Original FOIA Number: 2007-0758-S

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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: PHIL BRADY

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Presidential Remarks: Civil Rights Bill Signing Ceremony/11-21-91

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOFC	ORIGINATOR	91/11/19		C	91/11/20 CS
	Referral Note:				
CUAT 10	A	91/11/19		C	91/11/20
	Referral Note:	91/11/20 Ltr memo to Bandy			CS
CUGray	I	91/11/19		C	91/11/19
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				

ACTION

DISPOSITION

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
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FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
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Comments: _____

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5/81

THE WHITE HOUSE

WASHINGTON

November 20, 1991

MEMORANDUM FOR TONY SNOW

FROM: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Presidential Remarks: Civil Rights Bill Signing Ceremony/11-21-91(Draft 2)

Counsel's office has made a few suggested changes on the above-referenced matter. Please see attached pages. The comments were given orally to Mary Kate.

cc: Phillip Brady

Document No. 287200

COUNSEL'S OFFICE
RECEIVED
NOV 19 1991

WHITE HOUSE STAFFING MEMORANDUM

DATE: 11/18/91 ACTION/CONCURRENCE/COMMENT DUE BY: 1:00 p.m. Tues. 11/19

SUBJECT: PRESIDENTIAL REMARKS: CIVIL RIGHTS BILL SIGNING CEREMONY/11-21-91
(11/18 Draft two)

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

REMARKS: Please provide any comments directly to Tony Snow no later than 1:00 p.m. on Tuesday, 11/19, with a copy to this office. Thanks.

RESPONSE:

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

Grant / Aarhus
Draft two: Civilrts.ts
November 18, 1991

91 NOV 18 P7:44

BRIEF REMARKS: CIVIL RIGHTS BILL SIGNING CEREMONY
THE ROSE GARDEN
THURSDAY, NOVEMBER 21, 1991
2:00 P.M.

Welcome to the White House. [Acknowledgements]

Today, we celebrate a law that will fight the evil of discrimination while also building bridges of harmony between Americans of all races, sexes, creeds and backgrounds.

For the past few years, the issue of civil rights has divided Americans. Well, no more. From day one, I told the American people I wanted to sign a civil rights bill that advances the cause of equal opportunity. I wanted to sign a bill that advances the cause of racial harmony. And I wanted to sign a bill that encourages people to work together. **Today I am signing that bill, the Civil Rights Act of 1991.** //

Discrimination, whether on the basis of race, national origin, sex, religion or disability, is **worse than wrong.** It is an **evil** that strikes at the very heart of the American ideal. This bill, building on current law, will punish severely those who continue to discriminate against their fellow Americans, but it will not punish the innocent.

For these reasons, this is a very good bill. ~~Let me repeat that: this is a very good bill~~. Unlike last year's bill -- a bill I was forced to veto -- it will not encourage quotas or preferences. I oppose quotas because they incite tensions between the races, the sexes, between people who get trapped in a

It contains strong new remedies for the victims of discrimination and harassment, along with

numbers game. ~~Instead, I prefer bills that punish discrimination~~ head-on and tell ~~everyone~~ that our society does not accept ~~bigotry~~.

This bill contains several ~~important~~ innovations. For example, ~~its~~ provisions capping damages are an important model to be followed in tort reform. It encourages mediation and arbitration between parties before the last resort of litigation. **Our goal and our promise is harmony -- a return to civility and brotherhood -- as we build a better America for ourselves and our children.**

One discouraging note however: we are disappointed that Congress has not applied this statute to ~~themselves~~ in the same way it does to the rest of America. It's a sad and pitiful fact that most Congressional employees have no access at all to the courts ~~should they need judicial remedy~~. **I continue to urge the Congress to apply the same laws to itself that it enacts on the rest of America. //**

We had to work hard for this agreement. But the credit goes to the dedicated Republicans in Congress -- especially Senators Dole and Danforth -- for ensuring that I had a bill I could sign. No one likes to ~~veto~~ a civil rights bill -- **especially not me** -- and no one in Congress likes to vote against one either. I owe a debt of gratitude to those who stood with us against bad legislation last year, and to those who led the way toward this tremendous agreement we've reached today. To all of you, we say thank you.

But to the Congress I also say this: **The 1991 Civil Rights bill is only the first step.** If we seek -- and every one of us does -- to build a new era of harmony and shared purpose, we must make it possible for all Americans to scale the ladder of opportunity. If we seek to ease racial tensions in America, civil rights legislation is not enough. The elimination of discrimination in the workplace is a vital element of the American Dream, but it is **simply not enough.**

We cannot expect people to scale that ladder if we don't make jobs available to everyone who wants to work. We need an economic growth initiative from the Congress to create jobs and opportunity all across America. //

Americans cannot enjoy full opportunity until they receive first-rate educations that will prepare them for the competitive international marketplace. So we urge the Congress once again to act on our America 2000 education initiative.

We cannot expect Americans to work hard and prepare for the future if they live in a climate of fear and hopelessness -- our crime bill, bottled up for two years on Capitol Hill, will help us win the battle against drugs and violent crime in our streets.

Our people also deserve the dignity of owning their own homes. That's why we have proposed the HOPE initiative.

We've proposed these initiatives because we measure success not in dollars and lawsuits, but in terms of opportunity, prosperity and harmony.

The American Dream rests on the vision of life, liberty and the pursuit of happiness. In our workplaces, in our schools, or on our streets, this dream begins with equality of opportunity. Our agenda for the future -- whether it be guaranteeing equal protection under the law, promoting excellence in education, or creating jobs -- will ensure for future generations that America **remains** the beacon of opportunity in the world.

Now, with great pride, I will sign this bill into law.

# # #

ID# 287470

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

#4010

INCOMING

DATE RECEIVED: NOVEMBER 19, 1991

NAME OF CORRESPONDENT: MR. PAUL W. KERR

SUBJECT: EXPRESSES STRONG DISAGREEMENT WITH THE PRESIDENT'S DECISION TO SIGN THE CIVIL RIGHTS BILL

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	C/D	DISPOSITION COMPLETED YY/MM/DD
JEFF VOGT		ORG	91/11/19			91/11/15
	REFERRAL NOTE:					
	REFERRAL NOTE:					
	REFERRAL NOTE:					
	REFERRAL NOTE:					
	REFERRAL NOTE:					

COMMENTS: WRITER IS ALSO PRESIDENT, AMERICAN DESK MANUFACTURING COMPANY called - S

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 4200 4900 ____

PL MAIL USER CODES: (A)_____ (B)_____ (C)_____

*ACTION CODES:	*DISPOSITION	*OUTGOING CORRESPONDENCE:
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS OF SIGNER
*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	* CODE = A
*D-DRAFT RESPONSE	*C-COMPLETED	*COMPLETED = DATE OF
*F-FURNISH FACT SHEET	*S-SUSPENDED	* OUTGOING
*I-INFO COPY/NO ACT NEC		
*R-DIRECT REPLY W/COPY		
*S-FOR-SIGNATURE		
*X-INTERIM REPLY		

REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE (ROOM 75,OEOB) EXT-2590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

TEXAS ASSOCIATION OF BUSINESS
P. O. BOX 2989 ★ AUSTIN, TEXAS 78768-2989 ★ (512) 477-6721

887470

November 15, 1991

The Honorable George Bush
President of the United States
The White House
Washington, D. C. 20500

Dear Mr. President:

On behalf of thousands of companies represented by the Texas Association of Business, I am writing to express strong disagreement with your decision to sign the Civil Rights bill. This law will be exploited by trial lawyers to attack business, and will cause severe disruption of our efforts to restore economic growth in your home state.

This "compromise" bill is still a quota bill. The employer, rather than the claimant, will have the burden of proof in all disparate impact cases. Combining this with the incentive of monetary damages, despite caps, will subject businesses to many frivolous claims. A prudent business decision may require hiring by quotas simply to avoid the cost of litigation.

I understand that the political pressure on you during an election year is great. I encourage you to continue to stand firm for what is right, which has been the basis for your broad public support.

The economy will recover and jobs will be created when businesses prosper, not when government continually increases the web of regulation upon which trial lawyers feed.

I urge you to act in the best interest of all people by vetoing the Civil Rights bill which will add costs to business without creating jobs.

Sincerely,

Texas Association of Business

Paul W. Kerr, Chairman

President, American Desk
Manufacturing Company

PWK/BG:es

CS

ID # 287601 CU
HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Jack Vanderryn

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Objects to CBS's piece in the Washington Post on civil rights

ROUTE TO: | **ACTION** | **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuoco	ORIGINATOR	91/11/19		C	91/12/02
Cuat 10	A	91/11/20		C	91/12/02
	Referral Note:	ATTN: FYI — see comments			
	Referral Note:				
	Referral Note:				
	Referral Note:				

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ACTION CODES:
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Comments: No further action required per N. Lund 12-2-91

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2 8 7601 cu

JACK VANDERRYN
8112 WHITTIER BOULEVARD
BETHESDA, MARYLAND 20817

November 18, 1991

Dear Mr. Gray:

I vigorously object to your misleading article in The Washington Post on the civil rights bill. It was the most obvious attempt to rewrite history and place the Administration in a favorable position, when that was not justified.

Such attempts to place the President in a favorable light when he does not deserve it, will be seen through readily by the American people. You are not worthy to participate in such shenanigans.

Sincerely,
Jack Vanderryn

TJ

288030
Hill

CIVIL RIGHTS IN THE FUTURE

Since its inception the civil rights movement has sought remedies for discrimination primarily through the courts. Appropriately enough, school desegregation and voting rights battles were resolved by the courts, because they implicated fundamental notions of political rights. The courts represented the best forum for the civil rights movement's early objective -- to ensure each citizen's opportunity to participate in the citizenry, regardless of race. While the courts still preserve political rights, they have become and inappropriate and counterproductive arena to secure interracial economic parity. What is needed is a new approach to civil rights policy, in which economic disparity is evaluated as an issue of economic opportunity, rather than as a subset of legal "rights."

The Problem with Traditional Civil Rights Policies

In tandem with legal opinions, the 1960s civil rights acts provided remedies for discrimination, enhancing new legal protections, and creating preferential programs to facilitate minority advancement. Traditional thinking about civil rights was premised on a link between rights of political citizenship and guarantees of equal economic opportunity. Compensation for past wrongs became a necessary precursor to securing full rights as citizens.

Unfortunately, this formulation created a tension between end -- equal opportunity -- and means -- racial preferences.

This conflict has been manifested in civil rights policies in both conceptual and practical ways. Conceptually, traditional civil rights relies on an expansive definition of "rights," in which affirmative action and entitlements became as fundamental to citizenship as political rights of participation. However, the courts, in deciding issues outside the realm of political participation, have been reluctant to expand judicial commitments beyond ensuring equal opportunity. Thus, courts have insisted on equality of results in reapportionment and voting rights, but have retreated from broad remedies to do the same for inter-racial economic disparities, (i.e. Croson and minority set-asides). Given the courts' understandable reluctance, but the equally persuasive justification for interracial economic parity, it is clear that socio-economic issues will have to be resolved in political/legislative spheres, not constitutional/legal ones.

