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Civil Rights (2 of 2) 1991 [4]

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Executive Office of the President
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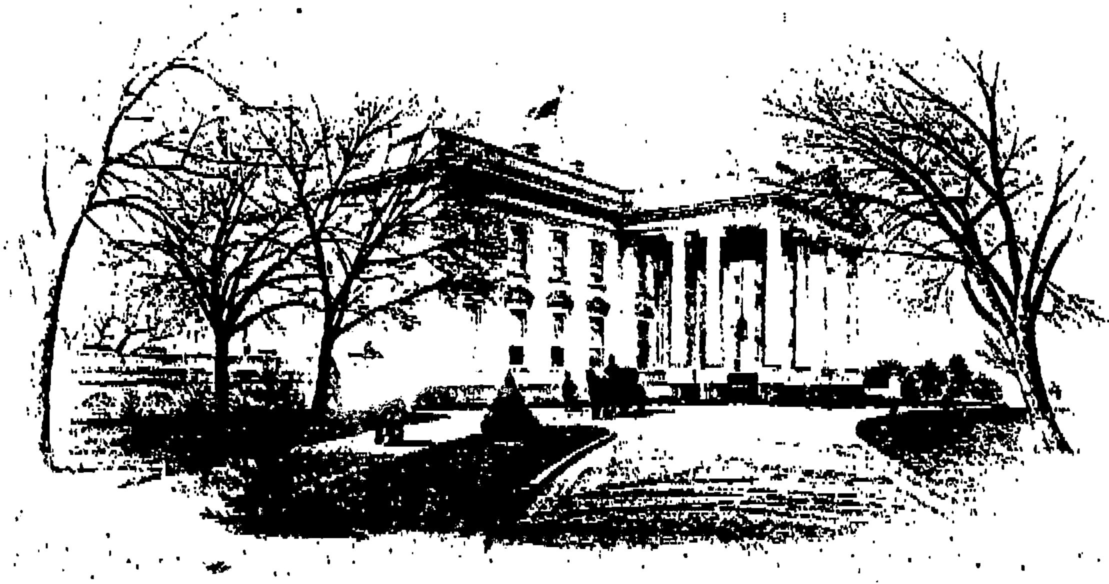

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DATE 9-19-91

TO Fred McClure

FAX NUMBER (213) 247-0950

OFFICE NUMBER

COMMENTS Sen. Danforth will be introducing this bill tomorrow. Essentially the same bill as before.

FROM Steve Hart

FAX NUMBER

OFFICE NUMBER

JOHN C. DANFORTH
MISSOURI

COMMITTEES:
COMMERCE, SCIENCE, AND TRANSPORTATION
FINANCE
INTELLIGENCE

United States Senate

WASHINGTON, DC 20510-2502

September 19, 1991

Mr. Fred McClure
Office of Legislative Affairs
The White House
Washington, D. C. 20500

Dear Fred:

Enclosed is a copy of the civil rights bill that Senator Danforth will introduce tomorrow. I thought you would like an advance copy.

Sincerely,

Jon

Jon Chambers
Legislative Director

102D CONGRESS
1ST SESSION

S. ____

IN THE SENATE OF THE UNITED STATES

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

A BILL

To amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, 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 "Civil Rights Act of 1991".

SEC. 2. FINDING.

The Congress finds that—

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

SEC. 3. PURPOSE.

The purposes of this Act are—

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) 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);

(3) to confirm 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.); and

(4) 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. 4. 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 contractual relationship.

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

SEC. 5. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section:

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

"(a) RIGHT OF RECOVERY.—

"(1) CIVIL RIGHTS.—In an action brought by a complaining party under section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5) 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 or 2000e–3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

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

"(3) REASONABLE ACCOMMODATION AND GOOD FAITH EFFORT.—In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

"(b) COMPENSATORY AND PUNITIVE DAMAGES.—

"(1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

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

"(3) LIMITATIONS.—The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed—

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

"(B) in the case of a respondent who has more than 100 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

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

"(4) CONSTRUCTION.—Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).

"(c) JURY TRIAL.—If a complaining party seeks compensatory or punitive damages under this section—

"(1) any party may demand a trial by jury; and

"(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

"(d) DEFINITION.—As used in this section:

"(1) COMPLAINING PARTY.—The term 'complaining party' means—

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

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

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

SEC. 6. ATTORNEY'S FEES.

The last sentence of section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting ", 1981A" after "1981".

SEC. 7. DEFINITIONS.

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

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

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

"(n) The term 'the 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 behavior that is important to the job, but may not comprise actual work activities.

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

"(1) in the case of employment practices that are used as qualification standards, employment tests, or other selection criteria, the challenged practice must bear a manifest relationship to the employment in question; and

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

"(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 subject to section 717.".

SEC. 8. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) is amended by adding at the end 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 particular employment practices (or decisionmaking process as described in subparagraph (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 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 each 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 decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

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

"(C) An employment practice that 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) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

"(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, 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.".

SEC. 9. 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 8) is further amended by adding at the end the following new subsection:

"(l) 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.".

SEC. 10. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) IN GENERAL.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) (as amended by sections 8 and 9) is further amended by adding at the end the following new subsection:

"(m) 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 indenting accordingly; and

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

"(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

"(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. 11. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) (as amended by sections 8, 9, and 10 of this Act) is further amended by adding at the end the following new subsection:

"(n)(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 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 on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

"(2) Nothing in this subsection shall be construed to—

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

"(B) apply to the rights of parties to the action in which a 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.

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

SEC. 12. 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, the term 'employee' includes an individual who is a citizen of the United States.".

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

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

(2) by adding at the end the following:

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

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

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

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

"(A) the interrelation of operations;

"(B) the common management;

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

"(D) the common ownership or financial control,

of the employer and the corporation.".

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

SEC. 13. 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. 14. 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 unlawful employment practice occurs, with respect to a seniority system that has 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), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.".

SEC. 15. 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. 16. 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. 17. NOTICE OF LIMITATIONS PERIOD UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)) is amended—

(1) by striking paragraph (2);

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

(3) by striking "Sections 6 and" and inserting "Section"; and

(4) by adding at the end the following:

"If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice.".

SEC. 18. 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. 19. COVERAGE OF CONGRESS AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) COVERAGE OF THE SENATE.—

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

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

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

"(b) discharge an individual; or

"(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment, on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.".

(2) APPLICATION TO SENATE EMPLOYMENT.—The rights and protections provided pursuant to this Act, the Civil Rights Act of 1964, and the Age Discrimination in Employment Act of 1967, shall, subject to paragraphs (3) through (7), apply with respect to employment by the United States Senate.

(3) INVESTIGATION AND ADJUDICATION OF CLAIMS.—All claims raised by any individual with respect to Senate employment, pursuant to the Acts referred to in paragraph (2), shall be investigated and adjudicated by the Select Committee on Ethics, pursuant to Senate Resolution 338, Eighty-eighth Congress, as amended, or such other entity as the Senate may designate.

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

(5) APPLICABLE REMEDIES.—When assigning remedies to individuals found to have a valid claim under the Acts referred to in paragraph (2), the select Committee on Ethics, or such other entity as the Senate may designate, should to the extent prac-

ticable apply the same remedies applicable to all other employees covered by the Acts referred to in paragraph (2). Such remedies shall apply exclusively.

(6) MATTERS OTHER THAN EMPLOYMENT.—

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

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

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

(7) EXERCISE OF RULEMAKING POWER.—Notwithstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in paragraphs (2) and (6)(A) shall be within the exclusive jurisdiction of the United States Senate. The provisions of paragraphs (1), (3), (4), (5), (6)(B), and (6)(C) are enacted by the Senate as an exercise of the 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 provision of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or of other law, the purposes of this Act shall, subject to paragraph (2), apply in their entirety to the House of Representatives.

(2) EMPLOYMENT IN THE HOUSE.—

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

House of Representatives and any employing authority of the House of Representatives.

(B) ADMINISTRATION.—

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

(ii) RESOLUTION.—The resolution referred to in clause (i) is the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988), as incorporated into the Rules of the House of Representatives of the One Hundred Second Congress as Rule LI, or any other provision that continues in effect the provisions of such resolution.

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

(c) INSTRUMENTALITIES OF CONGRESS.—

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

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

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

(4) DEFINITION OF INSTRUMENTALITIES.—For purposes of this section, instrumentalities of the Congress include the following: the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Of-

fice, the Office of Technology Assessment, and the United States Botanic Garden.

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

SEC. 20. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

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

SEC. 21. 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.

SEC. 22. EFFECTIVE DATE.

Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

Sen Dean
Trent Lord:
Regrettably he hasn't
changed support.
However if it would help...

On the record:

Administration officials have been discussing the civil rights bill with Sen. Danforth for quite some time. These discussions have not yet produced an agreement. If Sen. Danforth's decision to introduce a new bill means that he is no longer seeking an agreement, we are disappointed.

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 Sen. 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 definition of business necessity in the President's bill implicitly applies to the same standards, tests, and criteria as the new Danforth bill. Although linguistically awkward, the definition in the President's bill could be modified to include the 8 words from the ADA, so that it would 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."

If this use of the 8 words from the ADA in the President's bill will secure Sen. Danforth's support and allow the President's bill to be adopted by the Senate, the Administration ~~will accept this change.~~ would accept their addition. ~~to the~~ We hope the Congress will support the President's Civil Rights bill, with or without the additional 8 words. We cannot support Sen. Danforth's bill.

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 overwelmingly 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 practicesas 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.

CIVIL RIGHTS COMPROMISE

- WE HAVE REACHED AGREEMENT ON THE SO-CALLED WARDS COVE ISSUES, INCLUDING THE MEANING OF THE TERM "BUSINESS NECESSITY." BUSINESS NECESSITY HAS BEEN BEEN AT THE CENTER OF THE CIVIL RIGHTS STORM. AFTER NEARLY TWO YEARS OF ARGUMENT, WE HAVE FINALLY COME UP WITH AN ACCEPTABLE DEFINITION.

- WE HAVE GENERALLY ACCEPTED THE DAMAGES SCHEME IN THE DANFORTH BILL -- WITH A CAP OF $50,000 FOR THE SMALLEST EMPLOYERS AND A CAP OF $300,000 FOR THE LARGEST EMPLOYERS.

QUESTION: WHY IS THE COMPROMISE NO LONGER A QUOTA BILL?

ANSWER: UNLIKE H.R. 1 AND THE ORIGINAL VERSION OF S. 1745, WE HAVE NOT CHANGED THE BUSINESS NECESSITY TEST AS IT HAS BEEN DEFINED BY THE SUPEME COURT IN GRIGGS V. DUKE POWER CO. AND IN SUBSEQUENT SUPREME COURT CASES. IF THE BUSINESS NECESSITY TEST HAD BEEN TOO TOUGH TO SATISFY, RATIONAL EMPLOYERS WOULD HAVE BEEN FORCED TO ADOPT QUOTAS IN ORDER TO AVOID THE EXPENSE OF LITIGATION.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Letter	From Evan J. Kemp to Richard G. Darman Re: Budget for EEOC (6 pp.)	11/19/91	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 [4]

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

Date Closed: 1/3/2005	**OA/ID Number:** 29147-002
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:**
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P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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(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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

November 19, 1991

Honorable Richard G. Darman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Darman:

It is imperative that the EEOC's FY 1993 budget be revised if the Commission is to meet the obligations imposed by the Civil Rights Act of 1991 (Act).

The Act will increase the Commission's workload by an estimated 20% for a number of reasons. By adding new areas of inquiry to field investigations, the time period for processing charges will increase. The prospect of securing damage awards ranging from $50,000 to $300,000 is certain to attract additional charges. With the availability of damages under the ADA, individuals who would formerly have taken charges of intentional discrimination on the basis of disability to the Office of Federal Contract Compliance Programs can now be expected to file charges with the Commission. Similarly, more charges will be filed with the Commission because Federal statutes will now provide greater relief than those statutes administered by many of the state and local fair employment practice agencies. Heightened awareness of sexual harassment issues and Commission enforcement jurisdiction can be expected to add charges to our workload. And finally, the reach of civil rights law including the Americans with Disabilities Act (ADA) has been extended to persons employed extraterritorially.

In contrast with civil rights programs in other agencies such as the Office of Federal Contract Compliance Programs in the Department of Labor, the Offices for Civil Rights in HHS and Education, and the Fair Housing and Equal Opportunity Office in HUD, the EEOC's single mission is to enforce the civil rights laws passed by Congress. We can not afford the costly delays in charge resolution which will result if we do not increase staff resources immediately. The longer we wait to add staff, the more staff we will need because of the steady build-up in inventory. The impact of an inventory build-up must be considered from the viewpoint of the obstacles encountered when evidence must be obtained on "stale" charges. Furthermore, the influence of the public we serve and the diverse interest groups watching our every move will be felt politically. Therefore, our funding must be revised to reflect these new Congressionally mandated civil rights commitments which had not been included in our FY 1992 and FY 1993 budgets.

The Civil Rights Act of 1991

The Civil Rights Act of 1991 creates new Commission responsibilities. A "Technical Assistance Training Institute" to assist covered entities with EEO laws and regulations is to be established and the Commission is to engage in "educational and outreach activities." While the resource requirements of these new program responsibilities are straightforward, other aspects of the Act make our mission more complex than ever. The addition of damages and jury trials to Title VII will require that our budget be revised to train staff because the Commission has neither the expertise in developing cases involving damage awards nor much experience in litigating jury trials. Furthermore, without additional staff, recent charge processing productivity improvements will be impossible to maintain now that field investigations have been made more complex as a consequence of the Act.

The complexity of the Act fundamentally changes the Commission's focus from one of equity where individuals were made whole for their losses due to discrimination to a new emphasis on determining liability. The remedial provisions of the Act include jury trials to determine liability and to award compensatory and punitive damages both under Title VII as well as the Americans with Disabilities Act. Title VII enforcement will now require developing Commission expertise in new substantive disciplines to assist charging parties and the court. Medical experts will be required to assess the compensatory relief for both the emotional distress and the pain and suffering caused by intentional discrimination. Actuaries and other experts will be required when punitive damages are sought.

