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CIVIL RIGHTS AND WOMEN'S EQUITY IN EMPLOYMENT ACT OF 1991 PASSES THE HOUSE

On June 5, 1991, the House of Representatives by a vote of 273-158 (one member was absent, and three seats are vacant) passed the Civil Rights and Women's Equity in Employment Act of 1991. The bill passed with broad bipartisan support, but the vote was short of the number needed to override a veto by President Bush which is expected if a similar bill passes the Senate. House debate on the bill began on June 4, with consideration of the rule to control the length and structure of the debate on the bill. The rule passed by a vote of 247-175 and provided for three hours of general debate on H.R. 1, followed by the consideration of three substitute measures, not subject to amendment, with an hour of debate on each substitute. The rule also stipulated that the substitutes would be considered under the "king-of-the-hill" rule which allows the last substitute adopted to prevail.

After general debate, the first vote was on a measure sponsored by Representatives Edolphus Towns (D-NY), and Pat Schroeder (D-CO), which failed by a vote of 152-277. The second vote, on the Administration's bill, sponsored by Minority Leader Robert Michel (R-IL), failed by a vote of 162-266. The final vote was on a substitute sponsored by Representatives Jack Brooks (R-TX) and Hamilton Fish, Jr., (R-NY) which passed by the vote of 273-158.

The controversial issues which were the focus of the House debate were:

"whether the bill would result in employers instituting hiring quotas for women and minorities based upon their availability in the relevant labor pool in an effort to avoid discrimination suits;

"whether Title VII should be amended to allow women, religious minorities, and persons with disabilities to collect compensatory and punitive damages in cases of intentional discrimination; and

"whether the scores of tests that have been shown not to be good predictors of job performance across racial lines may be adjusted to account for the tests' racial bias."

Key Provisions of the Brooks-Fish Substitute

The Brooks-Fish Substitute includes several provisions that were added to H.R. 1 in the House Education and Labor Committee to address employment equity issues: Glass Ceiling Commission, Pay Equity Technical Assistance, and Equal Employment Data Reporting. The bill also authorizes EEOC to set up an outreach program for underserved minority groups (see pp. 7-8).

The bill attempts to address the quota concern by providing that the bill should not be construed "to require, encourage, or permit an employer to adopt hiring or promotion quotas." The bill has one definition of business necessity: practices must bear a "significant and manifest relationship to the requirements for effective job performance."

Brooks-Fish allows unlimited compensatory damages for intentional discrimination, and caps punitive damages at \$150,000, or the sum of backpay and compensatory damages, whichever is greater. The bill would ban the practice of adjusting test scores on written tests on the basis of race, color, religion, sex, or national origin, and prohibits the use of discriminatory tests.

(For a more thorough discussion of Brooks-Fish, see pp. 9-10 and pp. 11-12).

Action In The Senate

On June 4, 1991, Senator John Danforth (R-MO) and eight other moderate Republicans (Senators James Jeffords, Arlen Specter, Warren Rudman, John Chafee, William Cohen, Dave Durenberger, Mark Hatfield, Pete Domenici) introduced three bills addressing civil rights and employment discrimination with the stated hope of presenting "a legislative package which has some chance of becoming law." In introducing the bills, Senator Danforth said:

"...for the past 2 years the most contentious issue we have had before the Congress has

had to do with the possibility of overruling through legislation some five or six opinions of the U.S. Supreme Court on the question of employment discrimination...The issue has become enormously divisive, seemingly more divisive with every passing day. But it is important to recognize that there truly is a common ground between the advocates of civil rights legislation in the House of Representatives and the Bush Administration...The President has sent to Congress his legislative ideas. I compliment him for that. But I believe there is virtually no chance that the President's legislation will be enacted into law in its present form. The House of Representatives is about to pass its version of the civil rights bill. I believe that no matter how well meaning they are in the House of Representatives, there is almost no chance that the bill which passes in the House will be enacted into law in its present form.

"So the question remains, how can we move forward? How can we come together with a reasonable accommodation that can become law? The nine Senators who are about to introduce this legislation have taken the point of view that instead of one indigestible lump, which was the problem last year, one major bill trying to encompass a number of different subjects, it would be better to attempt to break that indigestible lump into three more digestible pieces, so we have developed a package of three bills.

"The first bill we believe to be almost entirely without controversy and a bill that can be enacted into law, we think, in very short order. It is a bill which would overrule five Supreme Court decisions. Those five Supreme Court decisions are decisions which most people believe should be overruled....The second proposal deals with the more knotty issue of defining business necessity and overruling the *Wards Cove* case decision by the Supreme Court in 1989....The third bill has to do with damages. This too has been a very, very contentious issue....we have proposed that in the case of pain and suffering and in the case of punitive damages which in this legislation we call equitable penalty, there be caps, and that the caps be differentiated according to the size of the business -- that a small employer have a lower cap than a large employer...."

Summary of Senator Danforth's Proposals

(For a review of the Supreme Court cases referred to below, see p. 7).