Legislative/political evolutions will also have to be reconciled with the paradox of racial preferences: programs which provide racial preferences to remove race as a barrier to economic parity accentuate race as a divisive force, rather than reduce it. The objective of economic parity between races is better served by focusing on the solution to the problem -- economics -- than the perceived cause -- racial discrimination. If the starting point for remedial programs is a depressed economic condition among blacks, eligibility for affirmative action could just as well be on an economic as a racial basis.

An even more compelling reason for economic preferences is that they work better than instead of racial ones. Affirmative action by race provides special considerations to minorities provided individuals also meet minimum job or academic standards. Accordingly, the prime beneficiaries of affirmative action over the past 20 years have been middle-class blacks and their children. Otherwise qualified minorities who are also poor have been crowded out. Similarly, poor minorities who want to educated or retrained to meet minimum job qualifications are excluded from preferential programs that assume baseline abilities. This aspect affirmative action though unintended, has left blacks with entitlements fostering economic dependency instead of creating incentives for self-advancement. Traditional civil rights secured political rights for minorities. But its insistence on society's coequal economic obligations has bred racial resentment without advancing all minorities' socio-economic status.

The New Paradigm of Civil Rights

A new paradigm of civil rights needs to address sources of inter-racial socio-economic disparities with the objective of eliminating group status as a qualifier or disqualifier for economic opportunity. The post-legal civil rights agenda will involve a wide range of education, criminal justice, and housing concerns. Unlike past issues like voting rights or school

busing, these policy areas will not be amenable to resolution by the courts for reasons already discussed.

In addition, education, crime, and housing are less questions of legal "rights" as they are of individuals' quality of lives. With this in mind the lexicon "civil rights" should relate only to those policies involving political rights of citizenship, e.g. voting rights. It should be replaced by the new vocabulary of "empowerment" which, unlike "civil rights," emphasizes individual self-determination, but has no judicial connotations.

In fostering economic opportunity, new empowerment policies will have to address a variety of social and cultural barriers. New policy initiatives will need to provide a framework of opportunity through which individuals can make choices to better their own lives. The autonomy to make self-advancing decisions will make possible the autonomy of self-advancement. The new empowerment agenda will have to address the needs of differently-situated minorities, making it possible for all to obtain necessary skills and stability to enjoy a mainstream lifestyle. Working parents on the edge of poverty will need tax relief to facilitate health and child care. Children born in poverty will need enough education to guarantee basic skills and the opportunity to pursue post-secondary training. Miscreant youths and criminals will need to be removed from city streets through

tough sentencing, and returned to society only after demanding rehabilitation.

It is important to note that focusing on economic hardship as the eligibility for assistance has been criticized as being no more successful than programs based on race. For example, Glenn Loury has observed:

> [W]hen there is social segregation in associational behavior along group as well as class lines, then it is not generally true that historically generated differences between the groups attenuate in the face of racially-neutral procedures.

Loury's conclusion is hard to dismiss because, like conservatives, he admits the importance of cultural and social factors in the perpetuation of poverty. These non-economic forces, he submits, may not be alleviated by economic incentives.

Nevertheless, his concerns can be answered by emphasizing the new approach of empowerment. Past policies tried to identify the external forces that created poverty, whether addressing political, social, or economic causes would be most crucial to reducing poverty. Empowerment policies admit the importance of all these factors, but suggest the need to focus on where those factors have resonance: the individual. Addressing the sources of problems is imprecise and often counterproductive; show a person the path to self improvement and the means to achieve it, and the contributing factors, whether social, political, or cultural, are nullified.

Thus, new policies will differ in design and intent from historic ones, providing the wherewithal for individuals to advance economically (education and training) and instilling the social responsibility that supports autonomy (tenant ownership and reduced crime). Even if these policies do not immediately end group segregation, as Loury contends, they will create new social structures that overcome poverty's social detriments. For example, conversion of a housing project to tenant ownership and management might not change the project's all-black population, but it will encourage equally important communitarian ties, a shared sense of responsibility and individual initiative.

Unintentionally, Loury offers a second response to his own quandary:

> The question remains: what have been the specific consequences of past deeds that require, for their reversal, the employment of racial classification? Those racial preferences that confer benefits upon minority group members who do not suffer background related impediments to their mobility only could be rationalized if the recipient's connection to their less-fortunate fellows would ensure a sufficiently large beneficial spillover effect on the social mobility of the poor.

For Loury, racial classifications can be justified if they preserve economic and social role models in poor areas, individuals who would not qualify for assistance on economic grounds. The problem is that during the 1980s Loury's economic and social role models left poor areas. Indeed, the movement of non-poor from poor areas explains in large part, the increasing concentration of poor in urban areas, and the deepening of

poverty within those concentrated areas. Similarly, marginally poor people have also left poor areas. (Jargowsky and Bane, 268)

The role models on which Loury justifies racial preferences have left poor urban areas. Rejuvenation of remaining populations will have to be achieved instead by the types of policies suggested above: education, tenant ownership and management, enterprise zones -- in short, self-improvement through a framework of opportunity. The raw materials for future role models are there; they need only be encouraged and enervated to take charge of their futures.

Devising Empowerment Policies

The best empowerment program ever conceived is a job. To be a productive member of society means being able to establish economic independence, to prepare for old age, and to establish a dignified social status. And with the personal responsibilities of employment come the opportunities of self-sufficiency, home ownership, and the ability to provide children with a stable environment. The cycle of poverty can be broken by policies promoting autonomy.

The scope of policies necessary to achieve autonomy is outlined by William Julius Wilson in his study of the urban underclass, The Truly Disadvantaged. Wilson emphasizes the related impact of disruptive economic, political, and cultural

forces; the cumulation of which have made inner-cities inhospitable to self-advancement.

Wilson concludes that the migration of jobs to suburbs, and the shift from goods-producing to service-producing industries increased black joblessness, concentrating unemployed poor in urban areas. The simultaneous emigration of working and middle-class families to the suburbs exacerbated inner-city poverty destroying the cities' economic and social infrastructure:

> [Middle-class families] invested economic and social resources in the neighborhoods, patronized the churches, stores, banks, and community organizations, sent their children to the local schools, reinforced societal norms and values, and made it meaningful for lower-class blacks in these segregated enclaves to envision the possibility of some upward mobility. (462)

Segregation from middle-class lifestyles and isolation from suburban jobs, Wilson concludes, has reinforced the underclass' social and economic alienation. This proposition is supported by some empirical research showing that low-income blacks, when provided suburban housing, are more likely to find jobs than cohorts housed in inner-cities. Clearly there is a correlation between housing, employment, and poverty but is it a causal relationship, and can it be broken?

To answer these questions Wilson's approach needs to be combined with labor market theories explaining trends in industrial growth and labor demand. Understanding why poor workers become unemployable helps to explain why they remain

jobless. Analysis of these labor market trends shows a long-term inflation in basic skills -- skills necessary for all jobs -- and an increased demand for advanced, specialized skills.[1] Continued skills growth and diversification in the types of skills in demand will likely create a mismatch between skill demands and the supply of workers to meet those demands.

The possibility of a future skills mismatch will have far-reaching implications for education and labor policies. But it will also be crucial to anti-poverty policies. If demand for advanced skills continue, old policies perused on "good jobs at good wages" will be inadequate and outdated. Policymakers need to consider carefully the relationship between labor supply and demand trends in devising programs to encourage industrial trends but provide workers skills enough to meet growth. The "good wages" assumption, for instance, will be altered by inflation in basic skill requirements the correlation between skills and earnings decreases. Correlation tests have shown that skills are positively correlated with education, and that education is positively correlated with earnings. But with the inflation in basic skills, jobs requiring high skills (relative to pre-skill inflation levels) no longer guarantee high earnings. In fact,

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1 The types of skills which will be in demand, the shortages of labor available to meet these demands, and the levels of education needed to redress this gap are discussed in greater detail in the following section of this article.

over the last 25 years, the most rapid growth in non-supervisory jobs -- the types of jobs non-college graduates compete for -- occurred in jobs requiring the highest skills. Yet those same jobs were located in low-wage industries.

The skills mismatch approach is important because it establishes a link between the need to meet workforce trends and the need to reform social structures in low-income areas. The education necessary to provide basic skills will also be the education that provides discipline and self-esteem. The housing and social policies that encourage home ownership and reduce crime will facilitate access to jobs and safe neighborhoods in which businesses can invest.

Empowerment, Education, and the Present Condition of Minorities

The first objective of empowerment policies, increasing the proportion of minorities in high-skill and high-wage jobs, can be achieved by minorities' educational attainment. Policies will have to be designed at two levels, to ensure minorities already in the workforce can keep pace with upskilling, and to encourage minority youths to pursue college education. Contrary to common media perceptions, the country has been doing an adequate job in the latter area.

The increasing rate of college graduation and professional employment among blacks is supporting an expanding black middle class. Although blacks continue to lag whites in college

completion rates, by 1990 an estimated 2.1 million blacks, more than 10 percent of the total black population, had completed college. Especially important is the increasing number of black women, completing high school and enrolling in college, making them eligible for higher-skill and higher-wage jobs. The narrowing levels of educational achievement between blacks and whites means that many future black workforce entrants will have similar educational qualifications to whites, and thus claims to higher-skill and higher wage jobs.[2]

Increasing educational attainment has coincided with a decreasing wage differential between black and white workers. Between 1960 and 1980 weekly wages of black men rose from 58.6% of the earnings of white men to 73.5%. More than one-third of the black-white wage gap was closed during these twenty years.[3] Part of this change occurred because schooling levels of blacks and whites converged, but even more important was the increase in black earnings relative to whites at the same schooling levels. Economist Richard Freeman has reported that relative income gains

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2 As _____ has written: Higher educational attainment has increasingly become the major mechanism for effecting upward economic and social mobility. The occupational opportunities for educated blacks have grown at an unprecedented rate over this period, and according to black sociologist William Wilson, they are comparable to those open to whites with the same qualifications. (317)

3 Welch, Finis, "Affirmative Action and Discrimination," printed in The Question of Discrimination, (Wesleyan University, 1989), 180

were particularly rapid among blacks with college degrees and in professional occupations. And though younger, well-educated blacks have benefited the most, income differentials have narrowed within all age groups. Racial differentials in the returns to schooling and in the impact of race on earnings have been declining persistently.[4]

At the same time, concentration of blacks in low-skill and low wage occupations persists, due in part to those workers' low educational attainment. There are only eight occupations in which 25% or more of the workforce has less than a high school degree. With the exception of agriculture and construction, blacks are significantly over-represented in each of these low-education professions, (in comparison to the total proportion of blacks in the labor force).[5] The second largest category of

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4 Shulman, Steven, "A Critique of the Declining Discrimination Hypothesis," printed in The Question of Discrimination, (Wesleyan University, 1989), 132

5 Black Employment and Education

	% held, no high school	% black	expec. grt 1988-2000
Priv. household workers	50%	23%	-5%
Cleaning and bldg serv	41%	23%	41%
Food prep and service	37%	12%	23%
Hand laborers & material movers	37%	15%	2%
Agri., forestry, fishing	36%	7%	-5%
Machine operators, assemblers	34%	15%	-3%
Transp., mechan. material moving	29%	16%	12%
Construction trades	25%	7%	16%

black employment, private household workers, will suffer the largest proportional job decline of any occupation. Every other non-service occupation with an over-representation of blacks either will grow slower than overall job growth, or will lose jobs. Service occupations, the only occupation group in which job growth will be rapid and in which blacks are over-represented, had the lowest median annual earnings of any occupation group in 1987, ($10,764).