The predictability of the charge settlement process upon which earlier budget forecasts were made will be substantially changed. Prior to the Act, Title VII enforcement policies encouraged voluntary compliance. When a Commission investigation revealed discrimination, appropriate remedial relief was sought through informal conciliation. If conciliation failed to resolve the charge, the Commission could always litigate and the threat of such litigation was the lubricant that greased voluntary charge settlements. Now the balancing of employee and employer interests has been changed in significant ways which, if our predictions prove correct, will substantially confound voluntary compliance while at the same time increasing the number of charges filed.

The Act provides for the awarding of both compensatory damages in the case of intentional discrimination ("disparate treatment") and expert fees in both the administrative process and the courts. With the exception of government employees, punitive damages will also be available where intentional discrimination is found. Because compensatory damages will be available in both forums, we do not anticipate a change in the balance of persons who elect to complete the administrative process before proceeding to court. The possibility of larger awards, however, will undoubtedly give rise to an increased number of charges being filed. We estimate a 20% increase in the number of charges filed annually as a consequence of the Act.

Federal Employee EEO Enforcement

Within the EEO administrative hearing procedure for Federal employees, as the number of complaints increases, the number of administrative hearings will rise proportionately. Because Administrative Judges will now be required to compile evidence and to make recommendations regarding the amount of potential compensatory damages, this additional work will decrease each individual Administrative Judge's productivity as measured by the number of cases heard annually.

The Commission's appellate work involving Federal employee's charges will increase substantially. Currently, 25% of all Federal complaints filed are appealed to the Commission. In addition to generating more complaints, the Act is also expected to decrease the number of settlements at the agency level thus increasing the percentage of complaints appealed to the Commission. In increasing numbers of cases, charging parties will expect "full relief" to include compensatory damages. Agencies faced with a higher cost of settlement will be less willing to settle or to offer "full relief." It is also expected that charging parties who believe that they were subjected to intentional discrimination will be less willing to accept settlement offers which do not include compensatory damages. As a result, fewer voluntary settlements will be achieved and a higher percentage of cases will be appealed to the Commission. Also because of the numerous procedural issues raised by the Act, the percentage of complaints appealed will increase for at least a couple of years until these issues are sorted out.

In addition, Commission Orders providing for full relief will now require computation of compensatory damages. It is unclear whether the determination of the exact dollar figure will be performed by the respondent agency or the Commission. If the determination is to be made by the Commission, several additional staff attorneys will be required to accommodate the increased workload. If the determination is to be made by the agency, the Commission will be called upon to mediate the inevitable disputes between the appellant and the agency.

The Americans With Disabilities Act

Wholly in addition to Title VII, our forecasts indicate that the Americans with Disabilities Act which takes effect July 26, 1992, will also increase our workload by a minimum of 20%. Processing times for ADA charges will take longer for the next few years because our staff will be starting at the bottom of learning curves both in mastering new substantive disciplines and in litigating jury trials for the first time. Additionally, rather than being able to depend upon solo litigators as in the past, the substantive complexity of defining what is meant by "reasonable accommodation" will require teams of attorneys to conduct discovery and to collect deposition testimony from experts in architecture, ergonomics, vocational rehabilitation and medicine.

Since Congress chose not to spell out critical ADA definitions, litigation will be necessary to give operational meaning to key terms such as "reasonable accommodation" and "undue hardship." In all likelihood, such key terms will be resolved at the Appeals Court level which will additionally add to the appellate work of our Office of General Counsel. Shaping the contours of employment disability law will be a lengthy development since each individual's "reasonable accommodation" will have to be investigated and litigated case by case, one disabled individual at a time.

Projected Budgetary Impact for FY 1992 & FY 1993

The budgetary and staffing implications of both the Americans with Disabilities Act and the Civil Rights Act of 1991 need to be addressed. In budget documents to be submitted to your staff, I will detail our need for a supplemental budget increase for FY 1992 and an increase of the previously submitted budget for FY 1993.

Fiscal Year 1992

The Civil Rights Act of 1991 becomes effective when signed by the President. Because there is no delay in implementation of the Act, the impact is immediate. Because of the Act, we project there will be an approximately 20 percent increase in the Commission's workload across the board. All of EEOC's publications designed for the public as well much of the agency's regulatory and procedural guidance and materials will become out-dated and obsolete and will need to be revised. Title I of the Americans with Disabilities Act becomes effective July 26, 1992. Because the workload implications of both Civil Rights Act of 1991 and the Americans with Disabilities Act have never been adequately addressed, the Commission will be submitting a supplemental request for FY 1992 to OMB in the next few weeks.

Fiscal Year 1993

Fiscal Year 1993 will be the first full year that both the Civil Rights Act of 1991 and the Americans with Disabilities Act will be in effect. In the non-Federal sector, we estimate that in FY 1993 there will be 91,607 charges added to the agency's workload, an increase of 24,070 over the actual number received in FY 1991. There will be a comparable workload increase in the Federal sector. As I have detailed earlier, not only will the numbers increase but so will the complexity of the charges and the time required for their investigation. Our revised FY 1993 budget which you will be receiving soon will reflect the Commission's need to hire more than 1000 investigators, attorneys, Administrative Judges, and support staff to handle this additional workload.

Please realize that under Title VII, the ADA and the Age Discrimination in Employment Act, EEOC is charge driven by statutory mandates. The Commission has become increasingly focused on charges filed by individuals with pattern and practice class action cases utilized where the facts and resources permit. The Commission's mandate to focus on charges filed by individuals needs to be contrasted with the predominantly statistically driven, group oriented enforcement policies such as those found at the Office of Federal Contract Compliance Programs at the Department of Labor. Much of the debate over the Civil Rights Act of 1991 dealt with the Administration's objection to statistical, group results definitions of discrimination. In view of the fact that EEOC is facing a massive increase in the agency workload, OMB should reexamine the distribution of civil rights enforcement funds.

I trust that after you and your staff have analyzed our supporting documents, we will be hearing your favorable response to our request. In the meantime, if you or your staff have any additional questions, please do not hesitate to call.

Sincerely,

Evan Kemp

Evan J. Kemp, Jr.
Chairman

cc: The Honorable John H. Sununu
Chief of the Staff to the President

C. Boyden Gray, Esq.
Counsel to the President

National Association
of Manufacturers

JERRY J. JASINOWSKI
President

November 4, 1991

The President
The White House
Washington, DC 20500

Dear Mr. President:

Final Congressional disposition of an agreement between the White House and Senate on civil rights legislation, S. 1745, appears to be a fait accompli. On behalf of the National Association of Manufacturers member companies, I am obliged to convey our deep disappointment not only with the substance of the agreement but also the manner in which it was brought about.

For nearly two years, NAM and others in the employer community worked closely with your staff and allies on Capitol Hill to fashion civil rights legislation that advanced equal opportunity without inducing employers to adopt preferential hiring/promotion strategies or exposing them to costly, unwarranted litigation. Significant time, energy and resources were committed to this endeavor, including support of your proposals, S. 611 and H.R. 1375. But no single employer concern was so dominant and consistent throughout than our opposition to jury trials and punitive/compensatory damages. Regrettably, the agreement embraced by the White House failed to consider the employer community's most fundamental concern.

Many important issues remain that will require close cooperation between the employer community and Administration. We won't always agree but our differences can be aired, debated and resolved. NAM hopes, however, that when the Administration contemplates future changes in direction that we might learn of it directly and have an opportunity for meaningful input into the decisions.

Respectfully,

Jerry J. Jasinowski

bc: C. Boyden Gray
Fred McClure
Roger Porter
John Sununu

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THE WHITE HOUSE

WASHINGTON

November 13, 1991

THE CHIEF of STAFF
has seen

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: DORRANCE SMITH

SUBJECT: **Civil Rights Editorial**

Attached is a copy of Boyden's Civil Rights editorial. We have offered it to the Washington Post. (Meg Greenfield), I should have an answer from them within 24 hours.

We'll do a complete mail out after it runs.

P.S.
I SENT A COPY TO THE PRESIDENT.

D

CIVIL RIGHTS EDITORIAL

By C. Boyden Gray

Contrary to a rapidly congealing press myth, President Bush did not "cave" or "surrender" on quotas in the new Civil Rights bill. Nor were any of the President's actions taken in response to the Clarence Thomas hearings or the David Duke campaign. On the contrary, the compromise bill the President will sign became possible only after the Democrats beat a total retreat on quotas, thereby paving the way for the President to make concessions on other, less fundamental, issues.

To understand what happened, the public needs to know the story of an extraordinary amendment that was adopted without debate or a vote. Here is what actually happened.

Under the Supreme Court's 1971 Griggs decision, employment practices having an adverse statistical impact on certain groups can lead to liability even if there was no hint of discriminatory intent. In 1989, the Wards Cove case summarized the rules under which such lawsuits would be conducted, noting that unfair rules would drive employers to use quotas to avoid any possibility of being dragged into such a lawsuit.

For the past two years, Democrats have insisted that Wards Cove overruled Griggs, and that legislation was needed to "restore" pre-Wards Cove law. The changes they actually proposed, however, would have gone much farther, exposing countless employers to ruinous litigation and liability anytime their numbers were not "right."

Administration lawyers always believed that the Supreme Court was right to think that Griggs and Wards Cove were consistent with each other. More important, we knew that the Democrat "restoration" was in fact a radical and destructive distortion of prior legal doctrine. If "bad numbers" alone became a sufficient basis for legal liability, employers would be foolish not to use quotas.

Last March, the President proposed a bill that made a symbolically important but practically insignificant concession to the Democrats on one issue involving the burden of proof. In other respects, the President's bill codified the law as it existed prior to Wards Cove (and which we believed was fully consistent with that decision). The Democrats in Congress never gave this bill the time of day.

Suddenly, on Thursday, October 24, Senator Kennedy stunned Administration negotiators by agreeing to a Wards Cove proposal developed by Senator Dole and transmitted through Senator Danforth.

This option was virtually identical in substance to the President's bill and to other formulations that Senator Kennedy and his private sector allies had rejected time and time again.

On most issues, the new proposal used language drawn from the President's bill and the analytical memorandum that accompanied that bill. On the contentious issue of "business necessity," which defines the standard that employers must meet in justifying statistical disparities, the proposal used essentially meaningless language from the Americans with Disabilities Act that left the term in question undefined. (Ironically, the negotiators of the disability law had settled on this empty language because they expected the issue to be addressed and resolved in the context of the upcoming Civil Rights bill.)

In its most critical component, the proposal included exclusive legislative history that would supply the definition of "business necessity" by referencing the case law as it stood immediately prior to the Wards Cove decision. In two carefully negotiated sentences of legislative history, the proposal indirectly accomplished what the President's bill had done in so many words: codifying the law as it stood at the time of Wards Cove (except on the burden of proof). Because the statutory language provided no definition, the definition referenced in the legislative history would necessarily be dispositive in the courts; for that reason, 90% of the negotiations centered on the legislative history, rather that on the statute itself.

In return for Senator Kennedy's complete capitulation on quotas, the Administration agreed to several compromises proposed by Senator Danforth on other issues. The question on which the Administration was most reluctant was the application of jury trials and punitive damages to employment cases under the Civil Rights Act. Although the Danforth proposal includes caps on such awards, thereby setting an important precedent for tort reform, such remedies are undeniably a dangerous experiment (as is suggested by the Senate's 54-42 vote against a proposal to apply to themselves the same remedies they are imposing on the private sector).

Despite our strong misgivings about jury trials and damages, the agreement was sealed and our startling success on Wards Cove remained the most salient component of the package. Imagine, then, how disturbed we were to learn that Senator Kennedy went to the floor of the Senate the very next day to create legislative history, inconsistent with Thursday night's agreement, attempting to resuscitate one of the most radically objectionable features of the original Democrat bill. Had we been sandbagged? Had the agreement so laboriously negotiated ever been meant to stick?

The following Monday, the Administration proposed to include in the bill an innovative provision specially designed to enforce the Thursday night agreement. This provision directed the courts to ignore any legislative history (such as the description of the agreement given by Senator Kennedy on Friday) apart from the two sentences agreed to originally. Senators Kennedy and Danforth objected to this proposal, while Administration negotiators felt they had to insist. Tense meetings ensued, and it seemed at points that there might be no civil rights bill after all.

On Tuesday, Senators Dole and Hatch engaged in heroic efforts to hold Senator Kennedy and his allies to the agreement. Republican Leader Dole's arguments were particularly effective -- that night, without any debate or a recorded vote, the Senate accepted a slightly modified version of the Administration proposal enforcing the deal.

Heroic efforts to enforce the agreement would not have been required unless something very significant were at stake. And there was. Buried in this dispute, as in so many of the earlier arcane debates over legal terminology, was the difference between maintaining current law essentially intact and creating a new quota monster. On the fundamental issue the President won a clean victory for equal opportunity, and that fact will survive the current round of fictions about some supposed political surrender.

FAIR
EMPLOYMENT
COALITION

COPY

October 31, 1991

DEDICATED

TO

EQUAL

OPPORTUNITY

FOR

ALL

AMERICANS

The President
The White House
Washington, DC 20500

Dear Mr. President:

The Fair Employment Coalition is extremely troubled by the agreement on civil rights legislation, S. 1745, that has been embraced by the White House and passed by the Senate. We believe it does not meet some conditions said by the Administration to be essential. In addition, we are anxious that this agreement may be an unfortunate precedent for similar accommodations on other issues in the future.

For nearly two years, the more than 250 companies, associations and professional societies that comprise the Fair Employment Coalition have worked hard in support of your efforts to arrive at an equitable resolution to the debate on civil rights. We supported alternatives in the last Congress and Coalition efforts in no small way contributed to sustaining your veto of the Kennedy-Hawkins bill. This year, we have worked hard to advance your legislative proposals, S. 611 and H.R. 1375. The Coalition has explicitly endorsed strong new remedies for harassment such as are contained in the Administration bill.

Throughout the lengthy debate on this legislation, no single issue has galvanized employer community opposition to the various civil rights proposals as jury trials for recovery of punitive and compensatory damages. This was clearly understood by the Congress and the Administration.

As recently as Tuesday, October 22, we were assured in meetings with your staff, by a letter from the Attorney General to Senate leadership and by the Statement of Administration Position on S. 1745 that the Administration's resolve to oppose legislation that constituted a "lawyers' bonanza" was unchanged. By sometime last Thursday, it evidently had changed as evidenced by Friday's headlines in the Washington Post.