The Civil Rights Restoration Act of 1991 (S. 1207): addresses the Supreme Court decisions in *Patterson*, *Price Waterhouse*, and *Wilks*. It also includes a provision allowing for the award of expert fees, and extending the statute of limitations on claims against the federal government as employer. In overturning the *Lorance* decision, this bill addresses only seniority systems.

The Equal Employment Opportunity Act of 1991 (S. 1208): addresses the Supreme Court's *Wards Cove* decision. In the case of employment practices involving selection, business necessity means "that the practice or group of practices bears a manifest relationship to requirements for effective job performance; and in the case of other employment decisions not involving employment selection...the practice or group of practices bears a manifest relationship to a legitimate business objective of the employer."

The Civil Rights and Remedies Act (S. 1209): provides limited damages for victims of intentional discrimination by creating a new federal law that provides for compensatory damages, and authorizes the court to award an equitable penalty (i.e., a sum of money to go to the federal government to be used for designated purposes) if the employer acted with malice or reckless disregard for the employee's rights and the penalty is necessary to deter a further violation by this employer.

Reaction to the Danforth Proposals

The Leadership Conference on Civil Rights responded to the Danforth proposals by asserting that "while the Danforth proposal is a commendable effort to reach a compromise on pending civil rights legislation, it contains a number of serious problems that must be addressed. These problems are all capable of resolution and, if addressed, could result in a strong bipartisan Civil Rights Act of 1991." In a memorandum analyzing the Danforth proposal, the LCCR cited major problems with the proposals including the following:

"Failure to restore established Griggs standard: A central purpose of the civil rights bill is to restore the landmark *Griggs* decision and to overrule the 1989 decision in *Wards Cove*, which dramatically weakened 20 years of established case law under *Griggs*....The Danforth proposal, however, fails to restore *Griggs* in several important

respects....Under the civil rights bill passed by the Senate last year and the House this year, bias victims who challenge a combination of job practices that result in a discriminatory impact must show which specific practices produced the discrimination unless they cannot do so because the relevant records have been destroyed or are [otherwise] unavailable....Under the Danforth proposal, however, employers could prevent plaintiffs in most cases from challenging a group of employment practices simply by destroying or failing to keep the records that show which specific practices within a group of practices resulted in the discriminatory impact. The only situation where a group of practices could be challenged as a whole would be where they are not "capable of separation for analysis," an extremely narrow exception. Indeed, employers would have every incentive under the Danforth proposal to block job bias suits by destroying or failing to keep the very records necessary for plaintiffs to make their proof of discrimination as specific as possible.

"Weakened 'business necessity' standard: The Danforth proposal would perpetuate another key harmful aspect of the *Wards Cove* decision due to its definition of "business necessity" which must be shown to justify job practices with disparate impact. The Danforth proposal uses a complicated two-tier definition which many business groups have objected to and which will cause unnecessary litigation as courts struggle to determine which definition applies in which case. Both tiers of the definition are substantially weakened because the proposal omits any requirement that discriminatory practices be shown to be significantly or substantially related to the requirements for effective job performance or other permissible objectives....

"Severe limitations on compensatory damages and elimination of punitive damages:..." The Danforth proposal...would fail to provide many bias victims with any meaningful compensatory or punitive damages remedy...Under the Danforth proposal, an absolute \$50,000 cap on damages for emotional distress and related injuries applies to 97% of all U.S. employers -- businesses with 100 or fewer employees -- with a \$150,000 cap on other employers...In addition, the proposal would require bias victims to prove their cases by a burdensome "clear and convincing evidence" standard, rather than the "preponderance of the evidence" rule that applies to other civil rights laws and to civil litigation generally....

"No punitive damages: Unlike victims of race, national origin, and certain religious discrimination, victims of other types of discrimination could recover no punitive damages whatsoever, regardless of how egregious the discrimination may be..."

In a June 18 letter to Senate Majority Leader George Mitchell, eleven Congresswomen wrote that they could not support Senator Danforth's proposals and "would actively oppose the provisions of S. 1209 relating to damages in cases of intentional employment discrimination involving women, individuals with disabilities, and other minorities not covered by [existing laws] Section 1981." The letter continues:

"One of the key purposes of the bipartisan civil rights legislation we supported in the House of Representatives was to end a longstanding anomaly in civil rights law under which victims of intentional race discrimination in employment may recover unlimited compensatory and punitive damages but victims of employment discrimination based on gender, religion, or disability may recover none.

"We very reluctantly accepted a cap on punitive damages in the House bill that gave women workers inferior remedies for job discrimination. We endorsed the legislation, however, because the bill as a whole promoted the interests of women. On the other hand, the Danforth bill is offensive to us because it goes beyond our compromise. It imposes a higher standard of proof for women bias victims than the 'preponderance of the evidence' standard applied to other civil rights laws and in almost all other civil litigation, it imposes a cap on actual damages, and it denies all punitive damages. The bill relegates women to second class status."

