party demonstrates that a respondent uses an employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and is consistent with business necessity; or."

Entire Legislative History. The phrase "job-related for the position in question and is consistent with business necessity" is intended to encapsulate the "business necessity" principle enunciated by the Supreme Court in Griggs v. Duke Power Company, 401 U.S. 424 (1971), and its progeny.

*Cumulation problem and alternative
selection practices problems still
need to be addressed.*

FINAL COMPROMISE
(Amendments to S. 1745)
October 24, 1991

1. **Purposes**

On page 2, strike lines 18-22 and substitute the following:

"(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

2. **Wards Cove -- Business Necessity/Cumulation/Alternative Business Practice**

On page 8, strike lines 17-24.

On page 9, strike lines 1-9.

On page 9, strike lines 19-24, on page 10, strike lines 1-20 and substitute the following:

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

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

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

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

On page 10, line 22, strike the phrase ", in whole or in significant part,".

On page 11, strike lines 1-9 and substitute the following:

"(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative

business practice'."

Exclusive Legislative History. The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove v. Atonio, 490 U.S. 642 (1989).

When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in Dothard v. Rawlinson, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice.

3. **Expert Fees.** Add section authorizing expert fees in Section 1981 cases.
4. **Damages.** Technical changes pertaining to ADA coverage and application to disparate impact cases.

Revise caps on compensatory and punitive damages as follows:

<u>Cap on Damages</u>	<u>Size of Employer</u>
\$50,000	16-100 employees
\$100,000	101-200 employees
\$200,000	201-500 employees
\$300,000	more than 500 employees

8

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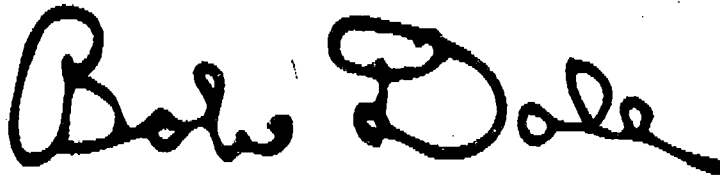
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**NEWS****U.S. SENATOR FOR KANSAS****FROM:****SENATE REPUBLICAN LEADER**

FOR IMMEDIATE RELEASE
OCTOBER 25, 1991

CONTACT: WALT RIKER
(202) 224-5358

CIVIL RIGHTS BREAKTHROUGH

HISTORIC CIVIL RIGHTS COMPROMISE BECOMES A REALITY

NEARLY TWO YEARS AGO, WE BEGAN A ROUGH-AND-TUMBLE JOURNEY THROUGH THE THICKETS OF TITLE VII AND DISPARATE IMPACT LAW.

AFTER ONE VETO, ONE ATTEMPTED VETO OVERRIDE, SEVERAL FLOOR VOTES, AND LOTS OF OVERHEATED RHETORIC, WE FINALLY END THIS JOURNEY WITH A COMPROMISE.

LAST NIGHT, SENATOR JACK DANFORTH, WHITE HOUSE CHIEF OF STAFF JOHN SUNUNU, AND WHITE HOUSE COUNSEL BOYDEN GRAY PUT THE FINISHING TOUCHES ON A COMPROMISE AGREEMENT THAT PRESIDENT BUSH WILL ACCEPT.

THIS AGREEMENT WILL REMAIN FIRM IF NO POLITICALLY ATTRACTIVE -- BUT POLITICALLY UNACCEPTABLE -- AMENDMENTS ARE ADOPTED, PARTICULARLY AN AMENDMENT LIFTING THE CAPS ON DAMAGE AWARDS.

THE COMPROMISE IS NOT PERFECT. IT WILL NOT SATISFY EVERYONE.

THE CAPS ON DAMAGES MAY BE FAIRLY REASONABLE -- TOO LOW FOR SOME BUT A BIT TOO HIGH FOR OTHERS.

THE LANGUAGE ON WARDS COVE MAY BE TOO BROAD TO SOME, OR TOO NARROW TO OTHERS.

BUT THAT'S THE NATURE OF A COMPROMISE, AND THAT'S THE BEST WE CAN DO UNDER THE CIRCUMSTANCES.

WHAT WE HAVE DONE IS PRODUCE AN AGREEMENT THAT -- ONCE AND FOR ALL -- WILL UNTIE THE GORDIAN KNOT OF CIVIL RIGHTS -- AND WITHOUT PRODUCING QUOTAS.

IT'S OBVIOUS THAT MY REPUBLICAN COLLEAGUE FROM MISSOURI, SENATOR DANFORTH, DESERVES OUR PRAISE FOR WORKING TIRELESSLY TO GET WHERE WE ARE TODAY.

WITHOUT A DOUBT, SENATOR DANFORTH'S LEADERSHIP HAS BEEN THE ENGINE DRIVING THE COMPROMISE EFFORT. THIS ENGINE HAS NOW COME INTO THE STATION.

AND LET'S NOT FORGET PRESIDENT BUSH, WHO HAS TIME-AND-TIME AGAIN STATED THAT HE WAS PREPARED TO ACCEPT A FAIR AND RESPONSIBLE CIVIL RIGHTS PROPOSAL.

WELL, TODAY, WITH THIS AGREEMENT -- AN HISTORIC AGREEMENT -- PRESIDENT BUSH HAS DELIVERED ON HIS PROMISE.

WE CAN HAVE A CIVIL RIGHTS ACT OF 1991.

THE TIME FOR DIVISIVENESS HAS ENDED, AND THE TIME FOR HEALING HAS BEGUN.

###

President's Bill

Authorizes a new monetary remedy for harassment in the workplace on the basis of race, sex, religion, or national origin. No punitive damages.

Complaining party is required to use employer's internal grievance procedure (if any) before going to court.

\$150,000 cap.

All cases to be tried by a judge, as in current law, unless the Constitution requires a jury for the liability phase of the trial. Juries would never set the amount of the award.

Special provisions creating incentives for employers to (1) establish compliance programs; (2) establish internal grievance procedures; and (3) take prompt corrective action in response to harassment complaints.

Special provision authorizing courts to issue an emergency order to put an immediate halt to on-going harassment.

Congress is covered in the same manner as the Executive branch.

Danforth Bill

Authorizes compensatory damages (including pain and suffering), as well as punitive damages, for virtually all Title VII cases, including cases of unintentional discrimination.

Plaintiff can by-pass the employer's internal grievance procedures and go straight to court.

No caps on past pecuniary losses (for example, psychiatrist's fees). Caps on other damages depending on firm size:

100 or fewer employees:	\$50,000.
101-500 employees:	\$100,000.
More than 500 employees:	\$300,000.

Jury trials on demand. Juries would both determine liability and set the amount of the award.

No such provisions for ensuring that employers have incentives to resolve problems outside the courts.

No provision for emergency relief.

No legal rights for congressional employees.

THE PRESIDENT'S CIVIL RIGHTS BILL

- o The President's bill -- S. 611 -- includes all the worthwhile measures supported by a bipartisan consensus:
 - o Overturns the Patterson and Lorange decisions.
 - o Overturns the Wards Cove decision by shifting the burden of proof to the employer in defending "business necessity."
 - o Creates new monetary remedies under Title VII with meaningful caps.
 - o Authorizes expert witness fees in civil rights cases.
 - o Extends the statute of limitations and authorizes the award of interest against the U.S. Government.
- o The President's bill uses the exact language of the Griggs holding in defining "business necessity" -- "manifest relationship to the employment in question."
- o The President's bill includes the exact "business necessity" language from the 1979 Beazer opinion, which was accepted in the Wards Cove dissent (written by the author of Beazer).
- o 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.
- o The President's bill will permit the President's educational reform initiative to go forward unimpeded (see attached op-ed by Dr. Chester Finn).
- o The President's bill preserves the right of victims of illegal quotas to have their day in court and be treated like other civil rights plaintiffs.
- o 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.

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

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.

Tough tests will aid minority students.

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.

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?

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. List	Timeline of Negotiation for Civil Rights Legislation (1 pp.)	n.d.	P-5	

Collection:

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

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

Date Closed: 1/3/2005	OA/ID Number: 29146-007
FOIA/SYS Case #: 1998-0004-F[2]	Appeal Case #:
Re-review Case #: 2005-0426-S	Appeal Disposition:
P-2/P-5 Review Case #:	Disposition Date:
AR Case #:	MR Case #:
AR Disposition:	MR Disposition:
AR Disposition Date:	MR Disposition Date:

RESTRICTION CODES

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

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

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

PRM. Removed as a personal record misfile.