Mr. President, neither the Fair Employment Coalition nor its individual members have enjoyed opposing any "civil rights" bill. We support equality of opportunity but could not ignore bad public policy. The Coalition and its members attempted on a number of occasions to

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seek a resolution with proponents who refused to consider change concerning jury trials and damages. We felt then and feel now that introducing tort-like remedies into the relationship between employers and their employees is ill-advised policy and should be opposed. Additionally, it runs counter to the very positive thrust of tort reform efforts initiated by your Administration. How long will it be before similar proposals are offered to amend other employment statutes, a question we raised with White House and Administration representatives as early as February 1990?

All this is history, the final chapter of which will soon be written by the House and Senate. It is not a history from which we take any comfort. And based on the phone calls we have received, our disappointment in the administration's change of position is not confined to the "beltway" -- it is a reflection of the Nation's employer community. In that regard, this letter is expected to be followed by those from individual coalition members.

Many issues of importance lay ahead. We hope and need to work in concert with the Administration. We can be counted on to do so on many issues of inevitable agreement between us, but cannot be looked to for automatic support or quiet acquiescence to "eleventh hour" changes in course to which we are not a party.

Respectfully,

THE FAIR EMPLOYMENT COALITION

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

October 23, 1991
(Senate)

STATEMENT OF ADMINISTRATION POLICY

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

S. 1745 - Civil Rights Act of 1991
(Danforth (R) Missouri and 6 others)

If S. 1745 were presented to the President in its current form, his senior advisers 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.

To suggest that the addition of eight words taken from the Americans with Disabilities Act ("ADA") represents an improvement in the definition of business necessity is incorrect. These words do not define "business necessity" either in the ADA (which uses "business necessity" as an <u>undefined term</u>) or in S. 1745. Nor does the use of these eight words materially alter the definition in S. 1745's predecessor bill (S. 1408). The same words could be inserted into the President's bill without changing its meaning. The Administration would have no objection to including these eight words in the President's bill.

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 unconstitutional. 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 bargaining away the rights of another group of employees.

S. 1745 would also create a lawyers' bonanza. It provides for jury trials and compensatory damages in all cases under Title VII of the Civil Rights Act of 1964, along with punitive damages in many cases. (As currently written, the bill would even make damages available in disparate impact cases, which goes beyond H.R. 1 and last year's Kennedy-Hawkins bill.) These damages provisions would 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 continues the congressional pattern of exempting itself from the civil rights laws. Although the bill includes provisions that purport to extend coverage to Congress, S. 1745 grants no judicially enforceable rights to congressional employees.

<u>The Administration's Proposal</u>

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 businesses, and the victims of discrimination, to endless and excessively costly litigation.

Like S. 1745, the Administration bill would overturn the <u>Lorance</u> and <u>Patterson</u> decisions; overturn <u>Wards Cove</u> 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 make available new monetary remedies under Title VII, up to $150,000, for victims of sexual harassment in the workplace. The Administration bill also includes special provisions creating incentives for employers to prevent and correct sexual harassment without waiting for lawsuits to be filed. Finally, the Administration bill extends 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.

* * * * *

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

This draft Statement of Administration Policy was developed by White House Counsel (Lund) and the Legislative Reference Division (Ratliff), in consultation with the Departments of Justice (Wise), Education (Bork), and Labor (McDaniel), EEOC (Moses), SBA (Dean), the White House Offices of Policy Development (McGettigan) and Cabinet Affairs (Luttig), and TCJ (Silas).

Differences from Bill Vetoed in 1990 and H.R. 1

S. 1745 is substantially identical to S. 2104 (a civil rights bill vetoed by the President in 1990) and to H.R. 1 (which passed the House on June 5, 1991, by a vote of 273-158), except for the following new provisions:

- Employers would have to demonstrate that challenged employment practices not involving selection bear a manifest relationship to a "legitimate business objective." S. 2104 required a significant relationship to a "manifest business objective." H.R. 1 requires a "significant and manifest relationship to the requirements for effective job performance."

- An employee would not have to identify specific practices that result in a disparate impact if the court finds that the elements of the employer's "decisionmaking process are not capable of separation for analysis." In that case, the decisionmaking process could be analyzed as one employment practice. S. 2104 required this identification unless the court found that the employer destroyed, concealed, refused to produce, or failed to keep records necessary to make that showing. H.R. 1 requires this identification unless the court finds that the employee after diligent effort cannot identify the practices from reasonably available information.

- S. 1745 would limit compensatory and punitive damages for intentional discrimination to a total of $300,000 (or less, in the case of employers with less than 500 employees). Like S. 2104, H.R. 1 caps punitive damages at the greater of $150,000 or the combined total of the amount of compensatory damages and back pay awarded in the case.

Recent Supreme Court Decisions and Related Provisions of S. 1745

S. 1745 is designed to reverse six recent Supreme Court decisions. These decisions and the related provisions of S. 1745 are described below.

-- Wards Cove

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

S. 1745 (Sections 7 and 8) overrides the Supreme Court in two ways. First, it places the burden on the defendant to demonstrate that an employment practice is "required by business necessity" if significant numerical disparities are found. Second, Section 7 defines the term "required by business necessity" as bearing a "manifest relationship to the employment in question" (for practices used as "qualification standards, employment tests, or other selection criteria") and as bearing a "manifest relationship to a legitimate business objective of the employer" (for other practices). Section 8 would relieve plaintiffs of the obligation to identify specific practices upon a demonstration that the elements of the employer's "decisionmaking process are not capable of separation for analysis." In that case, the decisionmaking process may be analyzed as one employment practice.

-- Price Waterhouse

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

S. 1745 (Section 10) provides that a violation of Title VII is proven if a motivating factor in an employment decision is shown to have been a complainant's race, color, religion, sex, or national origin. The term "motivating factor" is not defined, and it may not mean "causal factor." However, a court could not order a hire, promotion, or reinstatement if the defendant showed that the complainant would have not been hired, promoted, or retained even if discrimination had not been a factor.

-- Wilks

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

S. 1745 (Section 11) bars challenges to such consent decrees by non-parties if: (1) they had notice of the proposed judgment; or (2) their interests were "adequately represented" by another person who challenged the decree.

-- Lorance

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

S. 1745 (Section 14) specifies that where a seniority system has been adopted "for an intentionally discriminatory purpose," an unlawful practice occurs when the system is adopted, when an individual becomes subject to the system, or when a person is injured by the application of the system.

-- Patterson

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

S. 1745 (Section 4) specifies that the right to "make and enforce contracts" regardless of race extends beyond the formation of the contract to "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." S. 1745 would further specify that the prohibition applies to private as well as governmental discrimination.

-- Shaw

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

S. 1745 (Section 16) permits plaintiffs prevailing in Title VII discrimination cases against the Federal Government to recover "the same interest to compensate for delay in payment" as would be available in cases involving non-public parties.

Other Provisions of S. 1745

In addition, S. 1745 would:

-- Authorize jury trials and compensatory damages for intentional violations of Title VII and punitive damages when violations are committed with malice or reckless indifference to the rights of others. (Section 5)

-- Authorize awards of expert witness fees to prevailing parties in Title VII cases. (Section 15)

-- Authorize prevailing parties to recover attorneys fees in addition to other costs. (Section 6)

-- Lengthen the statute of limitations from 30 to 90 days for filing suits against the Federal Government following final agency actions. (Section 16)

-- Specify that the bill shall not "be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law." Unlike H.R. 1, the bill does not forbid quotas. (Section 18)

-- Provide that discrimination claims raised by Senate employees would be investigated and adjudicated by the Select Committee on Ethics, and that remedies available to House employees would be limited to those available under House Rules. (Section 19)

-- Prohibit employers from adjusting the scores, or otherwise altering the results, of employment-related tests on a discriminatory basis in connection with the selection or referral of applicants for employment or promotion. (Section 9)

-- Extend certain civil rights protections to U.S. citizens employed in a foreign country. (Section 12)

Administration Bill

On March 1, 1991, the Justice Department transmitted an Administration bill that was subsequently introduced as H.R. 1375/S. 611. Like S. 1745, the Administration bill would place the burden of proof on the employer to demonstrate "business necessity," overruling a contrary ruling in Wards Cove. However, the bill's definition of business necessity would be closer to the Wards Cove definition than S. 1745. The bill would also reverse Lorance and Patterson, consistent with S. 1745.

The bill does not contain the provision in S. 1745 that would bar certain challenges to consent decrees by non-parties. Instead, the bill expressly provides that the Federal Rules of Civil Procedure apply in determining who is bound by employment discrimination decrees.

The bill would make available new monetary remedies for victims of sexual harassment in the workplace. The provision provides for bench trials, and caps awards at $150,000. S. 1745, by contrast, would grant women and religious minorities the right to jury trials and monetary damages of up to $300,000 (or less, in the case of employers with less than 500 employees) for intentional discrimination.

Administration Position to Date

A Justice Department report on S. 1745 currently pending clearance states that the Acting Attorney General "and other senior advisers" would recommend a veto of the bill.

1990 Presidential Statement

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

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

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

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

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

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

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

According to TCJ (Silas), S. 1745 is not subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990 because it would not require any direct spending.

Legislative Reference Division Draft
10/23/91 - 11:40 a.m.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02a. Memo	From Bill Kristol to VPOTUS Re: Administration's Civil Rights Bill (1 pp.)	10/16/91	~~P-5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights (2 of 2) 1991 [4]

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

Date Closed: 1/3/2005	**OA/ID Number:** 29147-002
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]
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P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

OFFICE OF THE VICE PRESIDENT

WASHINGTON

October 16, 1991

THE CHIEF of STAFF
has seen

NOTE TO THE VICE PRESIDENT

FROM: BILL KRISTOL BK/ss

Shouldn't we heighten attention to the fact that our civil rights bill, but not the Democrats', would fully extend civil rights protections (including against sexual harassment) to the halls of Congress?

cc: John Sununu
Boyden Gray

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02b. Article	Roll Call, "Grassley: Expand Staff Rights Protection" (1 pp.)	10/10/91	~~P-5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights (2 of 2) 1991 [4]

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By [illegible] (NLGB) on 10/28/05

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ROLL CALL
October 10, 1991

Grassley: Expand Staff Rights Protection

Senator Wants Bill to Allow Hill Aides to Take Discrimination Cases to Federal Court

By Karen Foerstel

Saying he wants to bring Congress under the same laws that govern the rest of the country, Sen. Chuck Grassley (R-Iowa) announced Tuesday that he will introduce an amendment to the Civil Rights Bill that will allow Hill staffers to sue for discrimination.

While the current language of the Civil Rights Bill, which the Senate is expected to take up later this month, includes Congressional coverage, it allows staffers only to take their charges of discrimination to the Senate Ethics Committee.

Staffers, however, would not be allowed to bring their cases to court.

The reasoning for this "in-house" enforcement, many Senators say, is that allowing staffers a private right of action would breach the constitutional doctrine of separation of powers.

But Grassley said his amendment would solve the problem by allowing staffers to go directly to federal district court without having to first go to the Equal Employment Opportunity Commission.

"If there's concern about the executive branch unduly interfering with the activities of the legislative branch, we can fashion a remedy that excludes executive branch enforcement," Grassley said at the Tuesday press conference.

"We can allow for a direct cause of action in federal district court which is a simple solution to the argument against Congressional coverage."

Joining Grassley at the press conference were representatives of the National Federation of Independent Businesses, the National Taxpayers Union, the US Business and Industrial Council, and Citizens for Congressional Reform.

"How in the world can...Congress really know and understand the burden it puts on America when it doesn't even have to live under the law itself?" Grassley said. "As a result of this detachment, too many bad and onerous laws are passed."

Grassley cited the recent check-bouncing scandal and unpaid restaurant bills as examples of Congress's "detachment" from normal legal responsibilities.

Last year, Grassley unsuccessfully attempted to attach a similar amendment to the 1990 Civil Rights Bill, which was eventually vetoed by the President.

And earlier this month, Grassley tried to extend private right of action to Congressional workers under the Parental Leave Bill. Grassley, however, agreed to withhold the amendment and offer it instead to the new Civil Rights Bill in order to allow the Senate to begin deliberation of the nomination of Judge Clarence Thomas.

Under the House version of the Civil Rights Bill, which was passed by the House last June, enforcement of rules against discrimination of staffers is handled by the House Office of Fair Employment Practices (OFEP).

Last year, Congress passed and the President signed the Americans with Disabilities Act which extended coverage to Hill workers, again with "in-house" enforcement.

BOB DOLE
KANSAS

United States Senate

OFFICE OF THE REPUBLICAN LEADER
WASHINGTON, DC 20510-7020

FACSIMILE COVER SHEET

TIME: 5:10 p.m. **DATE:** Sept. 16, 1991

TO: Governor Sununu

FROM: Senator Dole

RE:

23 **PAGES TO FOLLOW THIS COVER SHEET**

COMMENTS: During the recess, I asked five outside experts to review the changes suggested in the Dole-Kassebaum letter. So far, I have received three responses, which I would like to share with you. I have also sent these to Boyden Grey's office.

SENT BY:

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PLEASE DELIVER A.S.A.P.

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September 3, 1991

OUR FILE NO.
09071.00001

VIA MESSENGER

Senator Robert Dole
United States Senate
Office of the Republican Leader
United States Capitol
Room S 230
Washington, D.C. 20510-7020

Re: Danforth Civil Rights Proposals

Dear Senator Dole:

Thank you for asking me to review and comment upon Senator Danforth's proposed civil rights bills, and the modifications to those measures suggested by yourself and Senator Kassebaum. I hope that my comments prove useful in considering this important legislation.

Before addressing the specific provisions in question, let me commend you, Senator Kassebaum and Senator Danforth for your attempts to mediate the different approaches in this area in order to achieve a compromise acceptable to all of the various interested parties and in the national interest. I know these efforts have been difficult, and everyone concerned with ensuring civil rights in America is in your collective debt.