Danforth Introduces Revised Proposals

After hours of negotiations with White House officials and Democratic and Republican Senators, on June 27, 1991, Senator Danforth introduced three revised proposals. In introducing the revised proposals the Senator said he had gone as far as he could in meeting the concerns of the Administration having included

some 22 changes that the Administration had requested. The White House's definition of business necessity which Chief of Staff John Sununu had insisted on, Danforth said, would leave a huge loophole in the law allowing employers to establish job qualifications that are not related to one's ability to do the job and that may have the effect of screening out women and minorities. On June 30, 1991, on NBC News Meet the Press, Senator Danforth said:

"...[T]he question is whether an employer can set up a qualification for employment that has nothing to do with the ability to do the job, and then use that to screen out blacks or women or other minorities. That really is the narrow issue. It was an issue that was decided by the Supreme Court twenty years ago in something called the *Griggs* case. The Supreme Court said that an employer could not use a high school diploma as a screen for employment in a job that really didn't require education....What the Supreme Court said is that depends on the job and whether it has any relationship to the ability to do that job. For the job of say, a janitor, it would serve just as an extraneous screen; it would have nothing to do with the ability to do the job. That's what the Supreme Court said in the *Griggs* case, and I think that the real issue is now does that...holding still stand? There would be other examples. For example, could an employer say that he's not going to hire single parents, even though that would have a disproportionate effect on women applicants for a job? That kind of qualification and whether or not the employer could use that extraneous qualification is really the basic issue now before the president and before the country."

The Bush Administration proposal reads:

"The term required by business necessity means--

- (1) in the case of employment practices that are used to measure the ability to perform the job, the challenged practice must bear a manifest relationship to the employment in question.
- (2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

"The term employment in question includes, but is not limited to--

- (1) the performance of actual work activities required by the employer for a job or class of jobs; and
- (2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities."

Senators Rudman and Domenici, two of the original nine Senators who introduced the Danforth proposals, did not cosponsor the revised proposals indicating that they thought it was still possible to work something out with the White House.

In introducing the revised proposals, Senator Danforth said:

"[A] very strong effort has been made by nine Republican Senators to make the bill acceptable to President Bush. We believe that we have come very close to addressing the President's concerns. We know that remaining concerns are there, but we believe that we have come about 90 percent of the way. Our hope now is that the President will be able to reach over to us for that remaining 10 percent; that we can have a bill which is both acceptable to those who want legislation and which is acceptable to the President of the United States. It will take a little bit of a reach. But I think we have closed the gap sufficiently, so that it is certainly something that can be accomplished....

"But I think that the real issue is not so much the exact wording of the legislation. I think the real issue before us is the extent to which race is going to be a nagging political issue in this country. I know, Mr. President, that there are those who believe that it is somehow a winning issue; that race is a wedge issue, that it can divide people, and that it can build constituencies. But I believe that it is a bad issue for the country. And I particularly believe that it is a bad issue for the Republican Party, my party. I think the job of Government in this diverse country should be an attempt to bring people together, not to find ways to rub nerve ends raw. And I think that is exactly what we are doing by constantly harping on the issue of quotas, the issue of job preferences,

and so on.”

Summary of The Revised Proposals

The Civil Rights Restoration Act (S. 1407) includes five Administration revisions including a provision which makes the section addressing *Martin v. Wilks* prospective.

The Equal Employment Opportunity Act (S. 1408) which addresses the *Wards Cove* decision includes fifteen revisions requested by the Administration. The new version defines business necessity in the following manner:

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

“in the case of...[other practices] the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.”

The Act provides that the purpose is “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.*.”

The Civil Rights and Remedies Act (S. 1409) includes three Administration changes including an exception under the Americans with Disabilities Act which provides that “damages may not be awarded where the covered entity demonstrates good faith efforts...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.” The Act contains a limit on compensatory damages for future pecuniary losses, and punitive damages based on the size of the workforce:

- for employers of 100 or fewer employees, the limitation is \$50,000
- for employers of more than 100 and fewer than 501 employees the limitation is \$100,000
- for employers of more than 500 employees, the limitation is \$300,000.

Reaction to Danforth's Revised Proposals

The civil rights community continued to express support for Senator Danforth's efforts to fashion a compromise civil rights bill. At the same time civil rights advocates expressed concern that Senator Danforth's proposals did not in fact accomplish what he said he wanted to accomplish, i.e., to prevent employers from establishing qualifications for employment that screen out minorities and women, and are not related to one's ability to do the job. Concern was also expressed about the damages provisions which set limits on punitive and compensatory damages based on the size of the company.

Civil rights advocates also noted that while the Danforth proposal makes it unlawful “in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cut-off scores for, or otherwise alter the results of, employment-related tests on the basis of race, color, religion, sex, or national origin”, the proposal does not require that such tests be valid and fair predictors of job performance.

The coalition noted that changes of the kind advocated would bring the compromise in line with the author's intentions, and continued to express guarded optimism that a workable compromise could be achieved on these and other concerns.

President Bush Rejects Danforth's Proposals

On August 1, 1991, Senator Danforth held a press conference to announce that President Bush had rejected his last attempt to fashion a compromise with the White House. President Bush and Senator Danforth met on July 25 to discuss the bill. Danforth released a July 28 letter from the President in which the President asserted that Danforth's efforts to prohibit the use of employment qualifications that are unnecessary for the performance of the job would “seriously, if not fatally, undermine the reform and renewal of our educational system by discouraging employers from relying on educational effort and achievement.”