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

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

- cf
- o Sununu agreement with Kennedy last summer. Kennedy later reneged.
 - o Lloyd Cutler proposal to Boyden Gray. Bill Coleman accepted this in a conversation with Sununu out at Andrews. Coleman later reneged.
 - o Vernon Jordan spoke with the President at Camp David, and agreed to the earlier Sununu-Kennedy agreement. Jordan later reneged on this at a meeting with Thornburgh and Gray.
 - o Sununu agreement with Danforth this year. Danforth later reneged.
 - o President gave Danforth a written offer of language to solve the "janitor problem." Rejected by Danforth without explanation.
 - o Danforth proposed to use 8 words from the ADA. Administration (through Dole) agreed to put these 8 words in the President's bill. Not accepted by Danforth.
 - o Dole and Kassebaum made an offer to Danforth, which Administration would have accepted. Rejected by Danforth without explanation.
 - o Domenici made a proposal to Danforth, which Administration would have accepted. Rejected by Danforth.

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100 or fewer employees:	\$50,000.
101-500 employees:	\$100,000.
More than 500 employees:	\$300,000.

Jury trials on demand. Juries would both determine liability and set the amount of the award.

No such provisions for ensuring that employers have incentives to resolve problems outside the courts.

No provision for emergency relief.

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^Republican Senator Lashes At White House Criticism of Rights Bill<

^By WILLIAM M. WELCH=

^Associated Press Writer=

WASHINGTON (AP) — Republican Sen. John Danforth, angered by the Bush administration's renewal of the quota charge against a civil rights bill, said Wednesday that such "race politics" hurts the nation and his party.

"This is not a quota issue," Danforth said on the Senate floor. "I am sorry that yet again this word 'quota' is being bandied about wrongly as a way to try to characterize this legislation."

The Missouri senator, the chief GOP sponsor of the pending civil rights legislation, was reacting to a White House statement a day earlier that used the word "quota" to describe the rights bill.

"I had hoped to avoid a contentious battle on the floor of the Senate, because I think race politics is not only bad for my political party, I believe it's bad for the country," Danforth told the Senate. "We have been unable to do that."

White House spokeswoman Judy Smith said President Bush's opposition to the bill had not been lessened by months of negotiations and numerous changes by Danforth aimed at overcoming the president's objections. His latest change adopted language Bush had approved in a rights bill for the disabled that was enacted last year.

Smith said that even with that change, the civil rights bill "would drive employers to adopt quotas" in hiring.

Repeating past administration criticism of earlier versions of the bill, Smith called the measure "a lawyers' bonanza."

"It would protect existing quotas from legal challenge by closing the courts to those who have been victimized by quotas and consent decrees," she said.

Danforth adopted language from the Americans with Disabilities Act in an attempt to solve a dispute over standards for employers to use in defending themselves against charges of unintentional discrimination for practices that have the effect of screening out women and minorities in hiring.

He noted that Bush signed that bill "in a Rose Garden ceremony with much fanfare" last year.

"The Americans with Disabilities Act provides, among other things, that selection criteria which have the effect of screening out the disabled must be related to an ability of an employee to perform the job," Danforth said. "That is precisely the same issue that will be before the Senate, maybe next week," on the civil rights bill.

He said the issue boils down to whether "the same standards which apply to the disabled apply to blacks and women and Hispanics and other minorities."

A leading Democratic supporter of civil rights legislation, Sen. Edward M. Kennedy of Massachusetts, has endorsed Danforth's latest version.

Danforth has said he hopes to attract enough moderate Republican senators to join Democrats in passing the measure with a two-thirds majority capable of overriding Bush's veto. Congress has never overridden a veto during Bush's presidency.

The legislation is designed to negate a series of Supreme Court rulings that have made it harder to win discrimination cases against employers.

Bush last year vetoed a similar civil rights bill and the Senate failed by one vote to override. A similar version passed the House earlier this year, but supporters fell short of the two-thirds majority needed to override.

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^Romania Miners Rampage in Bucharest, Set Fire to Government Building<

^Eds: Leads with 6 graf to UPDATE with descriptions from scene, injury count. Pickup 8th graf, 'Roman canceled ...' Edits to trim.<

^By GABRIEL PASLARU=

^Associated Press Writer=

BUCHAREST, Romania (AP) — Thousands of coal miners incensed by

THE WHITE HOUSE
WASHINGTON

September 27, 1991

MEMORANDUM FOR JACQUELINE KENNEDY
OFFICE OF THE CHIEF OF STAFF

FROM: NELSON LUND 
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Danforth Civil Rights Bill

Attached is a draft SAP (as submitted to OMB) on the Danforth Civil Rights bill, along with several pages of talking points on specific aspects of the bill.

Attachments

cc: C. Boyden Gray

DRAFT

DRAFT SAP - S. 1745, Civil Rights Act of 1991

If S. 1745 were presented to the President in its current form, his senior advisors would recommend a veto. The bill suffers from essentially the same major problems as H.R. 1, which was passed by the House of Representatives this year, and last year's Kennedy-Hawkins bill, which the President vetoed.

S. 1745 is a quota bill. The disparate impact provisions would overturn two decades of Supreme Court precedent, replacing this settled body of law with novel rules of litigation that will drive employers to adopt quotas and other unfair preferences. Employers who have not intentionally discriminated against anyone, but whose bottom-line numbers are not "demographically correct," will risk being dragged into lawsuits where the deck is stacked in ways that make a successful defense almost impossible.

In addition to flawed provisions dealing with the prima facie case and with "alternative employment practices," S. 1745 also defines the "business necessity" defense much too narrowly. S. 1745, for example, would prevent employers from defending a host of perfectly legitimate hiring and promotion criteria, including educational standards that all of our students should be encouraged to meet.

The bill's use of 8 words taken from the Americans with Disabilities Act ("ADA") is a misleading gimmick. These 8 words do not define "business necessity" either in the ADA (which uses "business necessity" as an undefined term) or in S. 1745. Nor does the use of these 8 words materially alter the definition in S. 1745's predecessor bill (S. 1408). The same 8 words could be inserted into the President's bill without changing its meaning, yet the proponents of S. 1745 have not suggested that they would accept the Administration bill if these 8 words were added to it.

S. 1745 is also a quota bill because it would close the courts to those who have been victimized by quotas in consent decrees. This provision is both manifestly unjust and constitutionally suspect. It would, moreover, create new incentives for collusive lawsuits in which employers would be encouraged to settle complaints by one portion of their workforce by illegally violating the rights of another group of employees.

Any new civil rights bill should include adequate provisions for deterring harassment in the workplace, but it should not create a lawyers' bonanza. S. 1745 provides for jury trials and compensatory damages in all Title VII cases, along with punitive damages in some cases. (Damages would be made available in disparate impact cases, which goes even beyond H.R. 1 and last year's Kennedy-Hawkins bill.) These damages provisions would

DRAFT

transform Title VII from its original design, which emphasizes conciliation and make-whole relief, into an entirely different structure modeled on our Nation's tort system -- which is now widely recognized to be in a state of crisis.

S. 1745 also continues the congressional pattern of exempting itself from the civil rights laws. Although the bill includes provisions that pretend to extend coverage to Congress, S. 1745 grants no judicially enforceable rights to congressional employees.

The Administration's Proposal

The Administration's proposal, S. 611, would strengthen our Nation's civil rights laws without creating powerful new incentives for quota hiring. S. 611 also avoids subjecting American businessmen and -women, and the victims of discrimination, to endless and costly litigation.

Like S. 1745, the Administration bill would overturn the Lorance and Patterson decisions; overturn Wards Cove by shifting the burden of proof to the employer in defending "business necessity"; authorize expert witness fees in civil rights cases; and extend the statute of limitations and authorize the award of interest against the U.S. Government. The Administration bill would also make available new monetary remedies under Title VII, with a \$150,000 cap, for victims of harassment in the workplace, and extend Title VII to apply to Congress.

In sum, the Administration bill achieves every legitimate goal of S. 1745. These important new protections for American employees should not be held hostage for S. 1745, which will produce quotas and other forms of unfair preferential treatment, disproportionately disadvantage small and medium-sized businesses, and unduly enrich the plaintiffs' bar.

THE PRESIDENT'S CIVIL RIGHTS BILL

- o The President's bill -- S. 611 -- includes all the worthwhile measures supported by a bipartisan consensus:
 - o Overturns the Patterson and Lorange decisions.
 - o Overturns the Wards Cove decision by shifting the burden of proof to the employer in defending "business necessity."
 - o Creates new monetary remedies under Title VII with meaningful caps.
 - o Authorizes expert witness fees in civil rights cases.
 - o Extends the statute of limitations and authorizes the award of interest against the U.S. Government.
- o The President's bill uses the exact language of the Griggs holding in defining "business necessity" -- "manifest relationship to the employment in question."
- o The President's bill includes the exact "business necessity" language from the 1979 Beazer opinion, which was accepted in the Wards Cove dissent (written by the author of Beazer).
- o 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.
- o The President's bill will permit the President's educational reform initiative to go forward unimpeded (see attached op-ed by Dr. Chester Finn).
- o The President's bill preserves the right of victims of illegal quotas to have their day in court and be treated like other civil rights plaintiffs.
- o The President's bill will avoid a new litigation explosion and new attorneys fees -- a lawyers' bonanza.