Senator Danforth's three bills, while a substantial improvement over H.R. 1 and the civil rights bills passed by both the House and Senate last year, still are very far reaching measures that go well beyond reversal of five troublesome Supreme Court rulings. Indeed, the Danforth bills embody all of the essential elements of prior legislative proposals. For this reason, these bills still suffer from the defects inherent in prior legislation in several key areas. In response to your request, however, I have addressed only those areas in which you and Senator Kassebaum have proposed alteration of the Danforth proposals.[1/]

Remedies

1. The Danforth Proposals

One principal area of concern lies in remedies. I have made my views on expanded remedies under Title VII quite clear in prior comments and testimony, and will not repeat those views at length yet again. I summarized my thoughts on this subject in a letter to you, dated October 10, 1990, discussing last year's proposals:

> I am firmly convinced that the basic Title VII remedial structure -- administrative conciliation, restorative relief rather than damages and bench rather than jury trials -- remains appropriate for the vast majority of Title VII cases. There may be some situations where some variance from this scheme is called for; for example, in harassment cases where there is no economic remedy available under current law. If Congress wishes to supplement existing remedies in these areas, it should do so specifically. It should not turn Title VII into a national tort law, at a time when tort law has shown itself so troublesome in so many areas of our society.[2/]

1/ I have not addressed collateral attacks to consent decrees, an issue raised by the Supreme Court decision in Martin v. Wilks, 109 S. Ct. 2180 (1989), because I wrote an *amicus curiae* brief to the Supreme Court in the Martin case, and actively participated in the advocacy of the losing side before the Court.

2/ You were kind enough to insert my comments into the Congressional Record on October 16, 1990, beginning at S 15350. I would be happy to send you other materials I have prepared on this issue, including testimony on H.R. 1 earlier this year.

Nothing has altered my fundamental conviction on this score. Senator Danforth apparently does not agree with me; his bills continue to allow compensatory and punitive damages, and jury trials, for all Title VII cases involving "intentional discrimination." I believe that this proposal, even with limitations on the amount of compensatory or punitive damages, threatens to disrupt Title VII's successful remedial mechanism.

The principal reason that I am concerned about the enhanced remedies embodied in the Danforth proposals is that they would apply to the vast majority of Title VII cases. Lest there be any misunderstanding, "intentional discrimination" is a term of art under Title VII, and has come to encompass all cases that are not premised upon a "disparate impact" theory of discrimination. "Intentional discrimination" claims do not necessarily involve malicious or intentional bigotry. These cases do not require direct proof of wrongdoing, and in my experience cases of "intentional discrimination" involving direct evidence of animus are quite rare.

Instead, the normal individual "intentional discrimination" claim is based wholly upon circumstantial evidence, and is tried according to a paradigm of proof established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under these standards, a plaintiff seeking to prove "intentional discrimination" initially must show that he or she is a member of a protected group; was qualified for and sought a particular opportunity; was rejected; and that thereafter, the employer continued to seek others for that opportunity. If the plaintiff can meet this initial burden, the employer must articulate a legitimate non-discriminatory reason for the plaintiff's treatment. If the employer does so, the plaintiff then must prove that this reason is a pretext; that is, that it is not the true reason for the employer's action. At no point in this sequence is direct evidence of intentional wrongdoing required.

The Danforth bills would allow compensatory and punitive damages, and jury trials, in such individual "intentional discrimination" cases. Additionally, it is vital for members of the Senate to understand clearly that

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these enhanced remedies and jury trials would be readily available in class actions under Title VII. As stated above, "intentional discrimination" encompasses a wide variety of claims, including any Title VII case not premised upon the disparate impact theory of discrimination. Many Title VII class actions involve claims of unequal treatment that plainly fall within the world of "intentional discrimination" as that term is used under Title VII.

In such "disparate treatment" class actions, the plaintiff generally must prove a pattern or practice of discrimination. To do so, plaintiffs often depend heavily upon statistical evidence. For example, in a disparate treatment class action attacking an employer's promotion policies, a minority plaintiff might use statistics to show that fewer minorities are promoted than would be expected by their presence in the relevant pool in the workforce. This is much the same premise that would be used in a disparate impact case, which would arise if the plaintiff chose to attack one specific aspect of the promotional process (e.g., an allegedly unlawful test) as opposed to the results of the promotion process as a whole.[3/] Moreover, many courts regard the same level or quantum of statistical proof as probative of discrimination under both theories. See, e.g., Kilgo v. Bowman Transportation, Inc., 789 F. 2d 859 (11th Cir. 1986); Diaz v. AT&T, 752 F. 2d 1356 (9th Cir. 1985). While most courts require some anecdotal evidence in disparate treatment class actions, on the theory that statistical evidence alone may not prove that the employer's "standard operating procedure" is discrimination, this trend is not uniform, and in any case introduction of some such evidence does not present a substantial barrier to recovery if adequate statistical evidence is available.

In other words, both the disparate impact and disparate treatment theories are usually available in any given class case, with the result that the expanded remedies, and jury trials, made available under the Danforth proposals would be regularly used in Title VII class actions. Moreover, given the pivotal role statistics often play in pattern or practice class actions, the availability

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3/ In a disparate impact case, plaintiffs also typically would demonstrate that the specific employment practice has a disparate or screening impact.

of enhanced remedies in such cases would generate substantial pressure for employers to avoid such actions in the first place. It is ironic that those who have criticized current civil rights proposals for imposing too much pressure upon employers to balance their workforces have not recognized that making class action remedies much more costly is as important in this regard as is too strict a definition of business necessity. If class action remedies are significantly enhanced, as the Danforth bills propose, risk-averse employers desirous of avoiding large potential liability naturally will attempt to avoid liability, presumably through eliminating any statistical disparities that might generate litigation.

To be sure, the Danforth proposals place caps on the recovery of damages, and these are preferable to unlimited damages. But these caps do not cure the fundamental problem. Under Senator Danforth's bills, the vast majority of Title VII cases would involve compensatory and punitive damage claims and would be tried to juries. This would result in a fundamental alteration of Title VII's remedial scheme, and would sacrifice prompt resolution of employment discrimination claims in favor of protracted litigation.

None of the arguments made by the proponents of this legislation are sufficient to justify this wholesale revision of Title VII's basic remedial structure. I have discussed the arguments of the proponents at some length elsewhere, and in the interests of brevity I will not recapitulate my views in this letter.[4/] I hasten to add, as stated above, that enhanced remedies are appropriate under Title VII in some situations. Providing economic remedies for workplace harassment is fully justified. But this limited remedial flaw in the current statute is no reason that the statute's basic remedial scheme should be jettisoned. Title VII is a very successful statute, and it should not be transformed into a national employment discrimination tort claims act.

4/ I would be pleased to provide you with a complete discussion of these matters if this would be helpful.

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2. The Dole-Kassebaum Alternative

The alteration that you and Senator Kassebaum have suggested in response to Senator Danforth's bills is a step in the right direction, but in my view incorrectly concedes that Title VII remedies are in need of a generic revision. I agree with you that the legislation would be improved by characterizing the enhanced remedies as "equitable monetary relief" and limiting jury trials to determinations of liability, as opposed to awards of damages. At the very least, this step would simplify the issues to be presented to the jury, and allow more expeditious resolution of Title VII cases. It also would provide less incentive for litigation as opposed to prompt resolution of employment discrimination claims.

Jury Trials

Nonetheless, I do not believe the evidence is sufficient to justify your willingness "to accept the principle of jury trials to determine liability in intentional discrimination cases." Indeed, as stated above, I believe the arguments offered by proponents of this legislation are insufficient to justify extension of jury trials and enhanced remedies to the broad universe of Title VII "intentional discrimination" cases. Moreover, limiting juries to determination of liability will not eliminate the evil that will arise from wholesale expansion of Title VII remedies; that is, undermining the system of administrative conciliation wisely inserted in Title VII in 1964. The enhanced remedies contemplated by the Danforth bills, even as modified by your proposal, would result in dramatic disruption of Title VII's existing remedial scheme.

I would urge you and Senator Kassebaum to reconsider your proposal, and specifically to consider whether the enhanced remedies proposed by Senator Danforth are justified for all Title VII "intentional discrimination" cases. As I have explained above, this is a broad universe of claims, and expanding remedies for all such actions would involve a substantial alteration of Title VII. I believe the expanded remedies that you and Senator Kassebaum contemplate would be quite useful in cases where there is a need for expanded remedies, such as workplace harassment. Indeed, the expanded remedies for workplace harassment contained in the Women's Equal Opportunity Act of 1991 (S. 472) that you introduced earlier this year seem to me a well-considered response to a significant problem. But in the absence of some showing that there is a need for additional remedies and jury trials in all "intentional discrimination" cases, there is no justification for deforming Title VII's remedial structure.

Cumulation of Practices

1. The Danforth Proposal

The "particularity" or "cumulation" problem that has arisen in connection with this legislation is a problem of substance. This problem is exemplified in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), in which plaintiffs alleged that the employer's hiring practices, taken as a whole, were unlawful because the result of those practices was an unbalanced workforce. The Court in Wards Cove held that a plaintiff could not engage in a wholesale attack upon an employer's practices, based upon proof that the employer's selection process taken as a whole yielded fewer successful minority candidates than would have been expected given the pool of qualified candidates available. Rather, the Court stated that a plaintiff was obliged to determine which specific employment practice was being challenged.

This step is vital if the Title VII inquiry is not to devolve into a pure search into whether the employer has hired or promoted by the numbers. This is particularly true in cases involving higher level jobs, where a number of subjective factors may contribute to the employer's decisions. If a plaintiff can attack those practices on a "bottom line" basis, the employer's opportunity to defend itself is severely truncated and there will be tremendous pressure to avoid litigation at all costs.

On the other hand, there may be situations where a plaintiff simply cannot parse an employment process up into its constituent parts for purposes of analysis. When this happens, and where the plaintiff can prove that the employment process, taken as a whole, has a significant disparate impact upon a protected group, it exalts form over substance to dismiss the case.

Senator Danforth's proposal attempts to encompass both situations, and offers a significant advance over prior

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bills insofar as it provides that the plaintiff can only attack an identified practice absent proof that the elements of the decision-making process are not susceptible of separate analysis. This basic principle, adapted from the Wards Cove case, is the only logical way to avoid pure "by the numbers" litigation. In cases where a plaintiff can prove that an employer's decisional process cannot be segregated for analysis, the process may be attacked as a whole, assuming it creates a disparate impact as a whole. Moreover, the Danforth bill still would allow an employer, in a case in which a global challenge is allowed, to avoid justifying any given practice under the "business necessity" doctrine by proving that the practice did not cause the disparate impact (i.e., was race or sex neutral).

2. The Dole-Kassebaum Alternative

Unfortunately, the Danforth proposal departs from the sensible principles enunciated in Wards Cove by repeatedly speaking of whether a particular employment practice causes the disparate impact "in whole or in significant part." Like you and Senator Kassebaum, I believe inclusion of this phrase in this legislation is very unwise. Indeed, I believe the use of such language stems from basic confusion about this issue, and that its inclusion in the bill will result in significant confusion and perhaps unintended consequences in the courts.

Cumulation

The focus of the disparate impact theory has been and should continue to be upon the use of criteria that unfairly hamper the employment opportunities of members of protected groups; on practices that the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971) described as "built-in headwinds" hampering full employment of members of protected groups. Where practices have an adverse impact, it is appropriate to place the burden on the employer of justifying their continued use despite their adverse impact. Where practices do not have such an impact, and thus do not disadvantage members of protected groups, their use should be committed to the employer's judgment.

The Danforth proposals appear to confuse two separate issues on this score; the adverse impact of the entire decisional process, and the adverse impact of any individual segment of that process. In a case where the elements of an employer's decisional process may be

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segregated for the purposes of analysis, determining whether any one of those elements has a disparate or screening impact on members of a protected group is relatively straight-forward. Well-accepted statistical principles regularly are utilized by the courts to determine whether any given practice (e.g., an employment test or educational qualification) has a disparate or screening impact upon members of protected groups. These principles are fully adequate to decide whether a particular standard adversely affects members of a protected group.[5]

In these circumstances, there is no reason to add a link between the individual selection criterion and the ultimate disparate impact of the entire selection process, which is what the Danforth proposals appear to do. The appropriate measure is the impact of the practice itself. If a selection criterion causes a disparate impact, it can be challenged under the disparate impact theory, regardless of whether it contributes "in whole or significant part" to any ultimate disparate impact. If the practice itself does not cause a disparate impact, it should not fall under the disparate impact theory, regardless of its relationship to any ultimate bottom line impact.[6]

5/ The normal method for such analysis lies in standard tests of statistical significance, originally used in jury selection cases (e.g., Castenada v. Partida, 430 U.S. 482 (1977)) and later adapted to Title VII and other discrimination claims. (See, e.g., Hazlewood School District v. United States, 433 U.S. 299 (1977)).

6/ Of course, this would be different if the employer were allowed to defend its selection practices on a "bottom line" basis. This would occur, for example, where an employer could show that its employment process was justified, even though it contained one of more screening tests, because taken as a whole it produced results consistent with the percentage of protected group members in the selection pool. The bottom line defense was rejected by the Supreme Court in Connecticut v. Teal, 457 U.S. 440 (1982), and no legislator has suggested that it be reinstated in connection with these bills. Absent such a defense, there is no rationale for tying the impact of a particular practice to the impact of the entire selection process.

Allowing challenges to practices that account for a disparate impact "in significant part" is nothing more than a thinly disguised method of stating that Congress is willing to allow challenges to practices that in fact do not cause a disparate impact. There is no warrant for allowing challenges to practices that do not hamper the employment opportunities of members of protected groups; by definition these practices do not serve as "built-in headwinds". It is difficult to see why their use should be of concern under a law designed to prohibit employment discrimination.

Moreover, allowing challenges to practices that do not cause a disparate impact opens the back door to the problem that the Court recognized in Wards Cove; attacks on the entire selection process, rather than unfair individual components of those processes. Allowing attacks on the entire selection process should be limited to cases where the entire process is so intertwined that it cannot be segregated for analysis. In such cases, and only in such cases, should the bottom line impact of the process be of significance. In such cases, an employer should be allowed to demonstrate that one or more components of its process does not cause or contribute to the bottom line impact in whole or significant part, and thus avoid the difficult task of justifying a practice under business necessity standards. And in such cases, the plaintiff should be able to controvert this proof, and demonstrate that one or more element of the selection process in fact does cause or contribute in significant part to the bottom line disparate impact. The linkage between individual components of a decisional process and the bottom line impact of that process should be of significance only in such unusual cases. There is no justification for going further, and allowing attacks on practices that do not themselves have a disparate impact on the grounds that these practices somehow contribute to the bottom line impact.