Danforth said that the President's argument was a very bad argument and that it was "a serious mistake for the President, for his Administration and for the Republican Party to try to turn the clock back on civil rights." The President's argument, the Senator said, could be accepted only "if you believe that an employer on his own is going to further educational policy by shutting out 50-year-old people who never got a high school diploma." Danforth said that it would be difficult for the Administration to present this as an educational issue, and queried: How can you deny a janitor a job just because he doesn't have a high school diploma? How can you require height and weight requirements with impunity when they discriminate against women?

Danforth said he would push for a vote in the Senate and the House on his bill, and indicated that he thought the Congress would override a veto if necessary.

BACKGROUND: WHY THE BILL IS NEEDED

The House-passed bill would amend Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, sex, national origin, or religion, and the 1866 Civil Rights Law (section 1981 of the U.S. Code) which prohibits intentional race discrimination in the making and enforcing of contracts. The bill addresses several Supreme Court decisions on employment discrimination that add up to a major shift from equal employment opportunity law established over the past twenty-five years to protect the rights of minorities and women. The decisions narrow the coverage of civil rights statutes, make it harder for women and minorities to prove discrimination and easier for employers to avoid responsibility for practices that discriminate, make it easier for those opposed to civil rights consent decrees to challenge them, and limit the award of attorney's fees. The bill also corrects an anomaly in Title VII, which prohibits gender, national origin, and religious discrimination in addition to racial discrimination, but which does not provide a damages remedy similar to that available under 1981 for intentional racial discrimination.

The legislation addresses the following Supreme Court decisions:

- *Patterson v. McLean Credit Union*, which limited the reach of the 1866 Civil Rights Law by ruling that the law's guarantee of non-discrimination in the making and enforcing of contracts extends only to the formation of a contract, and not to problems such as racial harassment that may arise later on the job.
- *Wards Cove Packing Co. v. Atonio*, which revised the standards governing proof of discrimination in Title VII disparate impact cases, standards the Supreme Court established eighteen years before in *Griggs v. Duke Power Co.*
- *Price Waterhouse v. Hopkins*, which held that an employer can defeat liability for a challenged employment decision, in which intentional discrimination was a motivating factor, by showing that it would have made the same decision for nondiscriminatory reasons.
- *Lorance v. AT&T Technologies, Inc.*, which held that any challenge to a facially neutral seniority system must be timely filed soon after the system is first put in place and that persons who wait until they are adversely affected by the system to file a suit may be too late.
- *Martin v. Wilks*, which held that court-approved consent decrees are open to challenge by other persons affected by the decree for apparently an indefinite period of time.
- *Independent Federation of Flight Attendants v. Zipes*, which held that successful plaintiffs who sue under Title VII may not be awarded attorneys fees against persons who intervene in the suit but do not prevail unless the intervenors' action was "frivolous, unreasonable, or without foundation."

HOUSE COMMITTEE ACTION IN THE 102nd CONGRESS

The Civil Rights Act of 1991, H.R. 1, was introduced in the House on January 3, 1991. On March 12 and March 19 respectively, the House Committees on Education and Labor and the Judiciary marked up the bill. The House Education and Labor Committee reported the bill out by a voice vote, after accepting a substitute bill proposed by Committee Chair William Ford (D-MI), and an amendment to the substitute offered by Rep. Jose E. Serrano (D-NY).

Ford's substitute changed the title of the bill to the Civil Rights and Women's Equity in Employment Act, and added several provisions to the bill:

Glass Ceiling Commission: establishes a 19 member commission to assess the underrepresentation of women and minorities in executive and management positions.

Pay Equity Technical Assistance: establishes a program within the Department of Labor to disseminate information on efforts to eliminate wage disparities based on race, sex, national origin or ethnicity; to undertake and promote research on eliminating such wage disparities; and to provide technical assistance to employers to correct wage-setting practices or eliminate such disparities.

Equal Employment Data Reporting: requires the Equal Employment Opportunity Commission to include in its annual report a summary and analysis of equal employment opportunity data submitted by employers. The Office of Federal Contract Compliance Programs is required to include similar data from federal contractors."

The amendment offered by Rep. Serrano and adopted by voice vote authorizes the EEOC to set up an outreach and public information program to reach underserved minority groups.

Rep. William Goodling (R-PA) offered the Administration's bill as a substitute amendment in Committee. The amendment failed by voice vote. The Administration's bill (H.R. 1375, S. 611) had been introduced in the House and Senate on March 12 by Senators Robert Dole, Alan Simpson, and Orrin Hatch and Representatives Robert Michel and Henry Hyde.

On March 19, H.R. 1, as introduced on January 3, was reported out of the House Judiciary Committee by a vote of 24-10. Six weakening amendments offered by Republicans were defeated including an amendment to substitute the Administration's bill.