THE DANFORTH BILL DOES NOT "RESTORE" THE LAW

Proponents of H.R. 1 and the Danforth bill claim that they want only to "restore" the law to what it was prior to some 1989 rulings by the Supreme Court. This is not true.

Proponents of these bills are rewriting the law to institutionalize quotas and guarantee full employment for lawyers. The Danforth bill differs from the President's bill on four major issues -- in each case, the Danforth bill creates new law, not a restoration of the law as it stood prior to the 1989 decisions.

- o With respect to Wards Cove, the Danforth bill (1) changes the definition of "business necessity"; (2) eliminates the requirement that a plaintiff always identify the particular employment practice being challenged; and (3) may bar consideration of the expense of plaintiff's proposed alternative selection devices.

None of these three provisions "restores" prior Supreme Court law. Instead, the Danforth bill stacks the deck against employers in ways that are supported by no Supreme Court precedent -- and that will drive employers to adopt surreptitious quotas.

- o With respect to Martin v. Wilks, the Danforth bill places a unique burden on certain civil rights plaintiffs. It would slam the courthouse door in the face of those who want to challenge illegal quotas. This is both unconstitutional and unfair. It has no basis in prior Supreme Court law.
- o With respect to the new compensatory and punitive damages provisions of the Danforth bill, such remedies have never been available under Title VII of Civil Rights Act of 1964. Congress itself made that decision over a quarter of a century ago, and no Supreme Court decision -- in 1989 or any other year -- has ever disturbed this settled principle.
- o With regard to Price Waterhouse v. Hopkins, the Danforth bill would overturn a pro-plaintiff Supreme Court decision written by Justice Brennan, by creating a brand new rule designed primarily for the benefit of lawyers.
 - o When Justice Brennan's opinion was issued, the decision was hailed by the NOW legal Defense Fund, National Women's Law Center, Women's Legal Defense Fund, and the New York Times as a victory for plaintiffs. Since that time, plaintiffs have prevailed over 70% of the time under this decision.
 - o Only lawyers -- who are the true beneficiaries of the Danforth provision -- could have the nerve to suggest that going far beyond Justice Brennan has anything to do with "restoring" the law.

THE DANFORTH BILL IS A QUOTA BILL

The Danforth bill is a quota bill for the same reasons that last year's Kennedy-Hawkins bill and this year's H.R. 1 were quota bills. **First**, it stacks the deck against employers in disparate impact suits so that they have no choice but to adopt surreptitious quotas. **Second**, it slams the courthouse door in the faces of those who want to challenge illegal quotas.

Stacking the Deck

- o By making it almost impossible for employers to defend "bad numbers," the Danforth bill creates enormous pressure for employers to avoid any selection criterion that has a disparate impact. This bill will drive employers to meet a quota for every racial, sexual, ethnic, and religious classification. "Demographic correctness," not qualifications or ability, will determine who gets a job.
- o By eliminating the requirement that the plaintiff identify a particular employment practice that caused any disparate impact, the Danforth bill permits challenges to a group of practices that simply results in a bad "bottom line," and imposes on employers the expense of proving the "business necessity" of each practice, even though none of them caused a disparate impact.
- o The Danforth bill will force employers to defend, on narrow "job performance" grounds, selection criteria that are perfectly legitimate but not necessarily related to how an individual performs the daily tasks of an entry level job.
- o The Danforth bill would allow courts to hold an employer liable for refusing to use an alternative selection device with less disparate impact -- even though that device may be prohibitively expensive.

Slamming the Courthouse Door

- o Like Kennedy-Hawkins and H.R. 1, the Danforth bill overturns Martin v. Wilks. In that case, the Supreme Court permitted a group of firefighters who were not parties to a consent decree to challenge the promotion quotas embedded in the decree. This decision simply reflects fundamental notions of fairness and due process that apply to all other civil litigants: everyone is entitled to his or her day in court.
- o Moreover, the only consent decrees that will ever be successfully challenged are those that contain illegal preferences. Why should such decrees ever be insulated from challenge?
- o The fact is, this provision is designed to disadvantage a specific class of civil rights plaintiffs: those who have been victimized by consent decrees implementing quotas and unfair preferences.

WHY THE DANFORTH BILL IS A QUOTA BILL

<u>Situation</u>	<u>Danforth Bill</u>	<u>S. 611 President's Bill</u>
At the mayor's request, a fast food chain rejects dropouts below age 18 for jobs during school hours.	NO DEFENSE	DEFENSIBLE POLICY
A trucking company promotes from within. Dock workers (the pool for future drivers) are not allowed to have drunk driving convictions.	NO DEFENSE	DEFENSIBLE POLICY
The American Cancer Society refuses to hire cigarette smokers for any job.	NO DEFENSE	DEFENSIBLE POLICY
A state police force denies employment to any applicant with a criminal conviction.	NO DEFENSE	DEFENSIBLE POLICY
To reduce health insurance costs, a mining company refuses to hire those who smoke on or off the job.	NO DEFENSE	DEFENSIBLE POLICY
A lawyer hires law students as interns so that she can choose new lawyers based on their performance as interns.	NO DEFENSE	DEFENSIBLE POLICY
None of these employers is biased against women or minorities. They want to keep their policies without being sued. How?	USE QUOTAS	TREAT EVERYONE THE SAME

THE DANFORTH BILL IS ANTI-EDUCATION

- o Under the Danforth bill, employers will risk ruinous lawsuits if they use educational criteria when making hiring decisions. In defending against such lawsuits, employers will have to prove their own innocence under a test that is much more difficult than anything the Supreme Court has ever imposed.
- o Secretary of Education Lamar Alexander has warned that the Danforth proposal threatens to undermine the educational reform efforts that are needed to salvage our failing schools.
 - o Our young people are not being prepared to meet the demands of the 21st century. Students will not stay in school and work hard at their studies unless they are rewarded for the effort.
 - o The Danforth bill undermines incentives to get a good education. The bill restricts employers' ability to require skills and knowledge beyond what they can prove in court is strictly needed for the initial job for which an individual is being hired. The Danforth bill tells employers not to ask for high school diplomas or transcripts for typical entry-level jobs.
 - o This sends the wrong message to students and teachers alike. It says to students that staying in school does not matter, because employers do not have the right to know how well you did or even whether you graduated. It tells teachers that their work is unimportant in the outside world.
- o Prominent union leader Albert Shanker agrees:

"[I]nstead of downplaying achievement, we should be letting students know that what they do in school will make a difference and that this will be true for all students. And we should be sure that the new civil rights act will permit employers to reward students who have done well. Anything else will teach students the wrong lesson." (New York Times, March 24, 1991).
- o The U.S. military (which is not covered by Title VII) requires high school diplomas and high test scores from all recruits. The military asks our young people to "Be All That You Can Be," and Operation Desert Storm demonstrated the results. The Danforth bill will encourage our kids to be the least they can be and still get away with it.
- o Foreign companies that compete with us economically routinely rely on the educational records of prospective employees. Like our military, these foreign companies think it is obvious why these records are so important. Under the Danforth bill, however, America's civilian employers will be threatened with lawsuits if they use these common sense criteria in hiring.
- o If employers want to use common sense educational standards, the Danforth bill does offer one surefire way to avoid legal liability: Use Quotas. If you hire by the numbers, you can use whatever other hiring criteria you want, and you will never have to fear a disparate impact lawsuit.

MARTIN v. WILKS SHOULD NOT BE OVERTURNED

- o Martin v. Wilks, 490 U.S. 755 (1989), permitted firefighters who had not been parties to a consent decree to file a lawsuit alleging that they had been harmed by the racial quotas in that decree.
- o The decision is a straightforward application of the fundamental rules of civil procedure that govern all civil cases in the federal courts. The Court simply said that civil rights cases are governed by the same rules that apply in other cases, and that individuals who were not parties to a lawsuit cannot be bound by the resolution of that lawsuit.
- o In other words, Wilks merely reaffirmed the bedrock principle that all individuals are entitled to their day in court before they suffer harm at the hands of the court.
- o Wilks involved white firefighters, but its underlying principle of procedural fairness applies to everyone. It would, for instance, apply to blacks who might be harmed by a decree favoring women, or women excluded by a decree setting quotas for Hispanics.
- o Claims by some that Wilks threatens to upset legitimate expectations or induce needless new litigation will not withstand scrutiny. Indeed, the Danforth bill's use of vague and undefined new terminology (such as references to a person whose interests were "adequately represented" by another person) may lead to more unproductive litigation than would ever occur under the Wilks decision.
- o Critics have contended that scores of decrees would be overturned as a result of Wilks. But two years after the decision not one reported decision has thrown out a Title VII decree.
- o Adequate safeguards already exist to discourage frivolous or repetitive challenges, such as the doctrines of res judicata, stare decisis, and law of the case, as well as Rule 11 of the Federal Rules of Civil Procedure.
- o In all events, a consent decree could be overturned because of Wilks only if it were found by a court to violate a person's constitutional or civil rights. Why should Congress seek to prevent challenges to such decrees? Why should quota decrees be protected?