Minority workers in occupations expected to contract by 2000 will have to find new jobs in growth occupations. But these job prospects will depend on workers' ability to transfer skills across industries, or to be retrained with necessary skills. Unfortunately, the educational attainment of workers in shrinking occupations tends to be low, which means retraining will have to be extensive and will require substantial investment by industry. Also, since retrained workers are older than workforce entrants, their future productivity and earnings potential is lower than those of new entrants. This reduces the near term profitability to both industry and government (in terms of tax revenues) to invest in training.

Clearly, government and industry will have to adopt innovative approaches to the problems of education and training. Companies in related industries concerned with workforce quality could form training consortiums and contract instructors to

retrain workers. Many business schools, for instance, offer courses to financial service executives on new business techniques. Similar programs run by universities or for-profit firms could provide training in health services, or computer repair fields -- two of the most rapidly growing industries. Industry should not appeal to government for help in retraining when the business of retraining itself may be profitable.

Similarly, government will need to approach barriers to economic opportunity in a more comprehensive and coordinated fashion, though with policies promoting autonomy not autocracy. The President's Education 2000 initiative, New Paradigm proposals, and Secretary Kemp's housing policies represent a substantial commitment to this goal. The success of these initiatives will depend, however, on the recognition by activists that empowerment policies, not litigation, will provide a long-term solution to economic gaps among minorities and between minorities and whites.

Preparation of the workforce for changes in the workplace offers a unique opportunity to advance simultaneously the causes of economic opportunity and national competitiveness. Fixation on old approaches to rights and radical equality will benefit neither the poor, for whom employment and autonomy represent success and dignity; nor the nation, for whom a qualified

workforce and equal opportunity will be the keys to social harmony and prosperity.

ID# 288087
HU010

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: NOVEMBER 21, 1991

NAME OF CORRESPONDENT: THE HONORABLE WILLIAM GRAY III

SUBJECT: REGRETS THAT HE CANNOT BE WITH THE PRESIDENT
FOR THE SIGNING OF THE CIVIL RIGHTS BILL

		ACTION		DISPOSITION		
ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACT CODE	DATE YY/MM/DD	TYPE RESP	C D	COMPLETED YY/MM/DD
SHIRLEY GREEN		ORG	91/11/21			C 91/11/25
	REFERRAL NOTE:					
CLAUDIA BUTTS		RSI	91/11/21			C 91/11/21
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*ACTION CODES:          *DISPOSITION            *OUTGOING             *
*                       *                       *CORRESPONDENCE:      *
*A-APPROPRIATE ACTION   *A-ANSWERED             *TYPE RESP=INITIALS   *
*C-COMMENT/RECOM        *B-NON-SPEC-REFERRAL    *          OF SIGNER  *
*D-DRAFT RESPONSE       *C-COMPLETED            *     CODE = A        *
*F-FURNISH FACT SHEET   *S-SUSPENDED            *COMPLETED = DATE OF  *
*I-INFO COPY/NO ACT NEC*                        *            OUTGOING *
*R-DIRECT REPLY W/COPY  *                       *                     *
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PRESIDENT BUSH

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PMS PRESIDENT GEORGE BUSH
WHITE HOUSE DC 20500
DEAR MR PRESIDENT:
THANK YOU FOR INVITING ME TO JOIN YOU AT THE SIGNING OF THE HISTORIC CIVIL RIGHTS BILL. EVEN THOUGH I DESIRE TO BE THERE, I REGRET THAT I CANNOT.

PHOTOCOPY
GB HANDWRITING

LET ME COMMEND YOU FOR YOUR SUPPORT OF THIS PIECE OF LEGISLATION AND YOUR STRONG STAND ON THE LOUISIANA GUBERNATORIAL RACE. THESE TWO ACTIONS, HOPEFULLY, WILL HAVE A HEALING EFFECT UPON OUR NATION AND SEND A STRONG MESSAGE AGAINST ETHNIC AND RACIAL DIVISIVENESS AND POLARIZATION.
RESPECTFULLY,

WILLIAM GRAY III
PRESIDENT AND CEO
UNITED NEGRO COLLEGE FUND

500 E 62 ST
NEW YORK NY 10017

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Name of Correspondent: Douglas S. McDowell

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Subject: Effective Date of the Civil Rights Act of 1991; copy of letter to Elton Kemp

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuoco	ORIGINATOR DJ	91/11/20		C	91/12/06 CS
Cuatro	Referral Note: A	91/11/2	DJ	C	91/12/06 CS
Cuatro	Referral Note: ~~DJ~~ see comments	91/11/02		C	91/11/02 CS
Cuguay	Referral Note: ~~DJ~~	91/11/02		C	91/11/02 CS
	Referral Note: DJ	/ /			/ /
	Referral Note:				

ACTION

DISPOSITION

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- C - Comment/Recommendation
- D - Draft Response
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- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

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- A - Answered
- B - Non-Special Referral
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- S - Suspended

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EQUAL EMPLOYMENT ADVISORY COUNCIL
SUITE 1220
1015 FIFTEENTH STREET, N. W.
WASHINGTON, D. C. 20005

(202) 789-8650
FAX (202) 789-2291

November 20, 1991

Hon. Evan J. Kemp, Chairman
Equal Employment Opportunity Commission
1801 L Street, N.W.
Room 10006
Washington, D.C. 20570

Re: Effective Date of the Civil Rights Act of 1991

Dear Chairman Kemp:

In the near future, President Bush will sign S. 1745 -- the Civil Rights Act of 1991. The final bill represents a compromise position between a number of divergent views and differs in significant ways from earlier versions of the bill. One of the primary compromises is found in Section 402, which states that "the Act shall take effect upon enactment." In adopting this language, Congress deleted specific and detailed retroactivity language found in the legislation that the President vetoed in 1990 and threatened to veto in 1991.

As you know, there has been a great deal of discussion about whether making S. 1745 effective "upon enactment" permits the new amendments to apply retroactively to lawsuits or charges pending on the date of enactment. There is, however, virtually no Congressional support in the legislative record for the idea that Congress intended this bill to apply to pending cases and charges. To the contrary, all the Republican Senators who worked so hard to achieve a compromise stated for the record that S. 1745 is to be applied only prospectively. Also, even Senator Kennedy -- the bill's primary Democratic sponsor -- was unwilling to state that Congress intended to apply the bill to pending cases and charges. Rather, he stated that Congress was not taking a position and that it will be up to the courts to determine the extent to which the bill will apply to pending cases and claims.

As we will explain more fully below, this and the other history of S. 1745 indicates that Congress did not intend to disturb the presumption that "congressional enactments and administrative rules will not be construed to have retroactive

effect unless their language requires this result." Bowen v. Georgetown University Hosp., 109 S.Ct. 468 (1988). Thus, because the statute does not, "in express terms," authorize its retroactive application, the EEOC would not have the authority to promulgate retroactive rules or regulations. Id. EEAC thus urges the EEOC to issue a policy guidance to all its offices stating that S. 1745 does not apply to cases and charges pending upon the date of enactment.

The issues discussed herein are of direct concern to EEAC's membership, which includes many of the nation's largest private sector employers. EEAC's members all are subject to the provisions of S. 1745. EEAC also filed amicus curiae briefs with the Supreme Court in all of the major cases that are affected by S. 1745. EEAC's members are firmly committed to the principle of equal employment opportunity, and they fully support sound, practical approaches to the enforcement of laws against discrimination. They recognize that without clear, understandable rules on the effective date of S. 1745, the EEOC and the courts could become mired in years of litigation. EEAC thus respectfully submits the following position on the effective date of the Civil Rights Act of 1991.

A. Unless Congress Indicates in "Express Terms" That Legislation is to Be Applied to Pending Cases and Charges, the Legislation Will Be Presumed to Operate Only Prospectively

It is a longstanding rule of American jurisprudence that retrospective application of statutes is not favored. Even though the Congress has the authority in some circumstances to enact legislation that applies to pending cases, "[t]he presumption. . . is that all laws operate prospectively only. Only when the legislature has clearly indicated its intention that the law operate retroactively will the courts so apply it." Sutherland Stat. Const. § 41.04 -- (4th Ed).

The basic rule against retroactivity was set out by the Supreme Court in Bowen v. Georgetown Univ. Hosp., 109 S.Ct. 468, 471 (1988):

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. E.g., Green v. United States, 376 U.S. 149, 160, 84 S.Ct. 615, 621-622, 11 L.Ed. 2d 576 (1964); Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164, 65 S.Ct. 172, 185, 89 L.Ed. 139 (1944); Miller v. United States, 294 U.S. 435, 439, 55 S. Ct. 440, 441-442, 79 L.Ed. 977 (1935); United States v. Magnolia Petroleum Co., 276 U.S. 160,

> 162-163, 48 S.Ct. 236, 237, 72 L.Ed. 509 (1928). By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. See Brimstone R. Co. v. United States, 276 U.S. 104, 122, 48 S.Ct. 282, 287, 72 L.Ed. 487 (1928) ("The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words"). Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

"This rule governs unless the words in the statute are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied." Alyeska Pipeline Service Co. v. U.S., 624 F.2d 1005, 1013 (Ct. Cl. 1980)(citations omitted). See also, United States v. Jacobson, 547 F.2d 21, 20 (2d Cir. 1976)("The 1972 amendments to Title VII have no retroactive effect where they create new substantive rights.")

B. The Supreme Court's Bradley Decision Does Not Lead to the Conclusion that S. 1745 Should Be Applied To Pending Cases and Charges

The case most often cited by proponents of retroactive application of S. 1745 is Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974). The Court there held that the attorney's fee provision of the Education Amendments Act of 1972 could be applied to a pending case. There, relying on Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969), the Court stated that "Thorpe thus stands for the proposition that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." 416 U.S. at 715.

The Court in Bradley rejected the contention that "a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." Id. at 416-17. But while it found "implicit support" for applying the statutory change to pending cases, it also stated:

> . . . neither our decision in Thorpe nor our decision today purports to hold that courts must always thus apply new laws to pending cases in the absence of clear legislative direction to the contrary.

416 U.S. at 716. Bradley, therefore, did not hand down a blanket rule of retroactivity. Rather, it found in that particular case that there was "implicit support" in the legislative history for its application of the law to the case at hand.