DISCUSSIONS BETWEEN THE BUSINESS ROUNDTABLE AND THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

In April, discussions between the Leadership Conference on Civil Rights and the Business Roundtable, a coalition of chief executive officers of 200 major corporations, to try to reach a compromise on key provisions of the bill were scuttled by senior administration officials. The two groups had been meeting since December 1990 to attempt to reach agreement on a set of recommendations that both sides could support, and that would win strong bipartisan support in Congress. On April 3, sixty-five Business Roundtable CEOs voted unanimously to continue discussions with the LCCR. In response, President Bush's Chief of Staff John Sununu and his Counsel Boyden Gray put pressure on CEOs to discontinue the talks with the civil rights community, and to support the Administration's bill. The White House pressure resulted in the Business Roundtable ending the discussions with the Leadership Conference on April 19. In withdrawing from the discussions, Robert Allen, Chair of AT&T, who had initiated the talks said:

"The political process in Washington is giving signals that they don't want us involved. It's clear that a lot of people want to sabotage the process that we started."

On April 24, 1991 twenty members of the House Judiciary Committee in a letter to President Bush said:

"We are deeply disturbed by reports that White House officials disrupted efforts by representatives of the business and civil rights communities to agree on civil rights legislation...[A]s painful as it is to acknowledge, discrimination still exists in society. We must continue to address the issue.

"The attempt of the Business Roundtable to craft a compromise with various civil rights organizations was commendable and should not have been criticized by Administration officials. Instead of disrupting these talks, White House officials should have encouraged the continuation of such efforts. If other business leaders and groups are truly concerned, they should join the process, not obstruct constructive negotiations.

"Even the executive branch is not immune. Only recently, the director of the FBI met with African-American FBI agents to assure them that the incidents of racial harassment by other FBI agents against an African-American agent would not recur and that

steps would be taken to end discrimination in promotions and job assignments. Three hundred Hispanic agents in the FBI sued on the basis of racial discrimination in job promotion and won that case....

"As President you are in a unique position to facilitate discussions and encourage understanding between the parties involved in the dispute over legislation intended to restore the force of civil rights laws....We urge you to consider your stated commitment to civil rights and assist in the fight against discrimination. There is no public purpose to be gained by permitting this issue to be reduced to a slogan designed for political gain."

REPRESENTATIVES BROOKS AND FISH FASHION A COMPROMISE

On May 21, 1991 Representatives Jack Brooks, Hamilton Fish, Jr., and Don Edwards held a press conference to state that they were making changes in H.R. 1 to address some of the major stated concerns about the bill including the quota issue and the damages provision. Representative Brooks said:

"I am pleased to announce that substitute language has been formulated to resolve a number of major issues pertaining to the Civil Rights Act of 1991. People of good will on all sides of the issues involved in this bill have put in many, many hours hammering out this compromise. It has been a long, arduous process trying to accommodate all the different interests involved, but I think it is fair to say we have done just that....

"The most important quality of the substitute language is that it addressed forthrightly the concerns that were expressed about H.R. 1 as it was introduced this year and as it passed the Judiciary Committee. Foremost among these is the issue of "quotas." The substitute language says explicitly that this bill will not encourage, require, or *permit* quotas in employment practices. Thus, any person -- no matter what their sex or race or national origin or religion -- who is the victim of discrimination, will always be able to utilize the remedies provided by this new amendment. That includes all victims of discrimination or *reverse* discrimination -- in the workplace."

The Major Revisions

Representatives Brooks, Fish, and Edwards said their changes would:

1. make clear that quotas are not permitted by the bill and are illegal by specifically providing in Section 13 that nothing in the bill will require, encourage, or even allow employers to adopt quotas.
2. clarify the rules for determining when job practices are illegal because of disparate impact by providing that where a group of job practices is challenged as discriminatory, the bias victim must show which particular practice has a disparate impact unless the court finds that no reasonably available information exists to enable doing so.
3. make clear that a practice that has disparate impact may be defended by an employer as required by "business necessity" if it has a "substantial and manifest relationship to the requirements for effective job performance."
4. provide that a business can determine its own job requirements, as long as they are nondiscriminatory, and can rely fairly on relative qualifications or skills to hire or promote the best qualified workers for each job.
5. provide that a final judgment in a discrimination case that has been entered under existing law, under which the rights of the parties have become fixed and vested, generally will remain in effect and cannot be disturbed.
6. include a cap on punitive damages of \$150,000 or the sum of compensatory damages plus back pay awarded to any persons in Title VII cases.
7. ban the practice of adjusting scores on written tests on the basis of race, color, religion, sex, or national origin. The changes also make clear that the use of discrimin-

atory tests themselves is prohibited.

8. make clear that attorney's fees may be waived voluntarily to settle job bias cases.

9. shorten the time period for filing bias claims from the two years contained in H.R. 1 to 18 months (current law provide a time period of 180 days).

Reaction to the Proposed Revisions

The Administration immediately denounced the proposed revisions to the bill, and continued to assert that the bill would result in quotas despite the specific anti-quota language. In a May 30 speech to graduates of the Federal Bureau of Investigation Academy at Quantico, Va. President Bush said that Congressional leaders "proposed an anti-quota amendment to take care of the problem, the quota problem they said didn't exist. It shouldn't fool anyone. Even the section that supposedly outlaws quotas endorses quotas. It defines the 'Q' word, as it's come to be known, it defines the 'Q' word so narrowly it would allow employers to establish personnel systems based on numbers, not merit. Other sections rig the rules against employers. If their numbers aren't right, the employers are essentially helpless to defend themselves in court."