THE DANFORTH BILL IS A LAWYERS' RELIEF ACT

Like H.R. 1 and last year's Kennedy-Hawkins bill, the Danforth bill is a dream-come-true for the plaintiffs' bar. It will radically rewrite Title VII of the Civil Rights Act of 1964, turning it into a tort-style litigation machine. And it contains a special provision designed so that plaintiffs' lawyers will get paid in cases in which the plaintiff herself does not get a cent.

Litigation Machine

- o Like H.R. 1, the Danforth bill will, for the first time, authorize compensatory and punitive damages in Title VII cases. It specifically contemplates awards for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," as well as punitive damages.

- o Like H.R. 1, the Danforth bill provides for these cases to be tried to a jury, which will determine both liability and the amount of damages.

- o Moreover, as drafted the bill would even go beyond H.R. 1 and make these damages available in disparate impact cases, where discriminatory intent was not shown.

- o All of this is radical and new. Damages have never before been awarded under Title VII, a statute that has worked well for over a quarter of a century.

- o Yet the Danforth bill would toss it out, and substitute instead the same tort-style model that has made medical malpractice litigation a nightmare.

Lawyers' Gold Mine

- o Like H.R. 1, the Danforth bill contains another provision included at the demand of the plaintiffs' bar. It overturns the Supreme Court's decision in Price Waterhouse v. Hopkins, a victory for plaintiffs that was written by Justice Brennan.

- o The reason? To guarantee that the lawyer will receive his attorney fees, even if the employer's actions did not cause any harm to the plaintiff and the plaintiff receives no relief.

- o Under the Danforth bill, incentives are created for a whole new class of litigation in which there is no prospect of relief for any plaintiff and in which the litigation is conducted solely to generate attorney fees for the lawyers.

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There is already too much litigation and too many lawyers. America doesn't need the Danforth "lawyers' relief bill."

DAMAGES

- o In 1964, Congress carefully considered what remedies should be available for a violation of Title VII. The decision was that reinstatement and back pay would best serve to remedy discrimination quickly and efficiently.
- o This "make whole" relief -- which restores victims of discrimination to their rightful places in the economy and minimizes conflicts between employers and employees -- was modeled after other labor statutes, particularly the National Labor Relations Act, none of which authorizes damage awards.
- o The past 27 years have shown the wisdom of the choice Congress made. Title VII has proven tremendously effective in transforming the workplace and fighting discrimination.
- o Like H.R. 1 and last year's Kennedy-Hawkins bill, the Danforth proposal radically alters the remedial focus of Title VII by authorizing awards of compensatory damages (including pain and suffering), punitive damages, and jury trials.
- o The Danforth bill even goes beyond H.R. 1 and Kennedy-Hawkins by authorizing damages in disparate impact cases, where no discriminatory intent has been shown.
- o Damage awards will encourage litigation and discourage conciliation as plaintiffs and their attorneys roll the dice in hopes of hitting a jackpot verdict. This process will distract the parties from the productive quest to get the victims of discrimination into their rightful places in the workforce.
- o Litigation will bog down and become a source of new and costly uncertainties for plaintiffs and defendants alike. This is inevitable as claims for pain and suffering, as well as for punitive damages, become staples of Title VII litigation. Sadly, many plaintiffs who could have gotten a job and back pay quickly will wait years for their cases to be resolved and many will end up with nothing.
- o As the Washington Post said: "Punitive damages are a form of Russian Roulette whose availability, not just in [civil rights] but other proceedings should be narrowed, not increased." (Washington Post, April 26, 1991, p. A22.)
- o The model adopted by the Danforth bill, like that in Kennedy-Hawkins, is the medical malpractice system, which is widely acknowledged to be in a state of crisis because it is unpredictable, expensive, and slow.
- o By increasing the unpredictability of disparate impact cases, as well as of disparate treatment cases in which statistics often play a significant evidentiary role, the Danforth damages provisions will increase the pressure on employers to adopt hiring and promotion quotas.

PRICE WATERHOUSE SHOULD NOT BE OVERTURNED

- o Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), held that when a Title VII plaintiff proves that a discriminatory motive was a substantial factor in an employment decision, the burden shifts to the employer to persuade the court that the same decision would have been made in the absence of any discriminatory motive.
- o This decision, in which the plurality opinion was authored by Justice Brennan, is favorable to plaintiffs. It alters the traditional rule in civil litigation that the burden of proof rests with the plaintiff throughout a case. The decision places a substantial burden of proof on employers if they are to escape liability under Title VII.
- o At the time it was issued, the Court's decision was hailed by liberal commentators and lobbyists as a major victory.
 - Marcia Greenberger of the National Women's Law Center said that Price Waterhouse "has advanced the law and put employers on notice that they will have some explaining to do." (BNA, Daily Report for Executives, May 3, 1989.)
 - Sarah Burns of NOW Legal Defense Fund called the decision an important victory for women's rights. (Associated Press, May 2, 1989, PM cycle, Byline: James H. Rubin.)
 - Judith Winston of the Women's Legal Defense Fund put the decision "in the win category." (Associated Press, May 2, 1989, PM cycle, Byline: James H. Rubin.)
 - The New York Times called Price Waterhouse "a balanced, sensible judgement" that made it easier for victims of employment discrimination to have their cases heard. (New York Times, May 6, 1989, p. 26.)
- o The Department of Justice has found that plaintiffs have won over 70% of the reported Title VII decisions since 1989 in which Price Waterhouse played a significant role.
- o Provisions in the Danforth bill that overrule Justice Brennan's decision are designed primarily to create new attorneys fee awards, even in cases where the plaintiff does not receive a cent.
- o Under the Danforth bill, incentives are created for a whole new class of litigation in which there is no prospect of relief for any plaintiff and in which the litigation is conducted solely to generate attorney fees for the lawyers.

THE WHITE HOUSE

Office of the Press Secretary
(New York, New York)

For Immediate Release

September 24, 1991

STATEMENT BY THE PRESS SECRETARY

Administration officials have reviewed Senator Danforth's new civil rights bill. Senator Danforth's tireless efforts on this important matter are deeply appreciated, but regrettably have not bridged the critical differences that have persisted throughout the negotiations.

The new bill contains 8 words taken from the Americans with Disabilities Act ("qualification standards, employment tests, or other selection criteria"), but these 8 words do not state a rule that courts can follow in deciding these cases.

The 8 words from the ADA do not change the meaning of the definition of business necessity in Senator Danforth's previous bill. They simply replace the phrase "employment practices that are used as job qualifications or used to measure the ability to perform the job." For more detail, see the attached analysis by the Chairman of the EEOC.

The new bill does not solve the most serious problems with H.R. 1 (the bill passed by the House of Representatives this year) and last year's Kennedy-Hawkins bill (which was vetoed by the President). The new bill, like the previous bills, would drive employers to adopt quotas by radically changing the law of disparate impact; would protect existing quotas from legal challenge by closing the courts to those who have been victimized by quotas in consent decrees; and would transform civil rights litigation into a lawyer's bonanza by creating a tort-style system with juries awarding compensatory and punitive damages.

Although the 8 words from the ADA do not address these issues, the Administration would be glad to include them in the President's bill so that the definition of business necessity could read as follows:

"The term 'justified by business necessity' means, in the case of qualification standards, employment tests, or other selection criteria, as well as any other employment practice, 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."

We hope the Congress will support the President's civil rights bill, with or without the additional 8 words. We cannot support Senator Danforth's bill.

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THE WHITE HOUSE
WASHINGTON

July 28, 1991

Dear Jack:

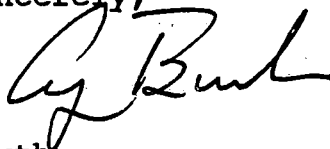
The meeting on Thursday was helpful to me, and I appreciate all the energy you've put into the civil rights issue.

As I understand it, you are worried that I would allow what Griggs ruled out: the use of unjustified educational requirements for menial jobs that are not tied to promotion policies. The Attorney General assures me that this is not allowed under my bill, but, to nail it down, I've asked for some additional language, which I am enclosing.

Ensuring that Griggs is preserved is far better than broadly legislating new rules that say employers cannot use educational standards in hiring decisions except in limited circumstances. I cannot ignore the advice of the Secretary of Education, the Attorney General and the Chairman of the EEOC that the other pending proposals will seriously, if not fatally, undermine the reform and renewal of our educational system by discouraging employers from relying on educational effort and achievement.