As now discussed, more recently in Bowen v. Georgetown Univ. Hospital, 109 S.Ct. 468 (1988) and other cases, the Supreme Court has backed away from the Bradley decision and the lower courts have taken an increasingly tough stand against retroactive application of statutes to pending cases and lawsuits. The Bowen decision adopted a presumption of prospective application of a statute unless, by its "express terms," the statute states it is to be applied retroactively.

In Bennett v. New Jersey, 470 U.S. 632 (1985), for example, the Court refused to apply retroactively the substantive provisions of the 1978 amendments to Title I of the Elementary and Secondary Education Act for determining if Title I funds were misused. While the Court of Appeals based its holding on a presumption that statutory amendments apply retroactively to pending cases (citing Bradley), the Supreme Court reversed the holding. It stated:

> We conclude, however, that reliance on such a presumption in this context is inappropriate. Both the nature of the obligation that arose under the Title I program and Bradley itself suggest that changes in substantive requirements for federal grants should not be presumed to operate retroactively.

470 U.S. at 638.

The Court then noted an additional presumption that "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." 470 U.S. at 639. The Court concluded that "absent a clear indication to the contrary in the relevant statutes or legislative history, changes in the substantive standards governing federal grant programs do not alter obligations and liabilities arising under earlier grants." 470 U.S. at 641.

Thereafter, in 1990, the Court recognized the "apparent tension" between Bradley and Bowen. See Kaiser Aluminum & Chemical Corp. v. Bonjorno, 110 S.Ct. 1570, 1577 (1990). It refused to reconcile the tension, however, and held that based on the brief legislative history that the amendment of a postjudgment interest statute was not retroactively applicable to a judgment entered before the effective date of the amendment.

Justice Scalia's concurrence in Kaiser Aluminum, however, took the majority to task for not resolving the conflict between the Bradley and Bowen lines of cases. He noted that the "apparent tension" in fact was an "irreconcilable contradiction." 110 S.Ct. at 1579. His long dissent argues that, in light of later cases, it is "doubtful" if anything of the Bradley-Thorpe line of cases "survives at all." 110 U.S. at 1586. He further argued that extension of those cases across the board "misleads prospective litigants and confuses judges in the lower courts." 110 U.S. at 1588. It is clear, however, that the Supreme Court's decisions since Bradley have not relied upon any alleged presumption in that decision to apply a statute retroactively.

C. The Lower Courts Have Resolved the Bowen/Bradley Tension By Adopting a Presumption Against Retroactive Application of a Statute

Actually, the lower courts appear less confused than feared by Justice Scalia. After reviewing the apparent conflict between the Supreme Court's Bowen and Bradley decisions, many have adopted a presumption against retroactivity. The most extensive analysis is in DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.1d 1377 (10th Cir. 1990), cert. denied, 111 S.Ct. 799 (1991). There, the court refused to apply retroactively the Civil Rights Restoration Act of 1987, intended to reverse the decision in Grove City College v. Bell, 465 U.S. 555 (1984). The court noted that the legislation had "no clear expression of [congressional] intent regarding retroactive application of the Act's amendments." 911 F.2d at 1385. Indeed, the court stated:

> Unlike other congressional amendments to existing laws enacted by Congress in response to Supreme Court decision, the Restoration Act contains no statutory language clearly stating that the Act's amendments shall or shall not apply to pending litigation.

911 F.2d at 1385 & n. 7 (citing statutes with specific retroactive language).

The court in DeVargas also disagreed with Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990), which applied the Grove City law retroactively based on implications from the surrounding circumstances. DeVargas held that:

> The standard of "clear congressional intent" for the retroactive application of statutes requires articulated and clear statements on retroactivity, not inferences drawn from the general purpose of the legislation. We simply cannot derive a "clear congressional intent" solely from the circumstances

> that Congress acted to amend existing law in response to a Supreme Court opinion, particularly where Congress, acting under the same motivating circumstances, has expressly and specifically stated that its newly enacted amendment was to apply to pending cases. See supra note 7.

911 F.2d at 1387 (emphasis added).

After reviewing the "apparent tension" between Bowen and Bradley, the Tenth Circuit concluded that Thorpe rested its holding on cases that either offer no support for that proposition [of retroactivity] or lend support to the opposite proposition." 911 F.2d at 1392. The Tenth Circuit thus adopted the presumption that absent clear congressional intent to the contrary, statutes are presumed to apply prospectively. [For your convenience, a copy of the DeVargas decision is enclosed.]

Other courts also have resolved this conflict by adopting the presumption against retroactivity. See Bess v. Bess, 929 F.2d 1392, 1334 (8th Cir. 1991), rehearing denied (punitive damages); Simmons v. A.L. Lockhart, 931 F.2d 1226, 1230 (8th Cir. 1991)(rejecting Bradley, the court refused to apply the attorney fees provision retroactively); Criger v. Becton, 902 F.2d 1348, 1353-54 (8th Cir. 1990)(flood insurance policy's exclusion coverage); Leland v. Federal Insurance Administrator, 934 F.2d 524, 529 (4th Cir. 1991); and Sargisson v. U.S., 913 F.2d 913, 923 (Fed. Cir. 1990).

Accordingly, we urge the Commission to recognize that, absent a clear expression of congressional intent, a statute will be presumed to have prospective application only. We now show that Congress did not express any intention to apply S. 1745 retroactively.

D. The General Effective Date Language of S. 1745 Does Not Express an Intent to Apply the Statute Retroactively

Section 402(a) of S. 1745 states:

> (a) In General -- Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

This language is, at best, "equivocal" and "inconclusive" as to whether the statute is retroactive and cannot be used as evidence of retroactive intent. See Sikora v. American Can Co., 622 F.2d 1116, 1120 (3d Cir. 1980); Jensen v. Gulf Oil Refining & Marketing, 623 F.2d 406, 409 (9th Cir. 1981).

In addition, references in legislative history to Congress' intent to "clarify" the meaning of the statute are not sufficient to infer retroactive application. Sikora, 622 F.2d at 1121. Likewise, expressions of Congressional intent to "restore" the law cannot be read to infer an intent to "retroactively restore," particularly where such a reading would impose substantive liability after the date of the affected Supreme Court decisions. DeVargas, 911 F.2d at 1385.

In part because of the ambiguous effective date provision, the courts refused to apply retroactively the 1978 amendments to the Age Discrimination in Employment Act. See, Sikora, 622 F.2d 1121-22 and cases cited.; Jensen, 623 F.2d at 409; and Smart v. Porter Paint Co., 630 F.2d 490, 497 (7th Cir. 1980).

E. Unlike H.R. 1 (1991) and the 1990 Civil Rights Act, S. 1745 Does Not Contain Express Retroactive Language

If Congress wants a law to apply retroactively, it is quite capable of saying so. One example is found in the 1972 amendments to Title VII. As the Supreme Court pointed out:

> Section 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 113, states: "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter.

IUE v. Robbins & Myers, 429 U.S. 229, 449 (1976)(180-day filing period applies to pending charges).

The absence of such a provision in S. 1745 argues strongly for applying this new statute prospectively only and raises the presumption that Congress did not intend S. 1745 to apply to pending charges. DeVargas, supra, 911 F.2d 1385 and n. 7.

Indeed, the new text of S. 1745 is markedly different from the effective date provisions of H.R. 1 (1991) and S. 2104 (1990), the 1990 Civil Rights Act vetoed by President Bush. Section 15 of S. 2104 (1990) contained very specific transition rules, setting forth that certain provisions would apply to "proceedings pending on or commenced after" the date of specific Supreme Court decisions that were being overturned. The bill also had provisions for reopening cases where orders were inconsistent with the legislation. Similarly, Section 112 of H.R. 1 (1991) contained specific provisions that the legislation would apply to all proceedings "pending on or commenced after" the date of the decision being overturned.

The absence of such a provision in S. 1745, as enacted, leads to two conclusions. First, there can be no presumption that S. 1745 can be applied to pending cases and charges. DeVargas, 911 F.2d at 1385. Second, Congress took out these specific, retroactive provisions because there was no consensus in the Congress in favor of such retrospective application of the amendments. That certainly was the understanding of most of the major figures responsible for the compromise bill that ultimately was enacted into law.

F. The Legislative History of Section 402(a) Indicates that the Presumption Against Retroactive Application Was Not Overcome

S. 1745 is a creature of compromise if there ever was one. Concessions were needed on both sides to craft a bill that the President would not veto. A crucial part of that compromise was the support of Republican Majority Leader Bob Dole, Senator Orrin Hatch and several moderate Republicans. All of these key players strongly asserted that their intent was that the bill be prospective only. Their statements arguing in favor of only prospective application are set forth below.

For example, Senator Dole introduced a section-by-section analysis of the bill. Vol. 137 Cong. Rec. S 15472-15478 (daily ed. Oct. 30, 1991). Senator Dole explained that the analysis represented "the views of the administration, myself, and Senators Burns, Cochran, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond." Id. at S 15472. The analysis discussed the effective date issue as follows:

> Section 22. Effective Date
>
> Section 22 specifies that the Act and the amendments made by the Act take effect upon enactment. Accordingly, they will not apply to cases arising before the effective date of the Act. See Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988); cf. Kaiser Aluminum & Chemical Corp. v. Bonjorno, 110 S.Ct. 1570 (1990) (declining to resolve conflict between Georgetown University Hospital and Bradley v. Richmond School Board, 416 U.S. 696 (1974)). At the request of the Senators from Alaska, section 22(b) specifically points out that nothing in the Act will apply retroactively to the Wards Cove Packing Company, an Alaska company that spent 24 years defending against a disparate impact challenge.

Next, Senator Jack Danforth, the key Senator in reaching the final compromise, argued that the bill was prospective only. First, prior to introducing his own analysis, Senator Danforth stated:

> Mr. Danforth: Mr. President, I am pleased that Senator Kennedy has agreed with almost all of the original cosponsors, interpretative memorandum. I understand that he questions only the discussion in our memorandum that the original cosponsors, who are the authors of the effective date provision, do not intend for the bill to have any retroactive effect or application.
>
> My review of Supreme Court case law supports my reading that in the absence of an explicit provision to the contrary, no new legislation is applied retroactively. Rather, new statutes are to be given prospective application only, unless Congress explicitly directs otherwise, which we have not done in this instance. Support for this proposition is derived from Justice Scalia's concurring opinion in Kaiser Aluminum & Chemical Corp. v. Bonjorno, 110 S.Ct. 1570, 1579 (1990), and the unanimous opinion of the Supreme Court in Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988), and the numerous cases cited by Justice Kennedy in Bowen.
>
> I acknowledge that there appear to be two cases that do not adhere to this principle but instead support retroactive application of new statutes in the absence of "manifest injustice." Bradley v. Richmond School Board, 416 U.S. 696 (1974); Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969). The sponsors disapprove of these cases.
>
> Our intention in drafting the effective date provision was to adhere to the principle followed by the vast majority of Supreme Court cases and exemplified by Bowen and Justice Scalia'a concurrence in Bonjorno.
>
> Subsection 22(b), regarding certain disparate impact cases, is intended only to provide additional assurance that the provision of the bill will not be applied to certain cases that fit the provision of that subsection. It should not be read in derogation of the sponsors' intention not to provide for retroactive effect or application as expressed in subsection 22(a) of the bill.
>
> There being no objection, the memorandum was ordered to be printed in the RECORD as follows:

SPONSORS' INTERPRETATIVE MEMORANDUM ON ISSUES OTHER THAN WARDS COVE -- BUSINESS NECESSITY/CUMULATION/ ALTERNATIVE BUSINESS PRACTICE

This Interpretive Memorandum is intended to reflect the intent of all of the original cosponsors to S. 1745 with respect to those issues not addressed by the Interpretive Memorandum introduced into the record at S. 15276 on October 25, 1991.