Similarly, Attorney General Dick Thornburgh referred to the anti-quota language as a "hoax." In a statement, he said:

"The new language to 'outlaw quotas' is purely and simply -- a hoax. The bill excludes from the definition of quotas the only kind of quotas that matter and it gives safe harbor to quotas already in existence. The new language would only bar an employer from using a quota system that required the hiring of unqualified persons. The bill would permit an employer, however, to use a quota system in the hiring of others so long as they met minimum standards. The new language therefore would protect the very kind of quotas that employers would be pressured to use in order to avoid the costly and time-consuming litigation that this bill would foster."

Ralph G. Neas, Executive Director of the Leadership Conference on Civil Rights, said: "The President's remarks today are almost Orwellian. His assertions turn the truth upside down. The bill explicitly prohibits quotas, making them for the first time an unlawful employment practice. The White House has opposed every compromise over the past two years and has tried to scuttle every effort to compromise."

In a memorandum released by the LCCR, the coalition asserted that:

"The responses of President Bush and Attorney General Thornburgh to the bipartisan Brooks-Fish Civil Rights Bill make it abundantly clear that they are determined to be the spoilers of *any* legislation that will preserve the gains of past civil rights laws and help heal racial divisions. The Administration's opposition to the anti-quota language in the bill contradicts the previous views of President Bush and the Justice Department itself. In this desperate attempt to create a divisive political issue, the Administration now opposes even a bill that would ban exactly the type of quotas that President Bush himself has criticized....

"Quotas would be made explicitly illegal for the first time. The Brooks-Fish bill would give victims of quota discrimination the right to sue, including for damages. Yet President Bush and Attorney General Thornburgh still oppose the bill. In fact, the White House announced its opposition before it even *saw* the bill. It has opposed every effort to achieve compromise, including its blatant sabotage of the discussions between the Business Roundtable and civil rights leaders. The administration wants a divisive political issue, not genuine civil rights progress. It is apparently willing to distort the truth, stir up racial fears, and sacrifice the rights of Black and white Americans for the sake of political gains."

House Majority Leader Richard Gephardt, in response to the President's speech, said: "We have produced a bill that makes quotas illegal, and which gives white workers, black workers, women and men, religious minorities and the disabled access to the courts to enforce their rights. This is not a President who wants a civil rights bill..."

Opposition to the compromise bill was also expressed by members of the Congressional Black Caucus, and the Congressional Caucus on Women's Issues who supported a measure sponsored by Representatives Edol

phus Towns and Patricia Schroeder. Representative Kweisi Mfume (D-MD) referred to the alternative measure as "a pure civil rights bill". In a Dear Colleague letter, Representatives Towns, Schroeder, Mary Rose Oakar (D-OH), Patsy Mink (D-HI), Barbara Kennelly (D-CT), and Mike Kopetski (D-OR) stated:

"There is only one civil rights bill that speaks to the American tradition of fairness and equality: the Towns-Schroeder substitute. Of the three civil rights substitutes, Towns-Schroeder is the only bill that restores prior law and provides equal access to remedies for intentional discrimination."

FOUR MAJOR DIFFERENCES: H.R. 1 AS REPORTED OUT OF COMMITTEE AND THE THREE SUBSTITUTES

This section borrows heavily from a document prepared by staff of People for the American Way.

1. DAMAGES

H.R. 1, Civil Rights and Women's Equity in Employment Act, (as reported out of the House Education and Labor Committee): Allows unlimited compensatory and punitive damages for claims of intentional discrimination based on race, religion, national origin, sex, and disability. Punitive damages could be awarded only where the employer "engaged in an unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others."

Towns-Schroeder, Civil Rights Act of 1991: similar to H.R. 1

Administration-Michel, Civil Rights Act of 1991: Permits monetary damage awards, limited to \$150,000, for intentional harassment, based on race, color, religion, sex, or national origin, *only*. Provides no damages for intentional discrimination other than harassment. Provides that employees would forfeit this remedy unless they pursue their employer's internal complaint procedures within 90 days of the harassment, regardless of how cumbersome or futile the internal procedure. Only courts, not juries, might award damages in harassment cases. Specifies numerous criteria that must be met before a court awarded damages.

Brooks-Fish, Civil Rights and Women's Equity in Employment Act: Allows unlimited compensatory damages, and caps punitive damages at \$150,000, or the sum of backpay and compensatory damages, whichever is greater.

2. ANTI-QUOTA LANGUAGE

H.R. 1: Provides that the Act shall not be construed "to require or encourage an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex, or national origin," provided, however, that the Act shall not be construed to "affect otherwise lawful affirmative action, conciliation agreements, or court-ordered remedies."