I understand that you have contacted Dick about some of the other outstanding issues, and I hope you can resolve them quickly so that I can sign a good bill this year.

Sincerely,



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

Legislative History to Accompany
Section 3 of the President's Civil Rights Bill (S. 611)

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 even by the dissent in Wards Cove: "Griggs made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose." See 109 S. Ct. at 2129 (1989) (Stevens, J., dissenting) (emphasis added).

The Supreme Court has consistently made clear that the business necessity defense must permit employers to defend employment practices that they have adopted in the furtherance of legitimate employment goals. At the same time, however, the Court has never permitted the business necessity defense to excuse arbitrary or whimsical employment criteria unrelated to the demands of the employment or the employer's valid business purposes. In Griggs itself, for example, the operator of a power plant required applicants for jobs as coal handlers to have a high school diploma and to register satisfactory scores on two aptitude tests. The defendant had never tried to determine whether such credentials were relevant in any way to work as a coal handler or to any other position in the company.

In particular, the employer made no showing that, in order to fulfill a genuine business need, its criteria took into account capability for the next succeeding position or related future promotions. See 401 U.S. at 431-432. Where an employer adopts educational credential requirements for a menial job without giving any consideration to the relationship between such requirements and the requirements of the job or any other valid business objective (such as capability for promotions), the business necessity defense is unavailable under Griggs and under this bill as well.



UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

JUL 25 1991

The Honorable Orrin G. Hatch
United States Senate
Washington, DC 20510-4402

Dear Senator Hatch:

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Virtually everyone who is concerned about the future of our nation understands that our population is not sufficiently well educated to meet the demands of the twenty-first century. Study after study has shown that neither our young people--nor our adult population--has the level of knowledge and skills that will be needed to succeed in a changing world. In order to change this situation, we must improve our schools. In order to improve our schools, we must enhance incentives for students to do well in school. We must send a message that attendance in school, achievement in school, and graduation from school are important. Our plans for improving the nation's educational system will be jeopardized by any legislation that inadvertently devalues schooling and depresses academic standards.

I am sure Congress is well aware that our national competitiveness depends on a better educated workforce. Because the global economy is rapidly changing, workers must have the skills to adapt to new work requirements or otherwise they will be left behind by change. Education is the key to equipping workers to respond to change. Employers in many competing

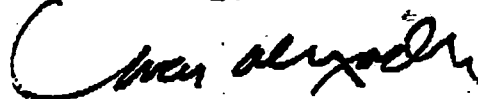
Page 2 - Letter to the Honorable Orrin G. Hatch

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Sincerely,

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Lamar Alexander

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Letter	From Evan J. Kemp to John Sununu Re: "Business Necessity" Language Proposed by Danforth (2 copies) (10 pp.)	6/24/91	P5	

Collection:

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

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(Document Follows)
By JP (NLGB) on 10/28/05

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Re-review Case #: 2005-0426-S	Appeal Disposition:
P-2/P-5 Review Case #:	Disposition Date:
AR Case #:	MR Case #:
AR Disposition:	MR Disposition:
AR Disposition Date:	MR Disposition Date:

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

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

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

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

JUN 24 1991

OFFICE OF
THE CHAIRMAN

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

Dear Governor:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

position.

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

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

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

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

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

You stated that the disability community's demand was not reasonable and clearly against Republican Party philosophy. Eventually both sides agreed to the "readily achievable" standard for existing public facilities to ensure mainstream opportunities

for disabled people. The ADA negotiations were exemplary in that both sides thoroughly discussed areas of philosophical disagreement. Had we not done so, the ADA would never have become law.

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

Best regards,



Evan J. Kemp, Jr.
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Evan J. Kemp, Jr.
Chairman

Chen

THE WHITE HOUSE
WASHINGTON

July 28, 1991

Dear Jack:

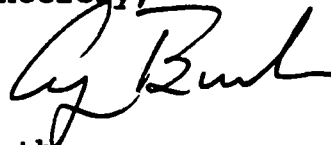
The meeting on Thursday was helpful to me, and I appreciate all the energy you've put into the civil rights issue.

As I understand it, you are worried that I would allow what Griggs ruled out: the use of unjustified educational requirements for menial jobs that are not tied to promotion policies. The Attorney General assures me that this is not allowed under my bill, but, to nail it down, I've asked for some additional language, which I am enclosing.

Ensuring that Griggs is preserved is far better than broadly legislating new rules that say employers cannot use educational standards in hiring decisions except in limited circumstances. I cannot ignore the advice of the Secretary of Education, the Attorney General and the Chairman of the EEOC that the other pending proposals will seriously, if not fatally, undermine the reform and renewal of our educational system by discouraging employers from relying on educational effort and achievement.

I understand that you have contacted Dick about some of the other outstanding issues, and I hope you can resolve them quickly so that I can sign a good bill this year.

Sincerely,



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

Legislative History to Accompany
Section 3 of the President's Civil Rights Bill (S. 611)

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 even by the dissent in Wards Cove: "Griggs made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose." See 109 S. Ct. at 2129 (1989) (Stevens, J., dissenting) (emphasis added).

The Supreme Court has consistently made clear that the business necessity defense must permit employers to defend employment practices that they have adopted in the furtherance of legitimate employment goals. At the same time, however, the Court has never permitted the business necessity defense to excuse arbitrary or whimsical employment criteria unrelated to the demands of the employment or the employer's valid business purposes. In Griggs itself, for example, the operator of a power plant required applicants for jobs as coal handlers to have a high school diploma and to register satisfactory scores on two aptitude tests. The defendant had never tried to determine whether such credentials were relevant in any way to work as a coal handler or to any other position in the company.

In particular, the employer made no showing that, in order to fulfill a genuine business need, its criteria took into account capability for the next succeeding position or related future promotions. See 401 U.S. at 431-432. Where an employer adopts educational credential requirements for a menial job without giving any consideration to the relationship between such requirements and the requirements of the job or any other valid business objective (such as capability for promotions), the business necessity defense is unavailable under Griggs and under this bill as well.



UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

JUL 25 1991

The Honorable Orrin G. Hatch
United States Senate
Washington, DC 20510-4402

Dear Senator Hatch:

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Virtually everyone who is concerned about the future of our nation understands that our population is not sufficiently well educated to meet the demands of the twenty-first century. Study after study has shown that neither our young people--nor our adult population--has the level of knowledge and skills that will be needed to succeed in a changing world. In order to change this situation, we must improve our schools. In order to improve our schools, we must enhance incentives for students to do well in school. We must send a message that attendance in school, achievement in school, and graduation from school are important. Our plans for improving the nation's educational system will be jeopardized by any legislation that inadvertently devalues schooling and depresses academic standards.

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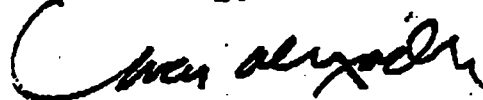
Page 2 - Letter to the Honorable Orrin G. Hatch

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I hope that the Congress will not do anything to remove or undercut the ability of the labor market to reward students who work hard and finish school.

Sincerely,

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Lamar Alexander



UNITED STATES SENATE
WASHINGTON, D. C.

JOHN C. DANFORTH
MISSOURI

June 27, 1991

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

Dear John:

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

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

Sincerely,

A handwritten signature in dark ink, appearing to read "Jack", with a long, sweeping underline.

Enclosures

THE CHIEF of STAFF
has seen

JUNE 27, 1991 1:00 PM

102nd CONGRESS

1st SESSION

S. _____

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

IN THE SENATE OF THE UNITED STATES
JUNE __, 1991

A BILL

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

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

SECTION 1. SHORT TITLE.

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

SEC. 2. FINDING AND PURPOSE.

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

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

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

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

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

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

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

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

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

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

new subsection:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEC. 6. DEFINITIONS.

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

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

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

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

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

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

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

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

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

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

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

SEC. 8. AUTHORIZING AWARD OF EXPERT FEES.

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

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

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

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

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

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

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

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

SEC. 11. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

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

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

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

(2) by adding at the end the following:

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

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

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

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

"(A) the interrelation of operations;

"(B) the common management;

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

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

SEC. 12. EDUCATION AND OUTREACH.

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

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

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

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

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

"(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination; concerning rights and obligations under this title or such law, as the case may be.

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

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

(a) COVERAGE OF THE SENATE.--

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

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

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

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

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

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

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

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

(2) EMPLOYMENT IN THE HOUSE.--

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

(B) ADMINISTRATION.--

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

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

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

(c) INSTRUMENTALITIES OF CONGRESS.--

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

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

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

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

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

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

SEC. 12 15. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

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

SEC. 13 16. EFFECTIVE DATE.