137 Cong. Rec. S 15483 (daily ed. Oct. 30, 1991).

Then, Senator Danforth introduced a section-by-section analysis signed by himself and Senators Cohen, Hatfield, Specter, Chafee, Durenberger, and Jeffords. The analysis concluded by stating:

Section 22: Effective Date

The bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment and shall not apply retroactively.

137 Cong. Rec. S 15485 (daily ed. Oct. 30, 1991).

Immediately after Senator Danforth's statements, Senator Kennedy set forth his version of the effective date provision:

Mr. Kennedy: Mr. President, as the principal Democratic sponsor of the Danforth-Kennedy substitute amendment, I want to state my agreement with the views set forth in Senator Danforth's interpretive memorandum.

I would also like to state, however, my understanding with regard to the bill's effective date. Section 22 of the bill states that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Section 22(b) provides that nothing in the act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

It will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment. Ordinarily, courts in such cases apply newly enacted procedures and remedies to pending cases. That was the Supreme Court's holding in Bradley v. Richmond School Bd., 416 U.S. 696 (1974).

> And where a new rule is merely a restoration of a prior rule that had been changed by the courts, the newly restored rule is often applied retroactively, as was the case with the Civil Rights Restoration Act of 1988. That is what the courts have held in Leake v. Long Island Jewish Medical Center, 695 F. Supp. 1414 (E.D.N.Y. 1988), aff'd, 869 F.2d 130 (2d Cir. 1989), Ayers v. Allain, 893 F. 2d 732 (5th Cir. 1990), and Bonner v. Arizona Department of Corrections, 714 F. Supp. 420 (D. Ariz. 1989). But see DeVargas v. Mason & Hanger-Silas Mason Co. Inc., 911 F.2d 1377 (10th Cir. 1990). It was with that understanding that I agreed to be the principal Democratic sponsor of the Danforth-Kennedy substitute.

Id., at S 15485.

It is extremely significant to note that Senator Kennedy did not state that it was his intent or the intent of Congress to apply S. 1745 retroactively to pending cases and charges. Instead he stated that "it will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment." Senator Kennedy also recognized that the DeVargas decision was contrary to the view that the statute could be applied retroactively. Thus, if anything, this is an expression of Congressional abdication or confusion over this issue. In no way can Senator Kennedy's statement be construed as clear evidence of Congressional intent to overcome the presumption against retroactivity.

G. Section 402(b) -- the Wards Cove "Fix" -- Cannot Be Used to Show An Intent for Retroactive Application of S. 1745

Section 402(b) provides that:

> (b) Certain Disparate Impact Cases -- Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

This provision was intended to make sure that the disparate impact provision of the bill (Section 105) would not apply to the Wards Cove Packing Company, the defendant in Atonio v. Wards Cove Packing, 109 S.Ct. 2115 (1989) -- a decision affected by the bill.

This provision was inserted at the insistence of Alaska Senators Murkowski and Stevens in return for their support for the bill. Those Senators agreed with the legislative history of this provision inserted into the Record by Senator Dole. That history makes it clear that no inference should be drawn from this amendment that any other provision of the bill is to be applied to pending cases or charges. That history states:

> Mr. President, I ask unanimous consent to have a document entitled "Legislative History, Technical Corrections" printed in the RECORD.
>
> There being no objection, the material was ordered to be printed in the RECORD, as follows:
>
> LEGISLATIVE HISTORY, TECHNICAL CORRECTIONS
>
> Section 402 of the Act, and this amendment to section 402, specify that the Act and the amendments made by the Act take effect on the date of enactment. Accordingly, they will not apply to cases arising before the effective date of the Act, See Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988); cf. Kaiser Aluminum & Chemical Corp. v. Bonjorno, 110 S.Ct. 1570 (1990)(declining to resolve conflict between Georgetown University Hospital and Bradley v. Richmond School Board, 416 U.S. 696 (1974)). This amendment specifically points out that nothing in the Act will apply retroactively to the well known case involving the Wards Cove Packing Company, and Alaska company that spent 24 years defending against a disparate impact challenge.
>
> Absolutely no inference is intended or should be drawn from the language of this amendment to section 402 that the provision of the Act or the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act. Such retroactive application of the Act and its amendments is not intended; on the contrary, the intention of this amendment to section 402 is simply to honor a commitment to eliminate every shadow of a doubt as to any possibility of retroactive application to the case involving the Wards Cove Company.
>
> Not only would retroactive application of the Act and its amendments to conduct occurring before the date of enactment be contrary to the language of section 402 and this amendment, but it would be extremely unfair. For example, defendants in pending litigation should not be made subject to awards of money damages of a

kind and an amount that they could not possibly have anticipated prior to the time suit was brought against them.

This interpretation of section 402 of the Act, and this amendment to section 402 of the Act, is confirmed by the Interpretive Memorandum (137 Cong. Rec. S 15472) (October 30, 1991), submitted by Senator Dole and others, and the Interpretive Memorandum (137 Cong. Rec. S 15483)(October 30, 1991), submitted by Senator Danforth and others. Thus, it is not "up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment." (137 Cong. Rec. S 15485)(Oct. 30, 1991). The language of section 402 and this amendment to section 402 is designed to make certain that the courts not apply the provisions of the Act or its amendments to conduct occurring before the date of enactment.

137 Cong. Rec. S 15953 (daily ed. Nov. 5, 1991).

It would be incomprehensible to disregard the intent of the Senators who insisted upon this amendment and conclude that it could be inferred to apply the bill retroactively.

Furthermore, Senator Durenberger, another key moderate Republican, followed Senator Dole's discussion with his own analysis concluding that the bill is prospective only:

> Mr. Durenberger: Mr. President, I will vote in favor of the Dole civil rights resolution. This resolution restores the civil rights bill to its original form, and therefore the vote on these technical amendments should be the same as it was last week on final passage, 93 to 5.
>
> When the Senate voted to amend the civil rights bill by adding the glass ceiling initiative, we mistakenly removed a provision regarding the effective date for disparate impact cases. That provision stated that "nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." Today, we are voting to place this provision back into the civil rights bill.
>
> I want to be clear that this vote does not change my view that the bill is completely prospective. In the original cosponsors' interpretive memorandum, which appears in the CONGRESSIONAL RECORD on October 30,

1991, we made clear that the bill takes effect "upon enactment" and "does not apply retroactively." I am pleased that the distinguished Republican leader has made clear his view that the civil rights legislation is to be applied prospectively.

When I voted for the civil rights bill last week, I believed that the bill applied prospectively. My vote in favor of this resolution does not alter that interpretation. Some may attempt to argue at a later date that a special exemption for cases filed before March 1, 1975, and adjudicated after October 1983, creates an inference that the bill, in general, is retroactive.

Mr. President, that is the wrong conclusion to draw from this resolution. This resolution, in my view, is really not necessary. We all know that the bill applies prospectively because that is what the plain language of the civil rights bill states. Therefore, the resolution adds nothing new.

However, there was some concern that an employer such as Wards Cove should not be required to litigate the fact that the civil rights bill applied prospectively. Therefore, the Senate included a provision that made explicit with respect to Wards Cove what was explicitly regarding the rest of the bill: that it is not retroactive in application. Thus, the general clause that states that the bill is prospective is simply reinforced by this amendment that provides merely one example where the bill is prospective.

Mr. President, in my view, aside from the other technical changes, the "effective date" language in this resolution is not necessary. I am voting for it simply because it was included in the original bill, and because it does not modify the meaning of the civil rights initiative.

137 Cong. Rec. S 15966 (daily ed. Nov. 5, 1991).

Thereafter, Senator Simpson (the Minority Whip) inserted a concurring view that the legislation was prospective only and that the Wards Cove resolution did not alter that in any way:

Mr. Simpson: Mr. President, I wish to clarify my intent in my reluctant vote in favor of this resolution.

> By adopting this resolution, the Senate is merely enforcing the terms of the agreement reached in the last week of October regarding the compromise civil rights bill.
>
> By including specific language to make it clear that the Wards Cove Co. will not be treated retroactively, I in no way am implying that all other companies with litigation pending on the date of enactment should be treated retroactively. To the contrary, I read section 402 of S. 1745 to apply the bill prospectively to all parties, so that no one with litigation pending on the date of enactment would have the rules changed on them.

137 Cong. Rec. S 15966 (daily ed. Nov. 5, 1991)

Once again, in construing this Wards Cove resolution, Senator Kennedy stated that the Congress was leaving the issue up to the courts:

> With the exception of the Murkowski amendment, this language will leave it to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment.
>
> There is disagreement among the supporters of the bill regarding this issue. Courts frequently apply newly enacted procedures and remedies to pending cases. That was the Supreme Court's holding in Bradley v. Richmond School Bd., 416 U.S. 696 (1974), and Thorpe v. Housing Authority, 393 U.S. 268 (1969), in which the Court stated: "The general rule * * * is that an appellate court must apply the law in effect at the time it renders its decision."
>
> And where a new rule is merely a restoration of a prior rule that had been changed by the courts, the newly restored rule is often applied retroactively, as was the case with the Civil Rights Restoration Act of 1988.
>
> Many of the provisions of the Civil Rights Act of 1991 are intended to correct erroneous Supreme Court decisions and to restore the law to where it was prior to those decisions. In my view, these restorations apply to pending cases, which is why the supporters of the Murkowski amendment sought specific language to prevent the restorations from applying to that particular case. In fact, the adoption of the Murkowski amendment makes it more likely that the restorations in the act will apply to all cases except

the Wards Cove case itself. Ironically, the defeat of the Murkowski amendment would make it more likely the courts would not apply the restorations to any pending cases, including the Wards Cove case.

Murkowski amendment was omitted from the final version of the Civil Rights Act because of a clerical error, and it would be a serious mistake for the Senate to go back on a compromise that was accepted in good faith.

All of us, on both sides of the aisle, are well aware of the numerous trade-offs involved in enacting this complex but extremely important compromise.

Drafting mistakes occasionally happen, but that does not mean it is right to take advantage of them. I urge the Senate to approve the Dole resolution.