6/ (...continued)
defense, there is no rationale for tying the impact of a particular practice to the impact of the entire selection process.

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Business Necessity

1. The Danforth Proposal

An appropriate definition of "business necessity" is central to this legislation. An unduly strict definition of business necessity would lead employers to abandon merit-related selection criteria, because the standards for their justification would be too stringent. There seems to be general agreement that the business necessity standard initially enunciated in Griggs v. Duke Power Company, 401 U.S. 424 (1971), and developed by the federal courts during the 20 years since the Griggs decision, represents an appropriate accommodation of the competing interests involved.

Senator Danforth's proposal, like so many others that have made their way into Congress, attempts to distinguish between employment practices that "are used as job qualifications or used to measure the ability to perform the job" and other practices, thus creating two different business necessity standards. I never have understood the need for two business necessity standards; the Court's decision in Griggs created only one standard. Two standards surely will lead to uncertainty and increased litigation, especially concerning what definition applies in any given case. The Griggs test was clear and simple. The Court held that where an employment practice is shown to have a disparate impact upon the employment opportunities of a protected group, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S., at 432. That concept has been elucidated by the federal courts during the past twenty years, and until the controversy over Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989), no one (in my memory) in the civil rights community argued that Griggs was not stringent enough.

Assuming there is some need for creating two different business necessity standards, there are two critical requirements; first, creating definitions that are appropriate, and second, determining when each definition applies. The Danforth proposal is better than prior efforts in the first respect because it uses the appropriate language from Griggs -- manifest relationship to the employment in question -- as the criterion in cases of employment practices that "are used as job qualifications or used to measure the ability to perform the employment in question." Moreover, the Danforth proposal also uses a broader phrase -- manifest relationship to a legitimate business objective of the employer -- as the standard for all other employment practices. The proposal also appropriately recognizes that the "employment in question" must encompass not only the ability to perform the job, but "any requirement related to behavior that is important to the job." This language is absolutely necessary to ensure that important aspects of behavior (e.g., absenteeism) may be the basis for selection criteria.

2. The Dole-Kassebaum Alternative

But the Danforth proposal fails to clarify the vital issue of when each standard applies, and in so doing creates serious potential problems. In particular, it is difficult to see how any employer would rely on any employment standards that are not "job qualifications." Virtually any requirement relied upon by an employer can be deemed a "job qualification", and thus fall within the first prong of the definition. If this is so, one wonders why the proposed legislation contains a second definitional clause. Moreover, to the extent that all job qualifications are to be judged under the "manifest relationship to the employment in question" standard, and that standard is tied to performance of "actual work activities ... for a job or class of jobs", there is some question as to the employer's ability to hire the best qualified employees, as opposed to those possessing only minimum competence to perform the job.

Business Necessity

I believe the alteration that you and Senator Kassebaum have suggested -- that prong one of the definition be limited to cases dealing with job qualifications that are used to measure the ability to perform the job -- meaningfully delineates between the two prongs of the definition, and solves many of the problems inherent in the Danforth proposal. Prong one of the definition obviously is meant to refer to performance-related criteria, measuring the employee or applicant's ability to perform a particular job. Prong two of the definition just as clearly refers to broader criteria, insofar as it discusses a "legitimate business objective of the employer." If there is to be a meaningful distinction between the two prongs of the definition, it surely should correspond with the purpose of

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the definitions themselves. Employers should be allowed to justify criteria that are not directly concerned with job performance (e.g., measures designed to ensure public safety) under standards that correspond to their underlying concerns. Moreover, an employer's right to hire the best possible workers would be safeguarded more adequately by your language than by Senator Danforth's provision standing alone. Your alternative seems to accomplish this goal while preserving the essential aspects of the Griggs principle.

With the alteration that you and Senator Kassebaum have suggested, I believe the Danforth proposal would provide a business necessity standard that satisfies the essential requirements of this legislation. I would like to make it clear that I do not share the view expressed by some that the Danforth proposal is flawed because it does not afford preference to those with greater educational achievement, whether or not such achievement is related to job performance. I agree with critics of the Danforth proposal, such as EEOC Chair Kemp and Secretary of Education Alexander, that our society places too little emphasis upon educational achievement, and that we should do everything possible to encourage young men and women to stay in school and obtain an education. I do not agree, however, that the equal employment laws should be altered to reward educational achievements if those achievements are not related to the work being performed. A fork-lift driver with an advanced degree in Chinese may be a more interesting person than someone with a grade school education, but there is no rationale for an employer preferring someone with this level of educational achievement if the result is to disadvantage minorities who have had less opportunity for advanced education. In this regard, I believe the Griggs principle strikes an appropriate balance that should be maintained in this legislation.

Once again, I hope that these comments will be useful to you. I would be happy to expand upon them, or to clarify any portion of them, at your convenience.

Very truly yours,

Zachary D. Fasman

ZDF/djw

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September 9, 1991

Honorable Bob Dole
Republican Leader
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Washington, DC 20510-7020

Dear Senator Dole:

This is my response to your invitation to comment on the modifications you and Senator Kassebaum have proposed to the civil rights bills (S. 1407, S. 1408 and S. 1409) introduced by Senator Danforth. I will address your proposed modifications to each of Senator Danforth's bills in the numerical sequence of those bills.

1. CIVIL RIGHTS RESTORATION ACT OF 1991 (S. 1407)

Before commenting on your proposals and the Danforth provisions on Martin v. Wilks, I want to advise you that I filed an amicus brief on behalf of the Legal Defense Fund in Martin v. Wilks when that case was before the Supreme Court. I did so because I believe it is important to effective and efficient settlement of discrimination complaints that employers and other respondents be able to resolve such complaints without subjecting themselves to repeated challenges by others affected by the resolution. As a result, while I do not favor retroactive reversal of Martin v. Wilks (or of other Supreme Court decisions), I do support prospective change in the law concerning collateral attacks on judgments or orders resolving employment discrimination complaints.

Martin v. Wilks

You and Senator Kassebaum have proposed three changes to the Danforth provisions on Martin v. Wilks. The principal one of these three would eliminate the provision barring collateral attacks by individuals who did not have actual notice of the proposed judgment or order but whose interests were "adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation."

I appreciate your belief that it is "fundamentally unfair" to bar challenges to judgments or orders by affected persons who did not have actual notice of such judgments and orders. Nevertheless, it seems to me that basic due process considerations are satisfied if one's interests in civil litigation are adequately represented by others similarly situated. Under Rule 23 of the Federal Rules of Civil Procedure, we already have a procedure for binding class members who may not have actual notice of litigation but whose interests are adequately represented by others.

While the Danforth provision does not require the kind of class certification or notice to class members provided in Rule 23, in practice it might function similarly. Perhaps your concerns could be met if these requirements were made more specific.

The second significant change you propose in the Danforth provisions on Martin v. Wilks is to limit the employment practices that will be insulated from collateral attack to those "specifically required" by a judgment or order. The Danforth provision would insulate a practice if it "implements and is within the scope of" a judgment or order.

Your desire to bar collateral attacks only when necessary for compliance with judgments or orders is understandable. However, actions may be "necessary" that are not specifically or at least expressly required by the judgment or order. While these problems could be met by specifying requirements in judgments or orders or in subsequent hearings, this may burden the parties and the courts with time consuming details.

I recommend that you reconsider if actions that are taken in good faith compliance with judgments or orders should not be protected from collateral attack if the other requirements for such protection are met.

Your third proposed change in the Danforth Martin v. Wilks' provisions is to substitute "challenge" for "present objections to" in the two places where the latter words are used. This does not appear to be a significant substantive change and should not be controversial.

2. EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1991 (S. 1408)

You have proposed five changes to Senator Danforth's provisions concerning Ward's Cove and disparate impact analysis. As you may know, I testified before the House Education and Labor Committee in 1990 in opposition to the Ward's Cove provisions of the Kennedy-Hawkins Bill. A copy of that testimony is attached for your information. I do not believe that either the bill passed by the House this year or Senator Danforth's bill adequately resolve my concerns.

Alternative Business Practice

Most of your proposals are ones I would support, especially your proposed substitute paragraph (K)(1)(C) which would make clear that cost is an appropriate consideration in judging the suitability of a proposed alternative employment practice. To my knowledge there is nothing to the contrary in any Supreme Court decision on this issue and at least two courts of appeals have declared that costs are an appropriate consideration in applying the suitable alternative language of Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). See Clady v. County of Los Angeles, 770 F.2d 1421, 1426 & n.1 (9th Cir. 1985), cert denied 475 U.S. 1109 (1986); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1263 (6th Cir. 1981).

References to Supreme Court Cases

I also favor deletion of the reference to Griggs and Ward's Cove as you propose, because I do not believe that all of Ward's Cove should be rejected (e.g., its description of suitable alternatives) and because I do not believe that "codifying" Griggs adequately deals with all of the issues that twenty years of disparate impact litigation have revealed.

Cumulation

I also support your proposal to eliminate the phrase "in whole or in significant part", because it seems to me that if the challenged practice or practices do not cause a statistically significant disparate impact by themselves, there is no basis for a liability determination.

As I testified last year, however, I question the appropriateness of requiring plaintiffs to identify one specific practice that is causing the disparity if the employer has so mingled selection considerations that the specific cause of the disparity is undiscoverable.

Business Necessity

Finally, I see merit in your proposal to limit the practices that must be justified by showing that they bear a manifest relation to the employment in question, to practices that are both job qualifications and that measure ability to perform the job. Your proposal would permit other nonperformance based job qualifications to be justified if they bear a manifest relationship to other legitimate business objectives of the employer. It is a fact that all legitimate job qualifications are not performance based and Senator Danforth's proposed definition of the term "employment in question" recognizes this. (S. 708, Section 5 proposing subsection 701(o)). Your proposal seems to me appropriate further recognition of this same fact.

3. <u>CIVIL RIGHTS AND REMEDIES ACT (S. 1409)</u>

You propose characterizing compensatory and punitive damages to be issued under Title VII as equitable monetary awards and to require a judge to determine the amount of the award after a jury determines liability.

I agree with your comment that the proposal that compensatory and punitive damages be added to Title VII is in no way a "restoration" of what civil rights law was before the Supreme Court's 1988-1989 term. (The same can also be said about a number of the other changes contained in the Danforth bills including the <u>Price Waterhouse</u> provisions and some of the <u>Ward's Cove</u> revisions.)

I also see no reason to introduce jury trials into Title VII litigation unless it is concluded that additional monetary awards should be provided and it is determined that those awards constitute damages to which a constitutional right to trial by jury attaches. If there is no constitutional right to a jury to decide on such monetary awards, I would question the reason for providing a jury trial only on liability.

I hope the above comments are helpful and would be glad to discuss these matters in more detail with you or your staff.

Sincerely,

N. Thompson Powers

N. Thompson Powers

Enclosure

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September 3, 1991

Hon. Bob Dole
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Office of the Republican Leader
Washington, DC 20510-7020

Dear Senator Dole:

At your request, I have reviewed the Dole-Kassebaum proposals to amend the three civil rights bills you sent me, each dated June 27, 1991 at 1:00 p.m. I gather that these three bills taken together are the Danforth proposal. Needless to say, the views expressed in this letter and personal, and do not represent The University of Texas.

1. **Martin v. Wilks.** The problem of judgments or consent decrees that override the rights of third parties is not unique to civil rights litigation. In my judgment, it can be adequately handled by existing procedures for mandatory joinder and class actions, and no legislation is necessary. Legislation to simplify the procedures for binding third parties should scrupulously protect the rights of those third parties. It should not be a disguised effort to legislate their rights away.

The Danforth proposal is a considerable improvement over earlier drafts on this issue. As a practical matter, § (*l*)(1)(B)(1) will require that formal notice be sent to affected third parties. Informal notice through press reports and word-of-mouth will rarely make clear that affected third parties could present objections by a date certain. The requirement in § (*l*)(1)(B)(ii) of adequate representation by a person "with a similar factual situation" will usually require a challenge by another employee or applicant, and will generally exclude claims that the employer was an adequate representative. The requirement that the earlier challenge be on "the same legal grounds" eliminates the possibility of a legal theory being waived by an earlier challenge. The legislative history should emphasize these requirements.

a. **"Implements" or "specifically required by."** You propose to strike "implements and is within the scope of," and substitute "is specifically required by." This would be a good change. Other employees should not lose their right to challenge discrimination against them because the employer has made a discretionary decision to do something that helps implement a prior decree. An employer who is discriminating against employees on the basis of race, and claiming the protection of an earlier judgment, should be doing something required by the judgment.

b. **Adequate representation.** You also propose to delete § (*l*)(1)(B)(ii), providing that an employee is barred if his interests were adequately represented by another person who challenged the judgment on the same legal grounds and with a similar factual situation. This matters more in theory than in practice, but it would be important even in practice if the whole package of bills is enacted.

Your proposal is certainly correct in theory and in general legal principle. The standard rule of res judicata is that one litigant's claim is not barred by an earlier litigant's similar claim unless the first litigant were authorized to represent the second. But it is easy to exaggerate the practical significance of this. If the second suit is tried to a judge, and especially if it is tried to the same judge, as the Danforth proposal requires if possible, the second litigant will face a difficult burden of persuasion. The judge will know that the plaintiff is raising objections that have already been litigated and rejected. Getting the judge to take a second challenge seriously, or even to allow adequate time for a full trial on the merits, will be very difficult.

The legal right to your own day in court matters most when there is truly independent fact finding, and that means, when there is a right to jury trial. If the second employee to challenge the decree can try his claim to a jury, the jury will not know about the first challenge. With a jury trial, it may make a real difference whether later claims are bound by the disposition of earlier claims.

A suit to enjoin the operation of an affirmative action plan, either across the board or to the extent of hiring or promoting the plaintiff, would be an equitable claim and tried to a judge. With respect to that claim, I think your proposed amendment is of limited practical significance.

But a suit for damages for intentional discrimination would be a legal claim, triable to a jury, under one of the other bills in the Danforth package. An employer who prefers a minority employee pursuant to a judicial decree is acting intentionally; the only question is one of justification. A white worker disadvantaged by such a preference, who was willing to waive his right to the job and simply sue for his lost pay or other damages, ought to be entitled to a jury trial. With respect to that claim, your proposal makes a practical difference, and your proposal is more consistent the traditional law of the right to be heard.