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

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

SEC. 14 17. SEVERABILITY.

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

JUNE 27, 1991 1:00 PM

102D CONGRESS

1st SESSION

S. _____

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

IN THE SENATE OF THE UNITED STATES
JUNE __, 1991

A BILL

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

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

SECTION 1. SHORT TITLE.

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

SEC. 2. FINDING AND PURPOSES.

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

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

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

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

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

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

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

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

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

~~national origin; and~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

religion, sex or national origin.

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

SEC. 5. DEFINITIONS.

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

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

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

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

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

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

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

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

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

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

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

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

~~The term 'employment in question' means--~~

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

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

~~"(q) (p) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program,~~

including an on-the-job training program, or Federal entity of head of a Federal entity subject to section 717."

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

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

(a) COVERAGE OF THE SENATE.

(1) APPLICATION TO SENATE EMPLOYMENT.

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

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

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

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

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

(b) COVERAGE OF THE HOUSE OF REPRESENTATIVES--

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

(2) EMPLOYMENT IN THE HOUSE.--

(A) APPLICATION.--The rights and protections under

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

(B) ADMINISTRATION.--

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

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

(C) EXERCISE OF RULEMAKING POWER.--

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

(c) INSTRUMENTALITIES OF CONGRESS.--

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

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

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

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

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

~~SEC. 7 CONSTRUCTION~~

~~(a) IN GENERAL. Except as provided in subsection (b)---~~
~~(1) nothing in this Act or the amendments made by this Act shall be construed to limit an employer in establishing job requirements that are otherwise lawful under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and~~
~~(2) nothing in title VII of the Civil Rights Act of 1964 or this Act shall be construed---~~

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

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

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

JUNE 27, 1991 1:00 PM

102D CONGRESS
1st SESSION

S. _____

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

IN THE SENATE OF THE UNITED STATES

June __, 1991

A BILL

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

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

SECTION I. SHORT TITLE.

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

SEC. 2. FINDING AND PURPOSE.

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

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

SEC. 3. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION

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

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

"(a) RIGHT OF RECOVERY.--

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

1 individual, the complaining party, and provided that the
2 complaining party cannot recover under section 1977 of the
3 Revised Statutes (42 U.S.C. 1981), the complaining party—
4

5 "~~(A)~~ may recover the compensatory and punitive damages
6 described as allowed in subsection (b), in addition to
7 any relief authorized by section 706(g) of the Civil
8 Rights Act of 1964, from the respondent; and—
9

10 "~~(B)~~ may request that a court impose the equitable
11 civil penalty described in subsection (c) against the
12 respondent.—
13

14 "(2) DISABILITY. -- In an action brought by a
15 complaining party under the powers, remedies, and procedures
16 set forth in section 706 of the Civil Rights Act of 1964 (as
17 provided in section 107(a) of the Americans with
18 Disabilities Act of 1990 (42 U.S.C. 12117(a))) against a
19 respondent who intentionally engaged in a practice that
20 constitutes discrimination under section 102 of the Act (42
21 U.S.C. 12112), other than discrimination described in
22 paragraph (3)(A) or (6) of subsection (b) of the section,
23 subsection (b) paragraphs (3)(A), 5(A), or 5(B), or other
24 than discrimination described in subsection (b) paragraph
25 (6) (except for practices intended to screen out individuals
26 with disabilities), against an individual, the complaining
27 party —
28

29 "~~(A)~~ may recover the compensatory and punitive damages
30 described as allowed in subsection (b), in addition to
31 any relief authorized by section 706(g) of the Civil
32 Rights Act of 1964, from the respondent; and—
33

34 "~~(B)~~ may request that a court impose the equitable
35 civil penalty described in subsection (c) against the
36 respondent.—
37

38 *[(B) Insert language reflecting that damages shall not*
39 *be available against respondents acting in good faith*
40 *who fail to make reasonable accomodation due to undue*
41 *hardship.]*
42

43 ~~(3) NOTICE. — a complaining party who requests that a~~
44 ~~court impose an equitable civil penalty under subsection (c)~~
45 ~~shall provide notice of the request to the Chairman of the~~
46 ~~Equal Employment Opportunity Commission and the Secretary of~~
47 ~~Health and Human Services.—~~
48

49 "(b) COMPENSATORY AND PUNITIVE DAMAGES.--
50

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

1 if it is determined that the complaining party has
2 demonstrated the existence of injury requiring compensation
3 by clear and convincing evidence. A complaining party may
4 recover punitive damages under this subsection if the
5 complaining party demonstrates that—
6

7 (A) the respondent engaged in a discriminatory
8 practice or discriminatory practices with malice
9 or with reckless indifference to the federally
10 protected rights of an aggrieved individual, ~~+~~ and
11

12 (B) the award of punitive damages is necessary to
13 deter the respondent from engaging in such a
14 discriminatory practice or discriminatory
15 practices in the future.
16
17

18 (2) EXCLUSIONS FROM COMPENSATORY DAMAGES.--
19 Compensatory damages awarded under this section shall not
20 include back pay, interest on back pay, or any other type of
21 relief authorized under section 706(g) of the Civil Rights
22 Act of 1964.
23

24 (3) LIMITATIONS.-- The sum of the amount of
25 compensatory damages awarded under this section against a
26 respondent who is not a government, government agency, or
27 political subdivision, for future pecuniary losses,
28 emotional pain, suffering, inconvenience, mental anguish,
29 loss of enjoyment of life, and other nonpecuniary losses,
30 and the amount of punitive damages awarded under this
31 section, shall not exceed --
32

33 (A) in the case of a respondent who has more than
34 100 or fewer employees in each of 20 or more calendar
35 weeks in the current or preceding calendar year,
36 \$50,000; and
37

38 (B) in the case of a respondent not described in
39 subparagraph (A), who has more than 100 and fewer than
40 501 employees in each of 20 or more calendar weeks in
41 the current or preceding calendar year, \$100,000; and
42

43 (C) in the case of a respondent who has more than
44 500 employees in each of 20 or more calendar weeks in
45 the current or preceding calendar year, \$300,000.
46

47 (4) PREJUDGMENT INTEREST.-- The court described in
48 paragraph (1) shall not award prejudgment interest to a
49 complaining party on compensatory damages awarded under this
50 section in an action in which the aggrieved individual is an
51 employee or applicant for employment described in section
52 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-

1 ~~16(a)).~~

2
3 "(c) ~~EQUITABLE PENALTY DETERMINATION.~~

4
5 ~~(A) IN GENERAL. A court shall impose an equitable~~
6 ~~civil penalty on a respondent under subsection (a) if the~~
7 ~~court finds that~~

8
9 ~~"(i) the respondent engaged in a discriminatory~~
10 ~~practice or discriminatory practices with malice or~~
11 ~~with reckless indifference to the federally protected~~
12 ~~rights of an aggrieved individual; and~~

13
14 ~~"(ii) the penalty is necessary to deter the~~
15 ~~respondent from engaging in such a discriminatory~~
16 ~~practice or such discriminatory practices in the~~
17 ~~future.~~

18
19 ~~"(B) AMOUNT The court shall impose an equitable~~
20 ~~civil penalty sufficient to deter the respondent from~~
21 ~~engaging in such a discriminatory practice or discriminatory~~
22 ~~practices in the future.~~

23
24 ~~"(2) EQUITABLE CONSIDERATIONS. In making the finding~~
25 ~~described in paragraph (1)(A), a court may consider~~

26
27 ~~"(A) the nature of the discriminatory practice or~~
28 ~~practices that are the subjects of the action described~~
29 ~~in subsection (a);~~

30
31 ~~"(B) the efforts of the respondent to instruct the~~
32 ~~managers, supervisors, and employees of the respondent~~
33 ~~about legal requirements regarding employment~~
34 ~~discrimination;~~

35
36 ~~"(C) the nature of compliance programs, if any,~~
37 ~~established by the respondent to ensure that~~
38 ~~discriminatory practices do not occur in the workplace;~~

39
40 ~~"(D) any lawful affirmative action under taken by the~~
41 ~~respondent with respect to the group injured by the~~
42 ~~discriminatory practice or practices that are the~~
43 ~~subject of the action described in subsection (a);~~

44
45 ~~"(E) the availability to the aggrieved individual of an~~
46 ~~internal grievance procedure or remediation policy~~
47 ~~established by the respondent;~~

48
49 ~~"(F) whether the respondent made a prompt investigation~~
50 ~~of the discriminatory practice or discriminatory~~
51 ~~practices;~~

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

3
4 ~~"(H) the size of the respondent and the effect of the~~
5 ~~equitable civil penalty on the economic viability of~~
6 ~~the respondent.~~

7
8 ~~"(3) LIMITATIONS. The amount of an equitable civil~~
9 ~~penalty imposed under subsection (a) shall not exceed~~