137 Cong. Rec. S 15963 (daily ed. Nov. 5, 1991)

Thus, by restating his disagreement with other Senators, Senator Kennedy underscores that there simply is no congressional intent to apply this bill retroactively. No case states that admitted Congressional abdication on this issue permits an administrative agency or the courts to apply a statute retroactively when all Congressional sponsors have expressly declined the opportunity to do so.

Moreover, we should note that Rep. Don Edwards attempted to craft his own legislative history in the House arguing that the bill should be applied retroactively. 137 Cong. Rec. H 9530-9531 (daily ed. Nov. 7, 1991). Rep. Edwards did not indicate that any other member supported his statement. In addition, this is not the first time Rep. Edwards has attempted to use his own personal views of legislative history supporting retroactive application of a statute. But as the court stated in DeVargas:

> [W]here the statutory language of the Restoration Act and the Senate report simply do not address retroactive application of the Act, we refuse to resolve this important issue solely on the basis of the floor statement of Congressman Edwards that the Act was to apply to pending cases.

911 F.2d at 1386, and cases cited.

Finally, although Section 109 (Protection of Extraterritorial Employment) "shall not apply with respect to conduct occurring before the date of the enactment of this Act," this does not indicate a "clear purpose" to have all other

sections apply retroactively. See 137 Cong. Rec. H 9530 (daily ed. Nov. 7, 1991)(Rep. Edwards). Rep. Edwards' view ignores the fact that Section 402(a) provides that the general effective date is "upon enactment", which we have shown is insufficient to overcome the presumption against retroactivity.

Further, the overwhelming history of this bill is that Senate sponsors who negotiated the agreement either declared unequivocally that the bill was prospective only, or indicated that Congress was not taking a position on the issue. No Senator, not even Senator Kennedy, even hinted that the effective date of Section 109 would in any way make the rest of the bill retroactive. Thus, neither Section 109, nor Rep. Edwards construction of that section, can be used to apply the other provisions of S. 1745 retroactively. Once again, Rep. Edwards view is merely a statement by an "individual legislator[] [which] should not be given controlling effect" for purposes of discerning congressional intent. Brock v. Pierce County, 476 U.S. 253, 263 (1986).

G. There are Strong Constitutional Arguments Against Retroactive Application of Legislation Reversing Supreme Court Decisions

Even if S. 1745 were to be construed to apply retroactively, there are strong constitutional arguments against applying it to employers who acted in reliance on Supreme Court decisions in the period between the Court's decision and the date of enactment of the legislation. These concerns were set forth in DeVargas:

> Moreover, the logic behind the Fifth Circuit's rule is inconsistent with the constitutional division of authority between Congress and the Supreme Court. Under our view of the separation of powers, it is Congress's prerogative to make the law by enacting legislation. It is, however, "emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803); see also The Federalist No. 78, at 116 (A. Hamilton)(H. Commager ed. 1949)("The interpretation of the laws is the proper and peculiar province of the courts.")(emphasis added). Once the Supreme Court has interpreted a statute, that construction becomes a part of the statute, and the Court's interpretation applies retroactively to pending cases. See infra note 11. This rule of retroactive application of judicial decisions flows directly from the Court's function of interpretating laws. Stated simply, what the Court interprets the law as saying is what the law says. Congress, of course, has the power to change the law and may amend the law to comport with

> either its own or the (perceived) intentions of the Congress which originally enacted the law. These congressional amendments, however, cannot undo the Supreme Court's authoritative construction of the original statute. When a subsequent Congress amends the law in response to the Supreme Court's interpretation, it does not revive the original enacting Congress's interpretation of the statute which existed before the Supreme Court's interpretation. Rather, the result of a subsequent Congress's "restoration" efforts is newly created law. As with any newly enacted legislation, Congress must state clearly its intentions with regard to retroactivity. We therefore disagree with the Fifth Circuit's approach to the extent that it creates a special rule for the situation where Congress rejects a judicial interpretation; this approach implicitly treats Congress as a court of revision rather than as the law-making branch of the federal government.

911 F.2d at 1387-88 (emphasis added).

Accordingly, arguments that Congress was merely restoring the law in some provisions of S. 1745 does not mean that the statute can be applied retroactively to pending cases or charges. And certainly, with respect to the jury trial and damages provision of Section 102, there can be no argument that the bill is merely restorative. These new substantive rights cannot be applied to pending cases and charges under the rubric of "restoration."

H. The Procedural/Remedial v. Substantive Dichotomy Does Not Resolve the Issue of Retroactivity

There are a number of other considerations against applying S. 1745 retroactively. First, it is clear that S. 1745 could not be extended retroactively to pre-Act conduct for which there was no timely EEOC charge pending on the date of enactment. Thompson v. Sawyer, 678 F.2d 257, 289 (D.C. Cir. 1982); Brown v. Turner, 659 F.2d 1199, 1201 (D.C. Cir. 1981).

Further, even under the Bradley analysis, "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." Bennett v. New Jersey, 105 S.Ct. 1555 (1985). This principle would preclude retroactive application of several substantive sections of S. 1745. See e.g., Section 101 (Patterson); Section 102 (jury trials and damages); Section 105 (Wards Cove); Section 106 (Race Norming); Section 107 (reversal of Price-Waterhouse); Section 108 (Martin v. Wilks, consent

decrees); Section 112 (Lorance) and Sec. 115 (ADEA suit-filing period).

Also, we strongly urge against applying the jury trial and compensatory and punitive damages provisions of Section 102 to pending cases and charges. There can be no doubt that these provisions affect the substantive rights of the parties. See Bess v. Bess, 929 F.2d 1332, 1334 (8th Cir.), holding that it would be a manifest injustice to apply a new punitive damages statute to a pending case.

Indeed, it is questionable whether the expert fee provision of Section 113 can be applied retroactively absent clear Congressional intent. See Simmons v. Lockhart, 931 F.2d 1226, 1230 (8th Cir. 1991), which resolved the Bradley/Bowen conflict by ruling that a new statutory attorney's fee provision could not be applied retroactively.

I. Conclusion

As shown above, there are important considerations supporting arguments against retroactive application of S. 1745. We urge, therefore, that the EEOC apply the new statute prospectively only and to issue policy guidance to this effect to all its offices.

We would be pleased to discuss these issues with you or any other Commissioners or your staffs. If there are any questions or additional issue on which the Commission wishes to have information, the Council will be pleased to respond.

Very truly yours,

Jeffrey A. Norris, E.S.

Jeffrey A. Norris
President

cc and enclosure:

C. Boyden Gray, Counsel to the President
R. Gaull Silberman, Vice Chairman
Joy Cherian, Commissioner
Tony E. Gallegos, Commissioner
Joyce E. Tucker, Commissioner
Donald Livingston, General Counsel
Thomasina Rogers, Legal Counsel

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Alfredo DeVARGAS,
Plaintiff–Appellant,

v.

MASON & HANGER–SILAS MASON CO., INC.; T.R. Hook, individually and in his official capacity; Don Hardwick, individually and in his official capacity; John Does, One through Three, individually and in their official capacities; Los Alamos National Laboratory; Gary Granere, Acting Area Manager–Department of Energy Los Alamos Area Office; Regents of University of California; Donald Kerr, Director, Los Alamos National Laboratory; The United States Department of Energy; Robert Pogna, Employee Los Alamos National Laboratory; Ed C. Walterscheid, Employee Los Alamos National Laboratory; Donald Paul Hodel, Secretary of Department of Energy; and Richard Roes, One through Two, Individually and in their official capacities; and John S. Herrington, Defendants–Appellees.

No. 89–2061.

United States Court of Appeals,
Tenth Circuit.

Aug. 9, 1990.

Unsuccessful applicant for security inspector position at Department of Energy research laboratory, which was operated by state university regents, brought action alleging violation of Rehabilitation Act, and unlawful discrimination on basis of ancestry and handicap, against private corporation which provided security inspectors, Department, laboratory, regents, and other officials and employees The United States District Court for the District of New Mexico, denied request of corporation and its employees for qualified immunity, and they filed interlocutory appeal. The Court of Appeals, 844 F.2d 714, reversed and remanded. On remand, the District Court, James A. Parker, J., granted summary judgment against applicant, and he appealed. The Court of Appeals, Tacha, Circuit

Judge, held that: (1) corporation and its employees had not received "federal financial assistance," within meaning of Rehabilitation Act; (2) amendments to Rehabilitation Act, which extended Act's prohibition on discrimination to all operations of college, university or other postsecondary institution, did not apply retroactively; and (3) Department of Energy regulation, which provided that one-eyed individual shall be medically disqualified for security inspector duties, had rational basis and thus did not deprive applicant of substantive due process.

Affirmed.

1. United States ⇐125(9)

Statute barring recovery of "money damages" in action against agency or officer or employee thereof does not bar recovery of equitable back pay. 5 U.S.C.A. § 702.

See publication Words and Phrases for other judicial constructions and definitions.

2. Civil Rights ⇐126

Entity receives "financial assistance," within meaning of provision of Rehabilitation Act prohibiting discrimination against handicapped persons by any program or activity receiving federal "financial assistance," when entity receives subsidy. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

See publication Words and Phrases for other judicial constructions and definitions.

3. Civil Rights ⇐126

In determining whether party has obtained "federal financial assistance," within meaning of provision of Rehabilitation Act prohibiting discrimination against handicapped persons by any program or activity receiving "federal financial assistance," Court of Appeals will not scrutinize fair market value of every transaction as if Court was Article III accountant. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794; U.S.C.A. Const. Art. 3, § 1 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

4. Civil Rights ⇐126

Contractor does not receive "federal financial assistance," within meaning of provision of Rehabilitation Act prohibiting discrimination against handicapped persons by any program or activity receiving "federal financial assistance," whenever contractor negotiates contract with favorable market terms that compensate contractor at rate above fair market value. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

5. Civil Rights ⇐126

Congress did not intend to subsidize operations of corporation which provided security inspectors at Department of Energy's research laboratory, and thus corporation had not received "federal financial assistance," within meaning of provision of Rehabilitation Act prohibiting discrimination against handicapped persons by any program or activity receiving "federal financial assistance"; Government concluded that it would save approximately $3.5 million by contracting out guard services, and Government awarded contract only after competitive bidding process. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

6. Civil Rights ⇐272

Unsuccessful applicant for security inspector position at Department of Energy research laboratory could not obtain equitable back pay under Rehabilitation Act from individual laboratory employees, since government officials acting in their individual capacities cannot perform function of awarding back pay. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

7. Civil Rights ⇐127

"Program or activity," within the meaning of Rehabilitation Act's prohibition on discrimination by "program or activity" receiving federal financial assistance, refers to all operations of university, as op-

posed to only the specific program or activity receiving federal funds. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

See publication Words and Phrases for other judicial constructions and definitions.

8. Civil Rights ⇐102

"Restore," within meaning of provision of Civil Rights Restoration Act stating that legislative action was necessary to "restore" prior consistent and long-standing executive branch interpretation and broad, institution-wide application of Rehabilitation Act as previously administered, would not be interpreted to mean retroactively restore, particularly where effect of such reading would be to impose substantive liability for actions committed in reliance on United States Supreme Court decision and its progeny prior to passage of Civil Rights Restoration Act. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794; Civil Rights Restoration Act of 1987, § 2, 102 Stat. 28.