Not True

c. "Reasonable opportunity to object." Your proposals do not address what seems to me to be the greatest weakness in the Danforth proposal. The bill does not define ""reasonable opportunity to present objections." What legal standard applies to these objections? Someone should have to prove, in a hearing to which the claimant is a party, that the employer violated the law and that an adequate remedy for the proven violation necessarily requires discrimination against the claimant. Anything less than that takes away the claimant's civil rights without due process.

The Danforth proposal does not explicitly say this. It may be read as requiring a mere "reasonableness hearing," in which there is no stated legal standard, and it is enough that the employer might have violated the law and that affirmative action is a fairly debatable remedy. Everything would be de facto presumed in favor of the decree and against the claimant. Such a hearing would be a charade, but that is what was allowed in some of the cases prior to *Martin v. Wilks*. See the cases collected in Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. Chi. Legal Forum 103, 137 n.144.

If Congress is going to legislate in the area, it should clarify the substantive standard. I would rewrite § (*l*)(1)(B)(i) as follows:

> (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, to litigate the claim that such person has rights inconsistent with the judgment or order; and

(II) ~~a reasonable~~ an opportunity to ~~present objections to such~~ litigate the claim that such person has rights inconsistent with the judgment or order; or

Then, I would add an additional subparagraph, something like the following:

(C)(i) If, in an action claiming employment discrimination in violation of the Constitution or Federal civil rights laws, a person objects to an employment practice required by a proposed remedy on the ground that the practice would violate such person's own rights under the Constitution or Federal civil rights laws, and the objecting person demonstrates that he would be disadvantaged because of his race by the proposed practice, then the person urging the proposed practice must demonstrate every element of a claim that the objecting person's rights under the Constitution and Federal will not be violated.

(ii) If, in an action challenging an employment practice described in subparagraph (A), the complaining party demonstrates that he has been disadvantaged because of his race by the challenged practice, then the person defending the challenged practice must demonstrate every element of a claim that the complaining party's rights under the Constitution and Federal have not been violated.

Note that this proposal does not specify what a plaintiff of one race must show to override the nondiscrimination rights of workers of other races. It does not try to resolve the debate over affirmative action. It simply says that whatever the elements of a claim to racial preferences are, affected workers of the other race are entitled to be heard on every element of that claim. I don't know whether this amendment is politically viable, but your efforts to guarantee a hearing may be of little moment unless you specify the purpose of the hearing.

2. Proof of disparate impact.

a. "Practice" or "practices." Your propose to strike "or particular employment practices" and "or practices" where ever they appear in § (k)(1)(B)(i). This suggestion is sound. Even after your proposal, the subsection would authorize cumulation of practices where "the elements of a respondent's decision-making process are not capable of separation for analysis." That would seem to be the only legitimate reason for cumulation. If the practices can be separated for analysis, they should be.

I tried to think of a case in which "or practices" might matter. I came up with this one: suppose an employer has one practice -- say a test -- that is readily isolated for analysis, and other practices that cannot be separated for analysis. The last proviso of § (k)(1)(B)(i) may not handle this situation; the language seems to contemplate either a practice-by-practice analysis or a unitary analysis of the whole "decision-making process." Perhaps Senator Danforth intended "or practices" to cover a multi-practice part of the decision-making process.

You can handle this problem by adopting your proposal to strike the references to "practices," and by rewriting the final exception as follows:

except that if the complaining party can demonstrate to the court that ~~the~~ two or more elements of a respondent's decision-making process are not capable of separation for analysis, the ~~decision-making-process~~ inseparable elements may be analyzed as one employment practice.

Unless I have missed something, I think that this would serve both your goals and Senator Danforth's.

b. "In significant part." Your other proposal is to strike "in whole or in significant part" where ever it appears. I am not aware of any case that has considered whether a practice can cause disparate impact in significant part. My initial reaction was that I simply did not know what this phrase meant or what cases it was intended to cover.

But I may have thought of a case, and I am not sure what is the best way to handle it. Consider a typical hiring process for a highly competitive white collar position. The hiring officer or committee attempts to predict success in the position and the career to which it leads, based on an assessment of the whole person and the whole file. They may use many predictors, no one of which is controlling. At and near the entry level, one predictor will be grades in college or professional school. The other predictors may be more subjective -- interviews, recommendations, writing samples, etc. Suppose the whole decision-making process has disparate impact, and that grades would have disparate impact if they were used alone.

One way to handle this is to say reliance on grades causes "in significant part the disparate impact." Therefore, the employer must show the business necessity of relying in part on grades. The other way to handle it is to say the elements of the employer's decision-making process cannot be separated, so the employer must show the business necessity of the whole process. Your amendment would leave only the second alternative; it would eliminate the first.

It may be easier for both sides to litigate the business necessity of a discrete practice like reliance on grades than to litigate the business necessity of the whole decision-making process. You may be taking away the more manageable option. On the other hand, leaving the more manageable option available would not preclude a plaintiff from trying to litigate the business necessity of the whole decision-making process. And we do not know what other meanings "in significant part" may turn out to have. It is a wildcard phrase, and I may even be wrong even about its core meaning. So I would not argue strongly for leaving it in. But neither am I sure it should come out.

c. Equally effective alternative.

You propose a substitute for Senator Danforth's § (k)(1)(C) on equally effective alternatives. One of the changes incorporates your suggestions to delete all references to "practices" and to "in significant part." Most of the others are stylistic and do not appear to affect meaning. Two changes appear to be substantive and independent of those discussed above.

a. Serving legitimate interests as well. You would elaborate on what it means to "serve the respondent's legitimate interests as well" as the existing practice. You would specify: "comparable in cost and equally effective in predicting job performance or serving the respondent's legitimate interests." This makes clear that cost matters, and that predicting job performance is only one of respondent's legitimate interests.

These are both helpful clarifications. A substantially more expensive alternative does not serve the employer's interests "as well," but that should not be left to inference. Neither proposal defines the scope of the respondent's "legitimate interests," and there will be arguments about that under either draft. But your proposal eliminates the argument that predicting job performance is the respondent's only legitimate interest.

b. More than negligible improvement. You would also eliminate Danforth language that the alternative must "make a difference in the disparate impact that is more than negligible." This is probably not very important; negligible differences are presumptively negligible. But the Danforth language eliminates the possibility of a plaintiff showing an alternative that would make a trivial difference, and then claiming that all persons rejected under the old practice are entitled to a remedy. I would be inclined to leave the Danforth language in.

3. Business necessity. You propose to substitute "and" for "or" in paragraph 1 of the Danforth definition of business necessity. Your proposal is so obviously an improvement that I suspect the Danforth language may just be a drafting error. Paragraphs 1 and 2 of the definition divide all employment practices into those that must be justified by showing "a manifest relationship to the employment" and those that must be justified by showing "a manifest relationship to a legitimate business objective." Obviously, those job qualifications that are designed to predict performance in the employment belong in the first paragraph, and those that are designed to predict something else belong in the second. But the Danforth "or" puts all "job qualifications" in the first paragraph. Thus, even those qualifications that are not used to measure ability to perform the job must be justified by their "relationship to the employment." Your substitution of "and" would correct this error.

4. Jury trial. The Danforth proposal would allow damages and jury trials in intentional discrimination claims. You propose to allow jury trial on liability but not on damages, recharacterizing damages as "an equitable monetary award." You have not specified how you would have the court determine the amount of this award.

I believe that your proposed amendment is unconstitutional. The Seventh Amendment is a dead letter if Congress can avoid it at will by referring to damages as an "equitable monetary award." Changing the label does not change the constitutional substance. The historical law-equity distinction is arcane, and it is unfortunate to have the scope of a constitutional right depend on it. But if Congress may choose legal or equitable remedies at will, the right to jury trial survives only at Congressional sufferance. In my view, the equitable label is plausible only where the money to be awarded is more analogous to some traditional equitable remedy than to common law damages.

The elements of recovery in the Danforth proposal are plainly common law damages. They are referred to as damages, they do not include any relief now authorized under § 706(g), and they do include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." If these would also be the elements of your equitable monetary award, then it would still be damages and the Seventh Amendment should still apply.

You may have in mind something like the "equitable penalty determination" that is now lined out on page 4 of the Danforth bill. This language directed a penalty sufficient to deter, and authorized the court to consider various factors relating to culpability. I believe that this is just a legislative punitive damages provision; the parties could argue about every one of these factors under common law punitive damages rules. But this provision does not so obviously track the elements of common law damages as the other, and there is a substantial chance that the Supreme Court would accept the equitable label and uphold the denial of jury trial.

In *Tull v. United States*, 481 U.S. 412, 427 (1987), the Court considered a scheme of civil penalties payable to the government, where the amount depended on "highly discretionary calculations that take into account multiple factors." It said that such calculations were "traditionally performed by judges," and that jury trial was not required. That reasoning might well apply here, but there is one important difference between Tull and any version of the civil rights bill. In *Tull*, the penalty was payable to the government, which made it look more like a fine or a criminal sentence, where juries have never been required in federal court. I assume that your equitable monetary award would be payable to the plaintiff, which makes it look a lot more like damages. If the money is not payable to plaintiff, it wholly fails to serve the bill's purpose of providing a meaningful remedy for violations that do not result in large accumulations of back pay.

Dicta in *Tull* went even further than I have indicated. The Court said that the Seventh Amendment simply does not apply "to the remedy phase of a civil trial." *Id.* at 426 n.9. If the Court were serious, then you can authorize common law damages and deny jury trial. But the statement is so preposterous that it is hard to believe the Court would adhere to its implications. The remedy to be awarded is the most important factor in determining whether the right to jury trial applies at all. Despite what it said, I do not believe the Court would hold that judges can assess damages in traditional common law actions.

Even if the Court would let you get away with it, I do not believe you should do it. Senators and Representatives also swear to uphold the Constitution, and if the Court quits enforcing the Seventh Amendment, it becomes all the more important for Congress to enforce it.

Assuming you can get away with it, amending the Danforth proposal to eliminate jury trial under Title VII would leave the anomaly that race cases under § 1981 would be treated differently from sex cases under Title VII. At the very least, one would have a jury trial available and one would not. If you change the measure of recovery under Title VII, so that plaintiff gets some sort of equitable penalty instead of common law damages, the anomaly is greater. If you try to eliminate the anomaly by eliminating jury trial and common law damages under § 1981, I assume you will have political difficulties because you would be trying to retract rather than restore civil rights protection.

I have written more than you asked for. But the proposals and their implications are complex, and my conclusory approval or disapproval would not help you much. No one elected me to anything, and my conclusions matter only insofar as their reasons are persuasive. I hope that at least some of the reasons are helpful.

Very truly yours,

Douglas Laycock
Alice McKean Young Regents Chair in Law

Document No. ______________________

WHITE HOUSE STAFFING MEMORANDUM

DATE: 9/26/91 ACTION/CONCURRENCE/COMMENT DUE BY: 10:00AM, TODAY, SEPT. 27

SUBJECT: SENIOR ADVISOR'S VETO THREAT ON S. 1745, SENATOR DANFORTH'S CIVIL RIGHTS BILL

	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 PROVIDE COMMENTS ON THE ATTACHED DIRECTLY TO FRED McCLURE, 2ndFl, WW, x2230, WITH A COPY TO THIS OFFICE NO LATER THAN 10:00AM, TODAY, FRIDAY, SEPTEMBER 27.

THANK YOU!

RESPONSE:

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

THE WHITE HOUSE

WASHINGTON

91 SEP 26 P8:55

September 26, 1991

MEMORANDUM FOR PHIL BRADY

FROM: FRED McCLURE FM

SUBJECT: Senior Advisor's Veto Threat on S. 1745, Senator Danforth's Civil Rights Bill

From: Acting Attorney General William Barr

To: Senators Dole and Hatch

RE: Senior Advisor's Veto Threat on S. 1745, Senator Danforth's Civil Rights Bill.

Attached is a draft 24 page letter containing a Senior Advisor's Veto Threat, relevent documents referenced in the letter and the actual bill. Because of scheduled action on this legislation in the Senate, we would appreciate your comments by **10:00 a.m., Friday, 9/27/91**.

Please direct all comments to my office at x2230.

Dear :

This letter presents the views of the Department of Justice regarding S. 1745, the civil rights bill introduced on September 24 by Senator John Danforth. As you know, the Administration has spent a great deal of time and effort with Senator Danforth in an attempt to craft an acceptable bill. Unfortunately, S. 1745 contains many of the same fundamental flaws as H.R. 1, the bill that the House of Representatives has passed, and last year's Kennedy-Hawkins bill, which the President vetoed. Consequently, if S. 1745 is presented to the President in its present form, I and his other senior advisors will recommend that he veto it. We instead urge that the Senate enact the President's bill, S. 611.

Contrary to the publicly-stated goals behind this legislation, S. 1745 would radically restructure pre-1989 civil rights law in ways that are both unprecedented and unacceptable. It would promote the adoption of new quotas by employers; it would perpetuate and institutionalize the use of quotas in consent decrees by insulating such quotas from legal challenge; and it would drastically change the carefully-balanced remedial scheme of Title VII, converting it into a costly and litigious tort-style system.

S. 1745 also follows the lead of H.R. 1, and of the Kennedy-Hawkins bill which the President vetoed last year, by exempting Congress from the very provisions to which the Administration has objected. Congress should not pass an employment statute unless it is willing to live under the same restrictions and risks that it places on our Nation's other employers.

The Goals of Civil Rights Legislation

President Bush has laid down several basic principles that must be respected in any new civil rights legislation. In a speech in the Rose Garden on May 17, 1990 to civil rights leaders gathered from around the nation, President Bush stated that he would only sign legislation (1) that did not have the effect of fostering quotas, (2) that reflected fundamental principles of fairness and due process for all civil rights plaintiffs, including those victimized by quotas, and (3) that provided a strong and speedy remedy for harassment without creating a lawyers' bonanza. He also stated that Congress should be willing to live by the same rules it imposes on other employers.

These continue to be the proper requirements for civil rights legislation. Unfortunately, S. 1745 fails to meet these requirements, and retains many of the critical deficiencies that caused President Bush to veto the Kennedy-Hawkins bill last year.