Towns-Schroeder: No language

Administration-Michel: No language

Brooks-Fish: Provides that the Act shall not be construed "to require, encourage, or permit an employer to adopt hiring or promotion quotas," and that quotas shall be deemed to be an unlawful employment practice under Title VII, while affirming the validity of lawful affirmative action programs.

3. BUSINESS NECESSITY

H.R. 1: Practices involving employee selection must be shown to "bear significant relationship to successful performance of the job." Practices not involving employee selection "must bear a significant relationship to a manifest business objective of the employer." The bill states that this section is meant to codify the meaning of business necessity as used in *Griggs* and overrule the treatment of business necessity as a defense in *Wards Cove*.

Towns-Schroeder: Practices must be shown to "bear a substantial and demonstrable relationship to effective job performance."

Administration-Michel: Practices must have a "manifest relationship to the employment in question," or the employer's "legitimate employment goals" must be "significantly served by, even if they do not require, the challenged practice." No specific language codifying *Griggs* or overruling *Wards Cove*.

Brooks-Fish: Practices must bear a "significant and manifest relationship to the requirements for effective job performance." Requirements for effective job performance include actual job functions and "factors which bear on such performance, such as attendance, punctuality, and not engaging in misconduct or insubordination." Specifies that the bill "is meant to codify the meaning of, and the type and sufficiency of evidence required to prove, 'business necessity' as used in *Griggs*...and to overrule the treatment of business necessity as a defense in *Wards Cove*...."

4. PROHIBITION ON THE USE OF UNFAIR JOB TESTS

H.R. 1: No language

Towns-Schroeder: No language

Administration-Michel: Prohibits the adjustment of test scores on the basis of race, color, religion, sex, or national origin, without prohibiting the use of discriminatory tests.

Brooks-Fish: Specifically bans the practice of adjusting test scores on written tests on the basis of race, color, religion, sex, or national origin. In addition, the substitute makes clear that the use of discriminatory tests is prohibited, and that employers should develop non-discriminatory tests or other selection criteria which accurately measure ability to perform the job.

The Brooks-Fish substitute includes the provisions added to the bill in the Education and Labor Committee: Glass Ceiling Commission, Pay Equity Technical Assistance, Equal Employment Data Reporting, and EEOC outreach and education activities to underserved minority groups (see pp. 7-8).

APPENDIX: HOUSE HEARINGS

The House Education and Labor Committee held two days of hearings and the House Judiciary Subcommittee on Civil and Constitutional Rights held three days of hearings in February and March.

Lack of Adequate Remedies

Some of the most compelling testimony was provided by victims of sexual harassment who had no effective remedy:

"My name is Jackie Morris...In 1981, I was hired as a machinist by the American National Can Corporation to work in the mold repair department at the company's Pevely, Missouri glass bottle manufacturing plant...During most of this time, I was the only woman in the department and trained many of the new employees. Since coming to work at the plant, my performance ratings have all been 'good' or 'excellent'... Beginning in 1984, my co-workers and my supervisor began engaging in a campaign of sexual harassment...[including] on more than one occasion, the manager of forming operations for the plant touched my buttocks, told me that I 'had a nice ___' and that he would 'like to have a piece of that'...I was tremendously embarrassed and offended by these incidents, but felt that I had nowhere to turn. My supervisors, the people I complain to, were harassing me themselves...Finally, I decided that I had to go outside the company for help. All I wanted was for the harassment to stop. I filed a charge of discrimination with the EEOC in July 1986. After I filed a complaint, however, the harassment escalated substantially...This harassment increasingly affected my health, and I missed a lot of days of work. In December 1989, a federal judge held that I had been subjected to unwelcome sexual harassment for at least two and one-half years in violation of Title VII of the Civil Rights Act of 1964...The court also concluded that the company was responsible for what happened to me. The judge held that the company was at best indifferent to my situation. But even though he held the company liable for violating Title VII, he only awarded me \$16,000 in back pay and interest for work I had missed. I received nothing for the pain, suffering and humiliation I endured for years at the hands of my co-workers and supervisors

"Today, the situation remains far from acceptable. Although the company promised that I would not have to work with my old supervisor, when I returned to work I was put right next to him. The company has never apologized or said 'what could we have done,' or 'what can we do now.' Instead, I have learned that the company told some of my coworkers that if they talked to me they would lose their jobs. And I am told that the plant manager has said 'I'll see to it that she gets what is coming to her.' I believe that the company would treat people better if damages were available in cases like mine. As it is now, I do not believe sex harassment is taken seriously."

Business Necessity Standard

Numerous witnesses provided testimony for and against the provisions in H.R. 1 that address the business necessity standard for disparate impact cases. David L. Rose who served as Chief of the Employment Section in the Department of Justice from 1969 to 1987, expressed strong support for the bill. He said that the Supreme Court's decision in *Wards Cove* allows the use of "artificial, arbitrary and unnecessary barriers" to equal employment opportunity that the Court struck down in *Griggs* because they were "unrelated to job performance."

"The decision in *Wards Cove* threatens to reinstate some of those traditional barriers to equal employment opportunity, and to encourage or permit employers, whether purposefully or through inadvertence, to continue or reinstate some of the traditional barriers, and to institute new selection procedures which are artificial and unnecessary barriers to equal opportunity, with devastating effect upon minorities and women."