See publication Words and Phrases for other judicial constructions and definitions.

9. Statutes ⇐216

Rule that congressional intent may be inferred from statement of sponsor on floor only applies where statement is consistent with statutory language and other legislative history.

10. Statutes ⇐262

Standard of "clear congressional intent" for retroactive application of statutes requires articulated and clear statements on retroactivity, not inferences drawn from general purpose of statute.

See publication Words and Phrases for other judicial constructions and definitions.

11. Statutes ⇐270

"Clear congressional intent" for retroactive application of statute could not be derived solely from circumstance that Congress acted to amend existing law in response to Supreme Court opinion, particularly where Congress acting under same motivating circumstances previously had expressly and specifically stated that its newly enacted amendment was to apply to pending cases.

12. Courts ⇐100(1)
Statutes ⇐218

Once Supreme Court has interpreted statute, that construction becomes part of statute, and Court's interpretation applies retroactively to pending cases.

13. Statutes ⇐270

When subsequent Congress amends law in response to Supreme Court's interpretation, it does not revive original enacting Congress' interpretation of statute which existed before Supreme Court's interpretation, but rather result of such "restoration" efforts is newly created law, and as with any newly enacted legislation, Congress must state clearly its intentions with regard to retroactivity.

14. Statutes ⇐263

Court of Appeals will not imply intent to apply new law retroactively where Congress chose to remain silent.

15. Statutes ⇐263

In absence of clear congressional intent to apply law retroactively, Court of Appeals applies the appropriate Supreme Court precedent setting forth presumptions governing retroactive application of newly enacted legislation.

16. Statutes ⇐263

Newly enacted statutes are presumed to have prospective application when congressional intent is unclear.

17. Civil Rights ⇐102

Civil Rights Restoration Act, which amends Rehabilitation Act to specifically extend the prohibition on discrimination by "program or activity" receiving federal financial assistance to all operations of college, university, or other postsecondary institution, should not be applied retroactively. Rehabilitation Act of 1973, § 504(b), as amended, 29 U.S.C.A. § 794(b); Civil Rights Restoration Act of 1987, §§ 2, 4, 102 Stat. 28.

18. Civil Rights ⇐102

Prior to enactment of Civil Rights Restoration Act, which provides that Rehabili-

tation Act's prohibition on discrimination by "program or activity" receiving federal financial assistance applies to all operations of college, university or other postsecondary institution, unsuccessful applicant for security inspector position at Department of Energy's research laboratory was precluded from bringing action under Restoration Act against laboratory's acting area manager for failure to adequately perform his duty to properly administer contract between state university regents, which operated laboratory, and private firm, which provided security inspectors, where Rehabilitation Act was previously program-specific. Rehabilitation Act of 1973, § 504(b), as amended, 29 U.S.C.A. § 794(b); Civil Rights Restoration Act of 1987, §§ 2, 4, 102 Stat. 28.

19. Federal Civil Procedure ⇐2553

District court did not abuse its discretion in denying unsuccessful applicant's request for further discovery on claim under Rehabilitation Act, where further factual development was unnecessary due to district court's proper dismissal of claim on basis of applicable law and intent of Congress. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794; Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

20. Constitutional Law ⇐275(2)

To withstand due process challenge, Department of Energy regulation providing that one-eyed individual shall be medically disqualified for security inspector duties only had to bear rational relationship to legitimate governmental purpose. U.S.C.A. Const.Amends. 5, 14.

21. Constitutional Law ⇐275(2)
Health and Environment ⇐25.5(7)

Department of Energy regulation providing that one-eyed individual shall be medically disqualified for security inspector duties had rational basis, and thus did not deprive one-eyed applicant of his right to substantive due process of law, where Government was concerned with protecting classified and nuclear material at research laboratory, and logical inference arose that fully sighted person might perform those security functions more capably than individual only partially sighted. U.S.C.A. Const.Amends. 5, 14.

Richard Rosenstock (Steven Farber, Santa Fe, N.M., and Philip Davis, Legal Director, New Mexico Civ. Liberties Union, Albuquerque, N.M., of counsel, with him on the briefs), Chama, N.M., for plaintiff-appellant.

Michael E. Robinson (Stuart E. Schiffer, Acting Asst. Atty. Gen., William L. Lutz, U.S. Atty., and John F. Cordes, with him on the brief), Appellate Staff Civ. Div., Dept. of Justice, Washington, D.C., for federal defendants-appellees.

Joseph E. Earnest (Laurie A. Vogel, of Cherpelis, Vogel & Salazar, of Albuquerque, N.M., with him on the brief), Montgomery & Andrews, P.A., Santa Fe, New Mexico, for defendants-appellees the University and Mason & Hanger.

Before TACHA and McWilliams, Circuit Judges, and CHRISTENSEN, District Judge.*

TACHA, Circuit Judge.

This civil rights action arises from the refusal of Mason & Hanger-Silas Mason Company, Inc. ("Mason & Hanger") to consider Alfredo DeVargas for a position as a security inspector at the Los Alamos National Laboratory ("LANL") in Los Alamos, New Mexico. The district court granted the defendants' motion for summary judgment, and DeVargas appeals. We affirm.

I.

DeVargas applied for a security inspector position with Mason & Hanger in 1981 and 1983. Pursuant to a contract with the Regents of the University of California ("Regents"), Mason & Hanger supplies security inspectors for LANL. The Regents

* The Honorable A. Sherman Christensen, District Judge, United States District Court for the District of Utah, sitting by designation.

operate LANL for the Department of Energy ("DOE"), which conducts nuclear weapon and energy research at LANL. The three individual LANL defendants, Donald Kerr, Robert Pogna, and Edward C. Walterscheid ("individual LANL defendants") are employees of the University of California ("University"). Gary Granere, the Acting Area Manager for the DOE's LANL office, is a federal employee.

In 1981, Mason & Hanger and its employees, T.R. Hook and Don Hardwick ("individual Mason & Hanger defendants"), refused to process DeVargas's employment application, relying on a then-applicable DOE regulation, Interim Management Directive No. 6102 § A.6.b.(8) Appendix IV (IMD 6102),[1] which provided that "[a] one-eyed individual shall be medically disqualified for security inspector duties." DeVargas has vision in only one eye. When DeVargas reapplied in 1983, the Mason & Hanger defendants consulted with the individual LANL defendants, who agreed that IMD 6102 constituted a mandatory disqualification of one-eyed persons.

DeVargas filed suit, alleging in his first amended complaint that the defendants violated sections 504 and 505 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 794–94a, and that the defendants unlawfully discriminated against him on the basis of his ancestry and handicap, in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the fifth and fourteenth amendments, U.S. Const. amends. V, XIV. DeVargas also alleged that the DOE promulgated IMD 6102 in violation of section 504 and the fifth amendment.

[1] On April 9, 1986, the district court granted the defendants' motion for summary judgment on the section 504 and fifth amendment claims. The court dismissed all claims against the Regents and LANL based on their eleventh amendment immunity.[2] The court did not extend eleventh amendment immunity to Kerr, Pogna, and Walterscheid, the LANL defendants, because they were sued only in their individual capacity. The DOE, Secretary of Energy Donald Paul Hodel, and Gary Granere moved to dismiss all claims for monetary damages based on the defense of sovereign immunity. The court permitted only DeVargas's claims for injunctive, nonmonetary relief to continue against these defendants in their official capacities.[3] *See* 5 U.S.C. § 702. The court did not dismiss the claims for monetary damages against Hodel and Granere in their individual capacities.

The defendants also raised the defense of qualified immunity against DeVargas's claim that they unlawfully discriminated against him on the basis of his ancestry and handicap in violation of 42 U.S.C. section 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In October, 1986, the district court ruled that the individual LANL and DOE defendants enjoyed qualified immunity from DeVargas's claims for damages against them in their individual capacities. The court rejected the request of the Mason & Hanger defendants for qualified immunity. Pursuant to an interlocutory appeal, this court reversed, ruling that Mason & Hanger and the individual Mason & Hanger defendants also possess

1. In November 1984, IMD 6102 was superseded by new regulations, which are codified at 10 C.F.R. § 1046 (1989). DeVargas has not reapplied for employment following the promulgation of these new regulations. For this reason the district court ruled that DeVargas lacks article III standing to argue that he is entitled to be hired by the defendants. DeVargas does not appeal this ruling.

2. Congress subsequently abrogated any Eleventh Amendment defenses to a section 504 claim that is based on conduct occurring after October 21, 1986. *See* 42 U.S.C. § 2000d–7.

3. We note that the district court's ruling was not entirely correct. While the district court barred all claims for monetary relief, the bar on recovery of "money damages" contained in 5 U.S.C. section 702 does not include equitable backpay, which is a form of equitable relief, not monetary damages. *See Bowen v. Massachusetts*, 487 U.S. 879, 891–912, 108 S.Ct. 2722, 2731–41, 101 L.Ed.2d 749 (1988). DeVargas, however, does not appeal the district court's ruling on this issue.

qualified immunity in spite of Mason & Hanger's status as a private corporation. *See DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714 (10th Cir. 1988) (*DeVargas I*). We also held that the conduct of the Mason & Hanger defendants did not violate clearly established law under either IMD 6102 or the equal protection clause of the fourteenth amendment.[4] *Id.* at 724–25. Following remand, the district court permitted DeVargas to file a second amended complaint. The court entered summary judgment against DeVargas's remaining claims on December 14, 1988.

DeVargas limits his appeal to the following arguments: (1) the defendants violated section 504; (2) the trial court erred by refusing to permit further discovery prior to ruling on the section 504 claim; (3) the defendants' application of IMD 6102 deprived DeVargas of his clearly established right to substantive due process of law under the fifth and fourteenth amendments; and (4) the defendants violated 42 U.S.C. section 1983.

II.

We first determine whether the Mason & Hanger defendants violated section 504, which prohibits discrimination against handicapped persons by "any program or activity receiving federal financial assistance." 29 U.S.C. § 794. The district court granted summary judgment in favor of Mason & Hanger, concluding that liability could not lie against the Mason & Hanger defendants because Mason & Hanger's operations were not programs or activities that received federal financial assistance DeVargas insists that the available evidence indicates that Mason & Hanger received federal financial assistance.

In our review of grants of summary judgment, we must reverse if there is a genuine issue concerning a material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). We review all legal questions de novo. *See Carey v. United States Postal Serv.*, 812 F.2d 621, 623 (10th Cir.1987).

[2] The term "financial assistance" is not defined in the Rehabilitation Act. We apply the ordinary meaning of the term and conclude that an entity receives financial assistance when it receives a subsidy. *See Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202, 1208–09 (9th Cir.1984), *cert. dismissed*, 471 U.S. 1062, 105 S.Ct. 2129, 85 L.Ed.2d 493 (1985).