S. 1745 Promotes Quotas

S. 1745 promotes quotas in two respects. First, it radically transforms the law of disparate impact. Both the President's and Senator Danforth's bills agree that, where a business practice causes a disparate impact, the employer should have the burden of showing the business practice is justified by "business necessity". However, S. 1745 so narrows the business necessity defense and makes the defense so hard to establish, while simultaneously easing the plaintiff's burden in establishing a prima facie case, that defending a disparate impact case would be prohibitively costly and difficult. To avoid this costly, uphill litigation, employers will be driven to hire by the numbers -- i.e., to use quotas -- as the only means of avoiding possible disparate impact challenges. Second, S. 1745 would encourage and perpetuate the use of quotas in consent decrees by insulating such provisions from challenge. We discuss these two quota features of S. 1745 in turn.

Creating New Quotas

The most widely discussed Title VII decision by the Supreme Court in 1989 is Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). That case addressed the manner of litigating disparate impact cases -- that is, cases arising out of facially neutral employment practices that have a statistically adverse impact upon a racial, religious, national origin or gender group. President Bush supports legislation accomplishing the originally stated objections to Wards Cove -- that it changed the placement of the burden of proof on the business necessity issue in disparate impact cases under Griggs v. Duke Power Co., 401 U.S. 424 (1971). However, the President vetoed the Kennedy-Hawkins bill, in part, because it radically altered the disparate impact standard established in Griggs. Like H.R. 1 and Kennedy-Hawkins, S. 1745 would overrule Griggs and fundamentally change the law that existed before Wards Cove in a manner that would promote the adoption of quotas.

The original objection to Wards Cove was that it altered the burden of proof allegedly contemplated in Griggs by holding that employers do not have the burden of proving that their challenged employment practices result from "business necessity." Thus, when Senator Kennedy introduced his bill in 1990, the only problem with Wards Cove that he noted was that it "unfairly shifted a key burden of proof from employers to employees." (Cong. Rec. S. 1018).

Although the Department of Justice had argued that the statutory language required the result reached by the Supreme Court in Wards Cove, the Administration has agreed to overrule that decision by shifting the burden of proof to employers.

The Administration has gone even further; the Administration has offered to codify the Griggs definition of business necessity. The language from Griggs used in S. 611 -- "manifest relationship to the employment in question" -- has been the operative legal definition of "business necessity" in an unbroken line of Supreme Court decisions. For clarity's sake, the Administration has also urged language from a 1979 Supreme Court decision interpreting Griggs. That case, New York City Transit Authority v. Beazer, 440 U.S. 568 (1979), was authored by Justice Stevens who wrote the principal dissent to Wards Cove.

Senator Danforth, like Senator Kennedy, has refused the straightforward approach of simply quoting Griggs and Beazer. Instead, S. 1745 continues the pattern of proposing new definitions that have never been used by the Supreme Court to interpret Griggs or its "business necessity" standard. The definition offered in S. 1745, like the definitions in Kennedy-Hawkins and H.R. 1, limits the "business necessity" defense in an unfair and unprecedentedly narrow way.

Senator Kennedy's original bill limited "business necessity" solely to "job performance." In the face of substantial opposition, new versions were proposed but each suffered from the original defect of unduly limiting an employer's ability to defend facially neutral employment practices. Senator Danforth now purports to use the Griggs language, but then defines the critical language to mean essentially the same thing as the language originally proposed by Senator Kennedy last year. S. 1745 accomplishes this narrowing of the business necessity defense by an elaborate definitional bifurcation. First, the bill defines "business necessity" as meaning, in the case of selection criteria, "a manifest relationship to the employment in question." This, of course, is the Griggs standard. He then, however, adds a sub-definition of "employment in question" narrowing it to include only job performance criteria in virtually all employment decisions. It is this unjustified departure from Griggs that unacceptably restricts the "business necessity" defense. In short, S. 1745 adopts the Griggs language and then redefines it to reflect the definitions contained in H.R. 1 and Kennedy-Hawkins. From a legal standpoint, there simply is no question that S. 1745 proposes a definition of "business necessity" which is much narrower than that found in Griggs and its Supreme Court progeny.

Similarly, the statement in S. 1745 that the definition of business necessity is intended to codify Griggs cannot alter the inconsistency between the bill's text and the language of Griggs, or the inconsistency between the text of S. 1745 and almost two decades of Supreme Court precedent interpreting Griggs. Instead, it merely guarantees confusion as courts attempt to sort out precisely what Congress had in mind in S. 1745. This confusion will be time-consuming and very expensive. And it will bring no benefit to the victims of discrimination.

The Administration continues to support the codification of Griggs (with the burden of proof shifted to the defendant on business necessity). For that reason, and to avoid interjecting novel language into Title VII that will spur complex litigation, produce results inconsistent with Griggs, and undermine other important national policies, the Administration must insist that the definition of "business necessity" be the well-established language from Griggs and Beazer found in S. 611.

We note in passing that there is no merit to the claim that the Danforth definition of "business necessity" is acceptable because it is taken from the Americans with Disabilities Act (ADA). The plain fact is that it is impossible to take a "business necessity" definition from the ADA and transfer it to Title VII because there is no "business necessity" definition in the ADA. The eight words which the Danforth bill lifts from the ADA -- "qualification standards, employment tests or other selection criteria" -- in no way define "business necessity" in either place. They merely describe the kind of employment practices to which the operative language (which appears elsewhere) applies. In that regard, the eight words say virtually the same thing as the words used in the legislation introduced by Senator Danforth earlier this year -- "employment practices used as job qualifications or used to measure the ability to perform the job." The eight words from the ADA do not alter the key operative part of the "business necessity" definition which is the narrowing language in the subdefinition of "employment in question". In short, Senator Danforth has neither incorporated any definition of "business necessity" from the ADA nor adopted any sort of key language from the ADA. Rather, he has merely repackaged the same definition he offered last time using eight words that could be inserted into the President's bill without changing its meaning.

There are also serious social and policy implications in narrowing Title VII's definition of "business necessity." Most important, S. 1745 would fundamentally undermine our Nation's educational policies. Employers would be restricted in their ability to consider educational criteria that might be necessary for promotion to higher levels of employment or appropriate to serve some important, legitimate and nondiscriminatory purpose. The attached letters from Secretary of Education Lamar Alexander and EEOC Chairman Evan Kemp elaborate these concerns. Further, among other uncertainties, the definition of "business necessity" in S. 1745 could deny the employer a defense in each of the following examples: A law firm hires as interns only people who will be eligible to become associates (i.e., law students); a mining company gives a preference to employees who don't smoke or drink (on or off the job), because it lowers health insurance costs; at the mayor's request, to discourage dropping out of school, a fast food chain rejects dropouts below age 18 for jobs during school hours; a metropolitan transit authority does not want to hire heroin addicts who are receiving methadone maintenance treatments.

There is no sound policy reason for these novel restrictions on the justifications an employer may offer for its employment practices. Nor were such restrictions required by Supreme Court decisions prior to Wards Cove. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); New York City Transit Authority v. Beazer, 440 U.S. 568, 587 n.31 (1979); Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977, 997-98 (1988) (plurality opinion). Indeed, even the dissenting opinion in Wards Cove made clear that under Griggs a "valid business purpose" would suffice. 490 U.S. at 665 (Stevens, J., dissenting).

S. 1745 also changes the law governing disparate impact cases in other ways that have never been publicly justified. These alterations would have devastating effects on employers faced with the threat of litigation.

Wards Cove reaffirmed the traditional rule that a plaintiff should identify the particular employment practice that allegedly caused the disparate impact. This particularity requirement is especially critical if, as the President has agreed, Wards Cove is to be overruled so that the employer will now bear the burden of proving "business necessity."

Like H.R. 1 and last year's Kennedy-Hawkins bill, S. 1745 dispenses with this requirement that a complainant identify the particular practice that allegedly caused the disparate impact. No Supreme Court decision has ever allowed what these bills would permit. See Griggs v. Duke Power Co., 401 U.S. 424 (1971) (high school diploma requirement and aptitude test); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirement for prison guards); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1977) (employment tests and seniority systems); Connecticut v. Teal, 457 U.S. 440 (1982) (written examination); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (subjective judgment of supervisor).

S. 1745 clearly allows plaintiffs to claim that, while no single practice has a legally cognizable disparate impact, such impact can be shown if enough practices are aggregated. In no Supreme Court disparate impact case has a plaintiff ever prevailed without identifying a specific practice that caused a disparate impact. S. 1745 would eliminate this commonsense requirement, which is absolutely essential in preventing disparate impact litigation from becoming so onerous that employers will resort to quotas to avoid them. (Apparently because of poor draftsmanship, S. 1745 can also be interpreted to allow a prima facie case to be established without proof the defendant's practices caused a disparate impact.)

S. 1745 also differs from long-established law on the issue of less discriminatory alternatives. The Supreme Court has agreed that an employer should be held liable even if it proves business necessity if the employer refused to adopt a significantly less discriminatory practice that would serve the employer's business purposes as well without increasing costs. S. 1745, unfortunately, could be interpreted to impose liability even if the rejected alternative was prohibitively expensive. S. 1745 could force employers to choose between vastly more expensive practices -- perhaps even to the point of virtual bankruptcy -- and quotas. All that would be necessary to overcome the Administration's objection would be to insert the phrase "comparable in cost and equally effective" in the description of the alternative practice. To date, Senator Danforth refuses to make that modest but important change.

In short, the changes in disparate impact analysis contained in the Danforth bill are unacceptable because they contradict the stated purpose of codifying Griggs, will drive employers to adopt quotas to avoid costly litigation, and would undermine critical educational and other policies. The Administration must oppose these provisions.

Protecting Old Quotas

S. 1745 would also promote quotas by insulating many already existing quotas from challenge. Section 11 of the bill would do this by overruling Martin v. Wilks, 490 U.S. 755 (1989). Here again, S. 1745 follows H.R. 1 and last year's Kennedy-Hawkins bill.

In Wilks, the Court held that persons who had not been parties in an action settled by a consent decree were entitled to a day in court to challenge racial quotas established by the decree as a violation of their civil rights. This ruling rested on a straightforward application of generally applicable rules of civil procedure. Although that particular case concerned a challenge by white firefighters to a decree establishing racial preferences, the principles of fairness on which the decision rests are equally applicable in all litigation. It is a fundamental principle of fairness that persons claiming a deprivation of their rights are entitled to their day in court. Their right to a hearing should not be shut off by a judgment in an earlier proceeding to which they were not a party. As the Supreme Court stated in Martin v. Wilks, "[t]his rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" 490 U.S. at 762, quoting 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4449, p. 417

(1981). Under this principle, "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 n.7 (1979). Indeed, section 11 would make decrees binding on persons who did not even have notice of the prior action, even though notice is an "elementary and fundamental requirement of due process." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Like H.R. 1, S. 1745 disregards this principle. It provides that a person who was not a party to the earlier action is nonetheless bound if, for instance, a judge decided that his or her "interests were adequately represented" by another person who previously challenged such judgment or order. It would apparently also bar claims by an individual or individuals (other than the original plaintiffs and the original defendant) who never had an opportunity, at an earlier time, to participate as a party in challenging the decree -- but instead were allowed only to stand up for two minutes at a "fairness hearing," and thus had no discovery rights or rights of appeal. This would be true even if the quotas were not a part of the consent decree, but instead were agreed to by the parties implementing the decree at a later time.

Martin v. Wilks should not be overruled. The only consent decrees that will ever be successfully challenged as a result of the decision in Wilks are those that contain illegal preferences which are violating a claimant's fundamental rights. There is simply no good reason to enact legislation in a civil rights bill that insulates such preferences from challenge. S. 1745, moreover, creates new incentives for collusive lawsuits in which employers settle disputes with one portion of their workforce by imposing illegal costs on another portion of the workforce. We therefore adhere to the refusal of S. 611, the President's bill, to overturn Wilks.

S. 1745 Would Promote Excessive Litigation

In addition to promoting and institutionalizing quotas, S. 1745 would radically alter the carefully crafted remedial provisions of Title VII and convert them into a tort-style litigation system by introducing, for the first time, broad compensatory and punitive damages and jury trials. S. 1745 would also eliminate the need for causation in employment discrimination cases -- allowing lawyers, but not their clients, to recover even where the employer could show that their actions were justified by legitimate, nondiscriminatory reasons. No one could even pretend that these changes are aimed at restoring pre-1989 law; rather, they are fundamental changes that will create an entirely new regime for employment discrimination cases. The net result of these changes would be to encourage excessive and costly litigation, primarily for the benefit of lawyers. Coupled with the changes in the "business necessity" defense described above, these changes will increase the pressure on employers to adopt quotas as the only means to avoid expensive litigation. We discuss these problems in turn.

Transforming Title VII To A Tort-Style System

Like H.R. 1 and last year's Kennedy-Hawkins bill, S. 1745 for the first time in our history authorizes damage awards in cases of intentional discrimination brought under Title VII of the Civil Rights Act of 1964. Under S. 1745, compensation for past pecuniary loss is allowed without limitation. Compensation for future pecuniary loss, compensation for non-pecuniary injury (such as pain and suffering, emotional distress, and the like), and punitive damages are also allowed, and are capped at $50,000 for employers with 100 or fewer employees, $100,000 for employers with 101-500 employees, and $300,000 for employers with more than 500 employees.

The provision for compensatory and punitive damages requires that Title VII cases for the first time be tried to a jury upon a party's demand, and that the jury would determine both liability and the amount of damages. Title VII lawsuits will become increasingly expensive and unpredictable.

The approach contained in the President's bill is far preferable. There, all of the monetary relief is equitable, and cases could be tried without a jury. Also, under the President's bill, if it were determined that a jury were required to determine liability, the amount of the monetary relief still would be determined by a judge. The President's bill limits the payment of additional monetary awards to cases of on-the-job harassment, where monetary relief is generally unavailable. The Danforth bill, however, would allow the additional awards in cases besides harassment, where there is no credible evidence that current monetary awards are inadequate. (In hiring, firing, and promotion cases, of course, substantial monetary relief is already available in the form of unlimited back pay.)

The legislative debates on the original Title VII reveal that S. 1745 conflicts with the remedial scheme carefully crafted by the authors of the 1964 Civil Rights Act. They purposely excluded compensatory and punitive damages because they would undermine the conciliatory and restorative object of Title VII.