10
11 ~~"(A) in the case of a respondent who has more than~~
12 ~~100 employees in each of 20 or more calendar weeks in~~
13 ~~the current or preceding calendar year, \$[insert~~
14 ~~amount]; and~~

15
16 ~~"(B) in the case of a respondent not described in~~
17 ~~subparagraph (A), \$[insert amount].~~

18
19 ~~"(4) RECOVERY OF COSTS.~~

20
21 ~~"(A) AWARD OF FEES. If a court imposes an~~
22 ~~equitable civil penalty in a case brought under this~~
23 ~~section the court shall award reasonable attorneys' and~~
24 ~~expert witness fees incurred by the complaining party~~
25 ~~in seeking the penalty.~~

26
27 ~~"(B) RELATIONSHIP TO PENALTY. The court shall~~
28 ~~not subtract the amount of the fees described in~~
29 ~~subparagraph (A) from the amount of the equitable civil~~
30 ~~penalty imposed against a respondent under this~~
31 ~~section.~~

32
33 ~~"(5) APPLICATION OF PROCEEDS OF PENALTY.~~

34
35 ~~"(A) CORRECTION OF DISCRIMINATORY PRACTICES. If~~
36 ~~a court determines, in the discretion of the court,~~
37 ~~that an equitable civil penalty imposed under this~~
38 ~~section is needed to correct discriminatory practices~~
39 ~~at the place of employment, or in the community, in~~
40 ~~which the discriminatory practice described in~~
41 ~~subsection (a) occurred, the penalty shall be expended~~
42 ~~all or in part, as directed by the court, to correct~~
43 ~~the discriminatory practices. The penalty may be~~
44 ~~expended to undertake actions such as public awareness~~
45 ~~or education programs regarding discrimination on the~~
46 ~~basis of race, color, religion, sex, or national~~
47 ~~origin, in order to eliminate future discrimination.~~

48
49 ~~"(B) TRUST FUND.~~

50
51 ~~"(i) FULL PAYMENT. If a court does not make the~~
52 ~~determination described in subparagraph (A), the~~

1 ~~penalty shall be deposited in the Equal Employment~~
2 ~~Enforcement Trust Fund, established in section~~
3 ~~9511 of the Internal Revenue Code of 1986.~~

4
5 ~~"(ii) PAYMENT IN PART. If a court directs that~~
6 ~~part of the penalty shall be expended as described~~
7 ~~in subparagraph (A), the remainder of the penalty~~
8 ~~shall be deposited in the Fund.~~

9
10 ~~"(C) DETERMINATION. In making the determination~~
11 ~~described in subparagraph (A), the court may consider~~

12
13 ~~"(i) anti discrimination and anti harassment~~
14 ~~policies and procedures established by the~~
15 ~~respondent, prior to the practice that is the~~
16 ~~subject of the action described in subsection (a),~~
17 ~~to ensure that discriminatory practices would not~~
18 ~~occur;~~

19
20 ~~"(ii) corrective actions taken by the respondent~~
21 ~~on becoming aware of a claim that a discriminatory~~
22 ~~practice had occurred; and~~

23
24 ~~"(iii) policies and procedures established by the~~
25 ~~respondent after the claim to ensure that~~
26 ~~discriminatory practices do not occur again.~~

27
28 ~~"(d) JURY TRIAL.--~~

29
30 ~~"(1) IN GENERAL.-- (A) If a complaining party seeks~~
31 ~~compensatory or punitive damages under this section, any~~
32 ~~party may demand a trial by jury.~~

33
34
35 ~~"(2) DETERMINATIONS. If a party requests a trial by~~
36 ~~jury in an action brought under this section--~~

37
38 ~~"(A) the jury shall determine all factual issues~~
39 ~~related to liability; and~~

40
41 ~~"(B) if the determination described in subsection~~
42 ~~(b)(1) is made--~~

43
44 ~~"(i), the jury shall determine the amount of~~
45 ~~compensatory damages awarded to the complaining~~
46 ~~party; and~~

47
48 ~~"(ii) (B) the court shall not inform the~~
49 ~~jury of the limitations described in subsection~~
50 ~~(b)(3).~~

51
52 ~~"(e) DEFINITION.-As used in this section:~~

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

4
5 ~~"(2) COMPLAINING PARTY.--The term 'complaining party'~~
6 ~~means--~~

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

11
12 ~~"(B) in the case of a person seeking to bring an~~
13 ~~action under subsection (a)(2), a person who may bring~~
14 ~~an action or proceeding under title I of the Americans~~
15 ~~with Disabilities Act of 1990 (42 U.S.C. 12101 et~~
16 ~~seq.).~~

17
18 ~~"(3) (2) DISCRIMINATORY PRACTICE .-- The term~~
19 ~~'discriminatory practice' means a practice described in~~
20 ~~paragraph (1) or (2) of subsection (a)."~~

21
22
23 ~~"SEC. 4. EQUAL EMPLOYMENT ENFORCEMENT TRUST FUND.~~

24
25 ~~(a) ESTABLISHMENT. Subchapter A of chapter 98 of the~~
26 ~~Internal Revenue Code of 1986 (relating to trust fund code) is~~
27 ~~amended by adding at the end the following new section:~~

28
29 ~~SEC. 9511 EQUAL EMPLOYMENT ENFORCEMENT TRUST FUND~~

30
31 ~~"(a) CREATION OF FUND. There is established in the~~
32 ~~Treasury of the United States a fund to be known as the Equal~~
33 ~~Employment Enforcement Trust Fund (referred to in this section as~~
34 ~~the 'Fund'), consisting of such amounts as may be appropriated or~~
35 ~~credited to the Fund as provided in this section.~~

36
37 ~~"(b) TRANSFERS TO FUND. There are appropriated to the Fund~~
38 ~~amounts equivalent to the additional revenues received in the~~
39 ~~Treasury as the result of the amendments made by section 3 of the~~
40 ~~Civil Rights and Remedies Act of 1991.~~

41
42 ~~"(c) EXPENDITURES.~~

43
44 ~~"(1) PURPOSES.~~

45
46 ~~"(A) CIVIL RIGHTS ENFORCEMENT. Fifty percent of~~
47 ~~the amounts in the Fund shall be available, to the~~
48 ~~extent provided in appropriation Acts, for the purposes~~
49 ~~of making expenditures to carry out section 706 of the~~
50 ~~Civil 21 Rights Act of 1964 (42 U.S.C. 2000e-5).~~

51
52 ~~"(B) FAMILY VIOLENCE PROTECTION. Fifty percent~~

1 of the amounts in the Fund shall be available, to the
2 extent provided in appropriation Acts, for the purposes
3 of making expenditures to carry out section 303 of the
4 Family Violence Prevention and Services Act (42 U.S.C.
5 10402).—
6

7 "~~(2) PAYMENTS BASED ON ESTIMATES.~~— Payments under
8 paragraph (1) shall be made on the basis of estimates by the
9 Secretary of the Treasury. Proper adjustments shall be made
10 in amounts subsequently transferred to the extent prior
11 estimates were in excess of or less than the amounts
12 required to be transferred."—
13

14 ~~(b) CONFORMING AMENDMENT.~~— Subchapter A of chapter 98 of
15 the Internal Revenue Code of 1986 is amended in the table of
16 sections by adding at the end the following new item:—
17

18 "Sec. 9511. Equal Employment Enforcement Trust Fund."—
19

20 **Sec. 4. ATTORNEYS' FEES**

21
22 The last sentence of Section 722 of the Revised Statutes (42
23 USC 1988) is amended by inserting ", 1981A" after "1981".
24

25 26 **SEC. 5. COVERAGE OF CONGRESS AND THE AGENCIES OF THE LEGISLATIVE** 27 **BRANCH.**

28 29 **(a) COVERAGE OF THE SENATE.--**

30
31 **(1) APPLICATION TO SENATE EMPLOYMENT.--** The rights and
32 protections provided pursuant to the amendment made by this
33 Act shall, subject to paragraphs (2) through (5), apply with
34 respect to any employee in an employment position in the
35 Senate and any employing authority of the Senate.
36

37 **(2) INVESTIGATION AND ADJUDICATION OF CLAIMS.--** All
38 claims raised by any individual with respect to Senate
39 employment pursuant to the provision described in paragraph
40 (1) shall be investigated and adjudicated by the Select
41 Committee on Ethics, pursuant to S. Res. 338, 88th Congress,
42 as amended, or such other entity as the Senate may
43 designate.
44

45 **(3) RIGHTS OF EMPLOYEES.--** The Committee on Rules and
46 Administration shall ensure that Senate employees are
47 informed of their rights under the provisions described in
48 paragraph (1).
49

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

1 or such other entity as the Senate may designate, shall to
2 the extent practicable apply the same remedies applicable to
3 all other employees covered by the provisions described in
4 paragraph (1). Such remedies shall apply exclusively.
5