In contrast, Cathie Shattuck, a former Commissioner and Vice Chair of the Equal Employment Opportunity Commission, said the provisions of the bill that address *Wards Cove*, go "much further than a codification of the *Griggs* standard or any other standards adopted by the Supreme Court in both defining the plaintiff's burden of proof and the defense of business necessity." She went on to say that:

"Any legislation that attempts to define 'business necessity' should do so in such a way that the courts can apply that definition to a variety of business circumstances. For example, an employer should be allowed to defend its actions by showing that it cannot operate its business safely (a valid drivers license and a good driving record for delivery truck drivers), efficiently (filing by a person who knows the alphabet versus one who does not), or in a fiscally responsible manner (the ability to insure drivers or secure a bond for persons who handle money). There should be a way for a court to recognize such facts of business life, even if they do incidentally limit the employment of members of a protected group to some extent. There should be some allowance for reasonable common sense in determining business necessity."

Title VII And Damages

Witnesses spoke about the need for a Title VII damages provision to make available to victims of discrimination based on sex, religion or disability the full range of damages that are available under sec. 1981, a post Civil War statute, to victims of race discrimination. Victor Glasberg, a lawyer in a small firm engaged in civil rights litigation, said:

"From my standpoint as a discrimination lawyer in the field, it is apparent that the law gives a wholly inadequate remedy to most women claiming sex discrimination in employment, regardless of how provable their claims are. Typically, these are women whose claims arise out of *intentionally discriminatory treatment* by persons still employed by (not to say highly placed in) the respondent company, as opposed to women with *disparate impact* claims...The critical difference is that in intentional discrimination cases, by the time the case gets to me, and certainly after litigation has proceeded for a while, there is a great deal of personalized hostility between the employee/plaintiff and her employer/defendant. It could not be otherwise, where my client claims that persons associated with the company have intentionally engaged in offensive and illegal conduct which has victimized her, and the company vigorously rejects the assertion and responds by pointing the blame at the plaintiff....It is not surprising, thus, that following successful Title VII litigation, the plaintiff emerges with a bitter-sweet victory at best. She has been legally vindicated -- and now must return to work for the very company -- even persons -- who just proclaimed her unworthiness or mendacity under oath. The company is apprehensive about her attitude, and she can reasonably fear subtle reprisal from her victimizers. This is success for a Title VII claimant....Granting a damages remedy for sex discrimination will protect the rights of the female employees who need protection most: women who are so put upon that they feel compelled to quit their jobs and lose their income in order to save their self-respect, their psychological and emotional well-being, and in some cases their marriages; and women who place these matters at risk by retaining (or returning to) a job in which they have been abused."

Other witnesses spoke in opposition to the damages provision asserting that such a provision would change the conciliatory nature of the statute. Zachary Fasman, in testimony on behalf of the National Association of Manufacturers and the Society for Human Resource Management, said:

"The change in remedies under Title VII reflects a basic shift in the governing philosophy under the statute, and will lead to increased litigation rather than enhanced equal employment. Title VII was carefully crafted to provide a complete and expeditious remedy for the economic harms suffered by victims of employment discrimination. Discrimination charges must be filed promptly; the EEOC is supposed to investigate expeditiously; and if reasonable cause exists to believe that the statute has been violated, the Commission must attempt to conciliate the matter prior to suit. The obvious and stated intent of Congress was to avoid extensive court delays and quickly remedy employment discrimination through administrative conciliation. This process depends upon maintaining the traditional 'economic harm' employment remedy of reinstatement and back pay, and excluding jury trials. At present, early in the process, even full recompense for an employee's economic injury is relatively slight in comparison to an employer's projected litigation costs, to say nothing of the plaintiff's legal fees that the employer will incur in the event of a loss...many if not most charges are resolved early in the process because an employer has a strong incentive to settle rather than litigate....An employer's economic incentive to settle largely is destroyed if

compensatory and punitive damages are routinely available. Experience in state wrongful discharge litigation reveals that compensatory and punitive damage awards regularly average in the hundreds of thousands of dollars...By expanding remedies in this fashion, Congress would create a marked incentive for litigation as opposed to expeditious administrative resolution of employment discrimination complaints."

Victor Glasberg in his testimony said that experience under Sec. 1981 does not suggest that expanding the remedies under Title VII to include monetary damages would result in excessive damage awards:

"The exhaustive study of reported decisions under...Sec. 1981 done by the law firm of Shea & Gardner...indicates how modest damages have been in the overwhelming majority of cases brought under that statute, which, unlike Title VII, provides for compensatory and punitive damages for cases of proven employment discrimination. Of a total of 466 reported cases from 1980 through 1990 of which the disposition is known, the study found as follows:

in 325 the defendant won

in 121 the plaintiff won

- in 52 the plaintiff received only back/front pay
- in 69 the plaintiff received damages
 - ▣ in 42 the damages were less than \$50,000
 - ▣ in 3 cases the damages exceeded \$200,000

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