Senator Hubert Humphrey rejected jury trials and extraordinary recoveries. The Title VII lawsuit, he explained on the floor of the Senate, would "ordinarily be heard by the **judge sitting without a jury** in accordance with the customary practice for suits for **preventive relief**." 110 Cong. Rec. 6549 (1964).

In describing the recovery that a Title VII plaintiff should receive, Senator Humphrey favored restorative back pay relief over "pain and suffering" and punitive damages:

> "The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the court could order appropriate affirmative relief, such as hiring or reinstatement of employees and the payment of back pay." (Id.)

Neither Senator Humphrey nor the other sponsors of Title VII mentioned punitive damages, "pain and suffering" or any other so-called "compensatory" damages beyond back pay.

This was no oversight. The sponsors of Title VII modelled its recovery provisions on the National Labor Relations Act which had worked so well -- and continues to work so well -- without providing windfalls for plaintiffs. Indeed, every major legislation relating to the workplace -- from the NLRA to OSHA to ERISA to state workers compensation laws -- all reject the notion of awards for "pain and suffering" and punitive damages.

Injunctions and backpay work. They encourage conciliation and discourage discrimination. They provide effective recovery for victims of discrimination without promising a high-risk proposition for those willing to gamble on litigation.

The Administration's approach is far more consistent than S. 1745 with the original design of Title VII and with the recognized need to provide more effective deterrents against harassment in the workplace. The Administration cannot accept a proposal that would so dramatically disrupt all Title VII litigation when a more focused change will adequately address the one real problem that has been identified.

We also note that, while the Danforth bill is said to be aimed at making damages available in cases of intentional discrimination under Title VII and certain sections of the Americans with Disabilities Act of 1990, it is drafted in such a way that practices intentionally adopted, but without discriminatory intent, would also give rise to liability for damages. For instance, if an employer explicitly required job applicants to have a high school diploma, yet had no discriminatory intent, he could still be held to have "intentionally engaged in an unlawful employment practice" -- i.e., he intentionally required the diploma, albeit for nondiscriminatory reasons -- and would be liable for damages. This goes far beyond even H.R. 1, and would make damages available in disparate impact cases. Coupled with the reality that most disparate impact lawsuits also contain claims for disparate treatment in which statistical evidence plays a major role, this critical departure from established case law would prompt many employers to conclude that numerical hiring, i.e. quotas, is necessary to avoid these new forms of damages.

Eliminating "Causation" Requirement

S. 1745 also changes long-established Title VII law by eliminating the causation requirement from employment discrimination litigation, although, as noted below, it is only the lawyers, not their clients, who will benefit. Like H.R. 1 and last year's Kennedy-Hawkins bill, Section 10 of S. 1745 would overturn Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). That case, in which the plurality opinion was authored by Justice William Brennan, joined by Justice Thurgood Marshall, along with Justices Harry Blackmun and John Paul Stevens, held that once a plaintiff demonstrates by direct evidence that discrimination played a substantial part in an employment decision, the burden shifts to the employer to persuade the court that it would have reached the same result without considering sex or race. If the employer succeeds, it is not liable. S. 1745 supplants this causation requirement by providing that an employer is still liable pursuant to Title VII if a complaining party demonstrates that discrimination was only "a motivating factor for any employment practice, even though other factors also motivated the practice."

Thus, under S. 1745, even where there is no causal relationship between discrimination and the challenged employment action -- i.e., where the adverse personnel action was ultimately prompted by, and justified by, legitimate non-discriminatory reasons -- the employer would nonetheless be liable.

The standard of liability proposed by S. 1745 has never been the law. Although requested by the plaintiff in Price Waterhouse, every member of the Supreme Court expressly rejected it, including Justices Brennan, Marshall, Blackmun and Stevens. There is simply no basis for taking the law to that extreme. Price Waterhouse is a sound and balanced decision. Its equitable result should be maintained.

Not surprisingly, at the time it was handed down, Price Waterhouse was lauded by civil rights groups and commentators as a significant victory. For instance, the National Women's Law Center said the decision "advanced the law and put employers on notice that they will have some explaining to do," and the New York Times called it "a balanced, sensible judgment." Our monitoring of cases since Price Waterhouse has shown that the decision has worked very favorably for plaintiffs. Based on this experience, we do not think overruling Price Waterhouse is necessary or wise.

The proponents of S. 1745 seem to recognize implicitly the fundamental soundness of the Price Waterhouse decision and the inherent deficiency of their own approach. In a curious twist, S. 1745 provides that, where an employer can demonstrate lack of causation, the employer may still be liable to the plaintiff's lawyer for attorney fees, but the plaintiff herself cannot be awarded a single dime. Thus, the only true beneficiaries of this provision would be the plaintiffs' attorneys, who would still be entitled to an award of attorney fees, even where the defendant employer's actions were justified and lawful. Consequently, this provision will encourage lawyers to pursue "Price Waterhouse claims" in every discrimination case in the hope that, whether or not their clients recover, the lawyer will. S. 1745 thus creates an incentive for otherwise untenable lawsuits where there are no actual "victims" and no "winners" except the lawyers.

Congress Should Live By Its Enactments

In his May 17, 1990, Rose Garden address, President Bush said that "Congress, with respect, should live by the same requirements it prescribes for others." The Executive branch, like private employers and state and local governments, is forbidden by law to discriminate on the basis of race, color, religion, sex, or national origin. The Congress, however, has exempted itself from the law. As President Bush has noted, "this inconsistency should be remedied to give congressional employees and applicants the full protection of the law to send a strong signal that it's both the Executive branch and Congress that are in this together. And the Congress should join the Executive branch in setting an example for these private employers."

In addition to setting a helpful example, and providing congressional employees with the same rights enjoyed by other Americans, coverage under Title VII will provide the Congress with the valuable experience of living under the same rules that it imposes on other employers. This experience should prove useful in encouraging the Congress to give prompt and serious consideration to proposals for improving the law and in enabling the Congress to resist ill-considered proposals -- like S. 1745 and the Kennedy-Hawkins bill that President Bush vetoed last year -- that would undermine the cause of civil rights and impose completely unjustified burdens on the employers of this nation.

The insistence by Congress that it be exempted from the Civil Rights Act of 1991 reinforces the concern that the changes it would make go well beyond the stated purpose of restoring the law and well beyond any claim that its provisions are modest. Congress apparently recognizes that the pressures it would impose upon millions of employers would be immense. No employer should be forced to operate under a statutory framework that Congress itself fears.

Pass the President's Bill

We urge, therefore, the passage of S. 611, the President's bill. It remains the only bill that would effectively and fairly protect the civil rights of working men and women. It would overturn Patterson v. McLean Credit Union, 491 U.S. 164 (1989), and Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989); would allow awards of up to $150,000 in cases of on-the-job harassment; and, in disparate impact cases, would put the burden of proof on the employer and adopt the long-established and proven definition of "business necessity." It also contains provisions to authorize the award of expert witness fees to prevailing parties in Title VII actions; to extend the time for filing Title VII complaints against the federal government; to authorize awards of interest against the federal government; to extend Title VII's protections to Congressional employees; and to encourage alternative dispute resolution. At the same time, however, the President's bill would not encourage numerical hiring, promote costly and endless litigation, or inhibit American businessmen and businesswomen from hiring the best qualified and most productive workers they can, so that they can compete effectively in an increasingly global economy.

The Administration also recognizes the fact that equal opportunity can never be a reality until there are decent schools, safe streets, and revitalized local economies. Therefore, in addition to passage of the President's civil rights bill, we seek Congressional action to promote individual opportunity on several fronts: educational choice and flexibility; home-ownership opportunity; enterprise zones and community opportunity areas; and heightened anti-crime efforts.

Conclusion

Therefore, for the reasons stated above, if S. 1745 is presented to the President in its present form, I and his other senior advisors will recommend that he veto it. The Office of Management and Budget has advised that it has no objection to the submission of this report and that enactment of S. 1745 in its present form would not be in accord with the President's program.

Sincerely,

William P. Barr
Acting Attorney General

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Memo	From Evan J. Kemp to John Sununu Re: "Business Necessity" Language Proposed by Danforth (5 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 [4]

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

Date Closed: 1/3/2005	**OA/ID Number:** 29147-002
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:**

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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]

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(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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF THE CHAIRMAN

JUN 24 1991

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

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 <u>not</u> 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 <u>America 2000: An Education Strategy</u> 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 <u>harm</u> 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 <u>Griggs</u> v. <u>Duke Power Co</u>. 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 <u>to measure the applicant's ability to perform a particular job or class of jobs</u>. (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 <u>Griggs</u> that <u>all</u> 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 <u>Uniform Guidelines on Employee Selection Procedures</u>, for example, define the universe of affected practices as follows:

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

Evan J. Kamp, Jr.
Chairman

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:

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 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,

Lamar Alexander

Proposed Modification of First Proposed Proviso in Senator Danforth's August 2, 1991 Letter

Nothing in this Act shall be construed to prevent an employer, in making a hiring or other employment decision, from considering an applicant's or employee's educational achievements, including the applicant's or employee's diploma or degrees or academic performance, including test scores, if such consideration has a manifest relationship to a legitimate business objective of the employer.

Conforming Amendment to Danforth bill, consistent with the Second Proposed Proviso in his August 2, 1991 letter

In Section 5, in paragraph (2) of the definition of the term, "employment in question," add the words "or class of jobs" after the word, "job."

102D CONGRESS
1ST SESSION

S. 1745

IN THE SENATE OF THE UNITED STATES

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

A BILL

To amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, 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 "Civil Rights Act of 1991".

SEC. 2. FINDINGS.

The Congress finds that—

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in *Wards Cove Packing Co.* v. *Atonio,* 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

SEC. 3. PURPOSES.

The purposes of this Act are—

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) 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);

(3) to confirm 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.); and

(4) 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. 4. 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 contractual relationship.

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

SEC. 5. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section:

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

"(a) RIGHT OF RECOVERY.—

"(1) CIVIL RIGHTS.—In an action brought by a complaining party under section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5) 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 or 2000e–3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

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

"(3) REASONABLE ACCOMMODATION AND GOOD FAITH EFFORT.—In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

"(b) COMPENSATORY AND PUNITIVE DAMAGES.—

"(1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

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

"(3) LIMITATIONS.—The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed—

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

"(B) in the case of a respondent who has more than 100 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

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

"(4) CONSTRUCTION.—Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).

"(c) JURY TRIAL.—If a complaining party seeks compensatory or punitive damages under this section—

"(1) any party may demand a trial by jury; and

"(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

"(d) DEFINITIONS.—As used in this section:

"(1) COMPLAINING PARTY.—The term 'complaining party' means—

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

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

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

SEC. 6. ATTORNEY'S FEES.

The last sentence of section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting ", 1981A" after "1981".

SEC. 7. DEFINITIONS.

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

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

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

"(n) The term 'the 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 behavior that is important to the job, but may not comprise actual work activities.

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

"(1) in the case of employment practices that are used as qualification standards, employment tests, or other selection criteria, the challenged practice must bear a manifest relationship to the employment in question; and

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

"(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 subject to section 717.".

SEC. 8. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) is amended by adding at the end 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 particular employment practices (or decisionmaking process as described in subparagraph (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 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 each 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 decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

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

"(C) An employment practice that 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) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

"(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, 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.".

SEC. 9. 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 8) is further amended by adding at the end the following new subsection:

"(l) 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.".

SEC. 10. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) IN GENERAL.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) (as amended by sections 8 and 9) is further amended by adding at the end the following new subsection:

"(m) 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 indenting accordingly; and

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

"(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

"(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. 11. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) (as amended by sections 8, 9, and 10 of this Act) is further amended by adding at the end the following new subsection:

"(n)(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 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 on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

"(2) Nothing in this subsection shall be construed to—

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

"(B) apply to the rights of parties to the action in which a 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.

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

SEC. 12. 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, the term 'employee' includes an individual who is a citizen of the United States.".

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

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

(2) by adding at the end the following:

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

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

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

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

"(A) the interrelation of operations;

"(B) the common management;

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

"(D) the common ownership or financial control,

of the employer and the corporation.".

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

SEC. 13. 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. 14. 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 unlawful employment practice occurs, with respect to a seniority system that has 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), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.".

SEC. 15. 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. 16. 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. 17. NOTICE OF LIMITATIONS PERIOD UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)) is amended—

(1) by striking paragraph (2);

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

(3) by striking "Sections 6 and" and inserting "Section"; and

(4) by adding at the end the following:

"If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice.".

SEC. 18. 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. 19. COVERAGE OF CONGRESS AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) COVERAGE OF THE SENATE.—

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

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

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

"(b) discharge an individual; or

"(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment, on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.".

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

(3) INVESTIGATION AND ADJUDICATION OF CLAIMS.—All claims raised by any individual with respect to Senate employment, pursuant to the Acts referred to in paragraph (2), shall be investigated and adjudicated by the Select Committee on Ethics, pursuant to Senate Resolution 338, Eighty-eighth Congress, as amended, or such other entity as the Senate may designate.

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

(5) APPLICABLE REMEDIES.—When assigning remedies to individuals found to have a valid claim under the Acts referred to in paragraph (2), the Select Committee on Ethics, or such other entity as

(7) EXERCISE OF RULEMAKING POWER.—Notwithstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in paragraphs (2) and (6)(A) shall be within the exclusive jurisdiction of the United States Senate. The provisions of paragraphs (1), (3), (4), (5), (6)(B), and (6)(C) are enacted by the Senate as an exercise of the 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 provision of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or of other law, the purposes of such title shall, subject to paragraph (2), apply in their entirety to the House of Representatives.

(2) EMPLOYMENT IN THE HOUSE.—

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

House of Representatives and any employing authority of the House of Representatives.

(B) ADMINISTRATION.—

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

(ii) RESOLUTION.—The resolution referred to in clause (i) is the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988), as incorporated into the Rules of the House of Representatives of the One Hundred Second Congress as Rule LI, or any other provision that continues in effect the provisions of such resolution.

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

(c) INSTRUMENTALITIES OF CONGRESS.—

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

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

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

(4) DEFINITION OF INSTRUMENTALITIES.—For purposes of this section, instrumentalities of the Congress include the following: the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Of-

fice, the Office of Technology Assessment, and the United States Botanic Garden.

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

SEC. 20. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

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

SEC. 21. 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.

SEC. 22. EFFECTIVE DATE.

Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.