6 (5) EXERCISE OF RULEMAKING POWER.-- Notwithstanding any
7 other provision of law, enforcement and adjudication of the
8 rights and protections referred to in paragraph (1) shall be
9 within the exclusive jurisdiction of the United States
10 Senate. The provisions of paragraphs (2), (3), and (4) are
11 enacted by the Senate as an exercise of the rulemaking power
12 of the Senate, with full recognition of the right of the
13 senate to change its rules, in the same manner, and to the
14 same extent, and to the same extent, as in the case of any
15 other rule of the Senate.
16

17 (b) COVERAGE OF THE HOUSE OF REPRESENTATIVES.--
18

19 (1) IN GENERAL.- Notwithstanding any other provision of
20 law, the purposes of this Act shall, subject to paragraph
21 (2), apply with respect to any employee in an employment
22 position in the House of Representatives and any employing
23 authority of the House of Representatives.
24

25 (2) EMPLOYMENT IN THE HOUSE.--
26

27 (A) APPLICATION.-The rights and protections under
28 the amendment made by this Act shall, subject to
29 subparagraph (B), apply with respect to any employee in
30 an employment position in the House of Representatives
31 and any employing authority of the House of
32 Representatives.
33

34 (B) ADMINISTRATION.--
35

36 (i) IN GENERAL.-- In the administration of
37 this paragraph, the remedies and procedures made
38 applicable pursuant to the resolution described in
39 clause (ii) shall apply exclusively.
40

41 (ii) RESOLUTION.-- The resolution referred to
42 in clause (i) is House Resolution 15 of the One
43 Hundred First Congress, as agreed to January 3,
44 1989, or any other provision that continues in
45 effect the provisions of, or is a successor to,
46 the Fair Employment Practices Resolution (House
47 Resolution 558 of the One Hundredth Congress, as
48 agreed to October 4, 1988).
49

50 (C) EXERCISE OF RULEMAKING POWER.-- The provisions
51 of subparagraph (B) are enacted by the House of
52

1 Representatives as an exercise of the rulemaking power
2 of the House of Representatives, with full recognition
3 of the right of the House to change its rules, in the
4 same manner, and to the same extent as in the case of
5 any other rule of the House.
6

7 (c) INSTRUMENTALITIES OF CONGRESS.--
8

9 (1) IN GENERAL.-- The rights and protections under the
10 amendment made by this Act, shall, subject to paragraph (2),
11 apply with respect to any employee in an employment position
12 in an instrumentality of the Congress and any chief official
13 of such an instrumentality.
14

15 (2) ESTABLISHMENT OF REMEDIES AND PROCEDURES BY
16 INSTRUMENTALITIES. -- The chief official of each
17 instrumentality of the Congress shall establish remedies and
18 procedures to be utilized with respect to the rights and
19 protections provided pursuant to paragraph (1). Such
20 remedies and procedures shall apply exclusively.
21

22 (3) REPORT TO CONGRESS. -- The chief official of each
23 instrumentality of the Congress shall, after establishing
24 remedies and procedures for purposes of paragraph (2),
25 submit to the Congress a report describing the remedies and
26 procedures.
27

28 (4) DEFINITION OF INSTRUMENTALITIES.-- For purposes of
29 this section, instrumentalities of the Congress include the
30 Architect of the Capitol, the Congressional Budget Office,
31 the General Accounting Office, the Government Printing
32 Office, the Office of Technology Assessment, and the United
33 States Botanic Garden.
34

35 SEC. 6. SEVERABILITY
36

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

DRAFT

July 28, 1991

Dear Jack,

The meeting on Thursday was helpful to me, and I appreciate all the energy you've put into the civil rights issue.

As I understand it, you are worried that I would allow what Griggs ruled out: the use of unjustified educational requirements for menial jobs that are not tied to promotion policies. The Attorney General assures me that this is not allowed under my bill, but I've asked for some additional language to nail it down. Enclosed is a legislative history proposal that I hope you find satisfactory.

Clarifying that my bill preserves Griggs is better than trying to make up a list that tells employers precisely how they are allowed to use educational standards in hiring decisions. Moreover, I cannot support a legal innovation that could jeopardize, or even destroy, one of the key elements in our educational reform program, which is so important to our future. More detail is included in the enclosed Thornburgh, Kemp, and Alexander letters.

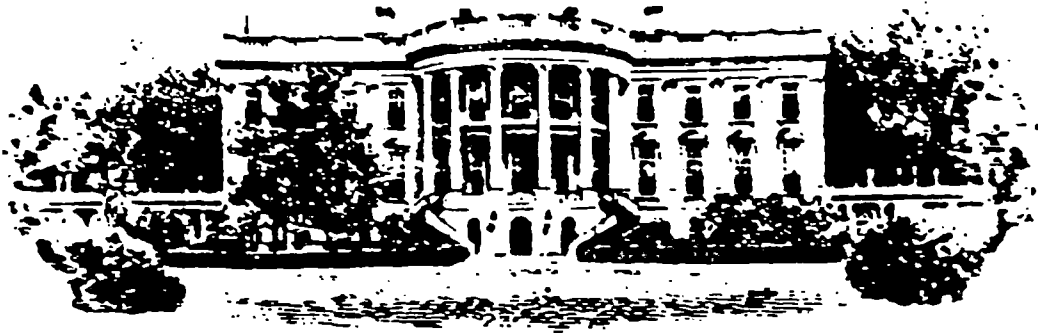
I understand that you have contacted the Attorney General about some of the other issues that remain. I look forward to getting all the issues resolved so that I can sign a good, strong civil rights bill this year. Thanks again for all your hard work.

Sincerely,

GB

THE CHIEF of STAFF
has seen

THE WHITE HOUSE
EXECUTIVE OFFICE OF THE PRESIDENT



FACSIMILE TRANSMITTAL SHEET

DATE: 7/26/91 -- 7:00pm

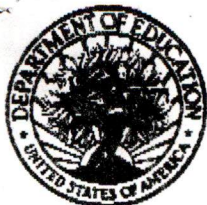
TO: Governor

FROM: Katie

PHONE: _____

COMMENTS: Attached is the draft from Boyden

NUMBER OF PAGES, EXCLUDING COVER SHEET 1



UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

JUL 25 1991

The Honorable Orrin G. Hatch
United States Senate
Washington, DC 20510-4402

THE CHIEF of STAFF
has seen

Dear Senator Hatch:

Thank you for your recent letter requesting my views on the effects S. 1408 could have on the national crusade for education reform. I am deeply concerned about the possible effect that S. 1408 could have on student motivation to stay in school and to work hard in school. Although the "business necessity" language of the bill is ambiguous in some respects, it is my understanding that employers would often have difficulty in defending the use of legitimate educational criteria in making hiring decisions. I have grave doubts about the wisdom of legislation that would threaten employers with civil liability if they asked prospective employees for a high school transcript or a diploma. To tell employers not to consider such information when making hiring decisions would undermine the importance of staying in school and working hard in school. It would send precisely the wrong message to students and teachers. It would say to students that staying in school doesn't matter, because employers don't have the right to know whether you graduated or whether you did well. It would say to teachers that their work is unimportant in the outside world.

Virtually everyone who is concerned about the future of our nation understands that our population is not sufficiently well educated to meet the demands of the twenty-first century. Study after study has shown that neither our young people--nor our adult population--has the level of knowledge and skills that will be needed to succeed in a changing world. In order to change this situation, we must improve our schools. In order to improve our schools, we must enhance incentives for students to do well in school. We must send a message that attendance in school, achievement in school, and graduation from school are important. Our plans for improving the nation's educational system will be jeopardized by any legislation that inadvertently devalues schooling and depresses academic standards.

I am sure Congress is well aware that our national competitiveness depends on a better educated workforce. Because the global economy is rapidly changing, workers must have the skills to adapt to new work requirements or otherwise they will be left behind by change. Education is the key to equipping workers to respond to change. Employers in many competing

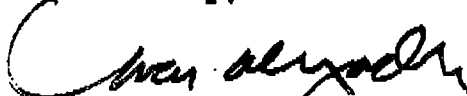
Page 2 - Letter to the Honorable Orrin G. Hatch

nations routinely examine the educational credentials of prospective employees.

Contrary to this global reality, S. 1408 appears to say that employers will not be able to require entry-level employees to have the skills and knowledge necessary to perform functions other than those required by the exact job for which they are being considered. In effect, the bill seems to require that employers hire as if every job is a changeless and dead-end job.

I hope that the Congress will not do anything to remove or undercut the ability of the labor market to reward students who work hard and finish school.

Sincerely,

A handwritten signature in dark ink, appearing to read "Lamar Alexander", written over a large, stylized initial "C".

Lamar Alexander