[3, 4] In determining whether a party has obtained federal financial assistance under section 504, we decline to scrutinize the fair market value of every transaction as if we were article III accountants. *See id.* at 1210 (outlining practical problems of a test based solely on fair market value). We do not read section 504 to declare that a contractor receives federal financial assistance whenever the contractor negotiates a contract with favorable terms that compensate the contractor at a rate above the fair market value. We agree with the *Jacobson* court's conclusion that "in determining which programs are subject to the civil rights laws, courts should focus not on market value but on *the intention of the government*" to give a subsidy, as opposed to government intent to provide compensation. *Id.* at 1210 (emphasis added). We conclude that to determine the applicability of section 504, we must determine whether the government intended to give Mason & Hanger a subsidy.

[5] In this case there is little doubt that Congress did not intend to subsidize Mason & Hanger's operations. Prior to the decision to replace the former government guards with private employees, the DOE conducted a study which concluded that the government would save approximately $3.5 million by contracting out guard services. Moreover, the government awarded the contract to Mason & Hanger only after a competitive bidding process. Both of these factors lead us to conclude that there was

4. None of the defendants in this case argue on appeal that they are entitled to a qualified immunity defense from the section 504 claim.

no governmental intent to give Mason & Hanger a subsidy.

Our conclusion is consistent with departmental regulations. The Department of Energy's implementing regulations state that the provisions of the Rehabilitation Act do not apply to government procurement contracts, *see* 10 C.F.R. § 1040.2(b)(3) (1985), which are defined as, inter alia, contracts to purchase services from nonfederal sources, *see* 41 C.F.R. § 1–1.209 (1984) (former provision). Under this regulation, the purchase from Mason & Hanger of nonpersonal services is a procurement contract outside the reach of the Rehabilitation Act.[5] We hold that the district court correctly granted the motion for summary judgment by the Mason & Hanger defendants on the grounds that the security company and its employees do not fall within the ambit of section 504 of the Rehabilitation Act.

III.

[6] We next determine whether the district court correctly granted the individual LANL defendants' request for summary judgment on the section 504 claim.[6] DeVargas argues that the individual LANL defendants are liable under section 504 because LANL, an alleged recipient of federal financial assistance, required Mason & Hanger to administer the allegedly discriminatory policy. The contract between the Regents and Mason & Hanger expressly required that Mason & Hanger abide by any applicable federal regulations relating to the security of LANL. One of the applicable regulations was IMD 6102, and DeVargas states that in 1983 the individual LANL defendants informed Mason & Hanger that IMD 6102 mandated that Mason & Hanger not hire DeVargas. DeVargas insists that the individual LANL defendants cannot escape liability for discrimination when they required Mason & Hanger to administer the allegedly discriminatory policy.

The district court rejected DeVargas's argument on the grounds that section 504's ban on "discrimination under any program or activity receiving Federal financial assistance," 29 U.S.C. § 794, was program-specific. Thus, the district court ruled that even if LANL did receive federal financial assistance, the actions of the LANL defendants did not violate section 504 because the particular program that allegedly discriminated against DeVargas was Mason & Hanger, not LANL.

[7] At the time that the district court issued its ruling on DeVargas's 504 claim, the court correctly relied on *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 104 S.Ct. 1248, 79 L.Ed.2d 568 (1984), which held that section 504's prohibition on discrimination by a "program or activity receiving Federal financial assistance" extended only to the specific program or activity receiving the federal funds. *Id.* at 635–36, 104 S.Ct. at 1255. The *Consolidated Rail* decision relied on *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), which held that Title IX's ban on sex discrimination in any "program or activity receiving Federal financial assistance" prohibited discrimination only in the particular program or activity specifically supported by federal funds. *Id.* at 570–76, 104 S.Ct. at 1219–23. On the basis of these decisions, the district court correctly held that section 504 was program-specific. *See Niehaus v. Kansas Bar Ass'n*, 793 F.2d 1159, 1162–63 (10th Cir. 1986) (section 504 contains a program specificity requirement); *Gallagher v. Pontiac*

5. The DOE regulation is in accord with those of other executive agencies. For example, the regulations of the Department of Health and Human Services state that government procurement contracts do not convey financial assistance, while transfers or leases of government property at less than fair market value or for reduced consideration are forms of financial assistance. *See* 45 C.F.R. § 84.3(h) (1989). *See also* 28 C.F.R. § 41.3(e) (1989) (Department of Justice regulation).

6. At the outset we note that the individual LANL defendants are now before us only in their individual, as opposed to their official, capacities. Therefore DeVargas cannot obtain equitable backpay from the LANL defendants because government officials acting in their individual capacities cannot perform the official function of awarding backpay. *See Lenea v. Lane*, 882 F.2d 1171, 1178 (7th Cir.1989).

School Dist., 807 F.2d 75, 79–81 (6th Cir. 1986) (holding that under program-specific requirement of section 504, plaintiff must show that he was denied the benefits of a scholastic program receiving federal financial assistance and not just that he was denied the benefits of a program operated by a school system receiving federal financial assistance).

After the district court issued its opinion, however, Congress enacted the Civil Rights Restoration Act of 1987, Pub.L. No. 100–259, 102 Stat. 28 (1988) ("Restoration Act" or "Act"). Congress premised the Restoration Act upon its findings that (1) "certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964; and (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." Restoration Act § 2, 102 Stat. at 28. The Senate report more bluntly states that the purpose of the Restoration Act is "to overturn the Supreme Court's 1984 decision in *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211...." S.Rep. No. 64, 100th Cong., 2d Sess. 1, *reprinted in* 1988 U.S. Code Cong. & Admin.News 3–4.

Section four of the Restoration Act added section 504(b) to the Rehabilitation Act, which provides in pertinent part: "For purposes of this section, the term 'program or activity' means *all of the operations* of— ... (2)(A) a college, university or other postsecondary institution...." Restoration Act § 4, 102 Stat. at 29 (emphasis added) (codified at 29 U.S.C. § 794(b)). This language overturns the program-specific interpretation of "program or activity" developed in *Grove City* and *Consolidated Rail*. In the context of a university, the term "program or activity" now refers to all of the operations of the university.

DeVargas argues that the passage of the Restoration Act invalidates the district court's reliance on the program-specific interpretation of section 504 that existed prior to enactment of the Restoration Act. DeVargas renews his argument that the individual LANL defendants cannot escape liability under section 504 of the Rehabilitation Act when they required Mason & Hanger to perpetrate discrimination.

A.

It is clear that the individual LANL defendants are not liable under section 504 as interpreted by the Supreme Court in *Consolidated Rail* prior to the Restoration Act. Therefore, we must decide whether the Restoration Act retroactively applies to this case.

To determine whether the Restoration Act applies retroactively, we look to congressional intent. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, — U.S. —, —, 110 S.Ct. 1570, 1577, 108 L.Ed.2d 842 (1990) ("where the congressional intent is clear, it governs"). Our examination of the language and legislative history of the Restoration Act reveals an absence of clear congressional intent that courts retroactively apply the Act's amendments.

We look first to the language of the Restoration Act. *See Kaiser*, 110 S.Ct. at 1575. The Act states:

> The Congress finds that—
>
> (1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of ... section 504 of the Rehabilitation Act of 1973 ...; and
>
> (2) legislative action is necessary to *restore* the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

See Restoration Act § 2, 102 Stat. at 28 (1988) (emphasis added). The Senate report accompanying the proposed legislation echoes these sentiments:

> II. Purpose
>
> S. 557 was introduced on February 19, 1987, to overturn the Supreme Court's

1984 decision in *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, and to restore the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally assisted programs.

The *Grove City* ruling severely narrows the application of coverage of Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

The purpose of the Civil Rights Restoration Act of 1987 is to reaffirm pre-*Grove City College* judicial and executive branch interpretations and enforcement practices which provided for broad coverage of the anti-discrimination provisions of these civil rights statutes.

S.Rep. No. 64, 100th Cong., 2d Sess. 2, *reprinted in* 1988 U.S.Code Cong. & Admin.News 3, 3–4 (footnote omitted; emphasis added). The Senate report also states that: "other cases that were in the formal enforcement stage are still in jeopardy. These are cases where discrimination has been found, voluntary compliance was refused, and recipients are using the Supreme Court's decision [in *Grove City College*] as a defense against federal enforcement." S.Rep. No. 64, 100th Cong., 2d Sess. 11, *reprinted in* 1988 U.S.Code Cong & Admin. News 13.

[8] Considering both the language of the Restoration Act and the Senate report, we find a congressional purpose to overturn *Grove City College*, but no clear expression of intent regarding retroactive application of the Act's amendments. Unlike other congressional amendments to existing laws enacted by Congress in response to Supreme Court decisions, the Restoration Act contains no statutory language clearly stating that the Act's amendments shall or shall not apply to pending litigation.[7] We also find that the expressed congressional intent in the Senate report to "restore" section 504 to its pre-*Grove City College* interpretation reflects unambiguously only Congress's purpose to reverse the Supreme Court's program-specific reading of federal prohibitions on discrimination by programs or activities receiving federal financial assistance. Because we must find clear congressional intent to invoke retroactivity, we cannot read "restore" to mean "retroactively restore," particularly where the effect of such a reading would be to impose substantive liability for actions committed in reliance on *Grove City College* and its progeny prior to the passage of the Restoration Act in 1988. *Contra Leake v. Long Island Jewish Medical Center*, 695 F.Supp. 1414, 1416–18 (E.D.N.Y.1988) (Restoration Act applies retroactively), *aff'd*, 869 F.2d 130, 131 (2d Cir. 1989) (per curiam); *see also Bonner v. Arizona Dep't of Corrections*, 714 F.Supp. 420, 422–23 (D.Ariz.1989) (adopting reasoning of *Leake*). Nor do we find that the Senate report's concern about potential jeopardy to formal enforcement actions due to the *Grove City College* decision necessarily requires retroactive application because there is no indication that the violation applies to pending cases, thus *WAMTA* will not have precedential effect); *Louviere v. Marathon Oil Co.*, 755 F.2d 428, 430 (5th Cir. 1985) (Congress provided that LHWCA amendment to 33 U.S.C. § 905 shall apply to pending cases), S.Rep. No. 112, 99th Cong., 2d Sess. 2–3, *reprinted in* 1986 U.S.Code Cong. & Admin. News 1799–1800 (in response to *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984), § 2 of the HCPA clarifies Congress's intent that prevailing parents in Education of the Handicapped Act ("EHA") cases be awarded reasonable attorneys' fees, and HCPA also authorizes courts retroactively to award attorneys' fees for civil court actions to parents who prevailed in EHA cases pending or brought after the date of the *Smith v. Robinson* decision).

7. *Compare* Restoration Act *with* Longshore and Harbor Workers' Compensation Act Amendments of 1984 ("LHWCA"), Pub.L. No. 98–426, §§ 5, 28(a), 28(c), 98 Stat. 1639, 1641, 1655 (§ 5 codified as amended at 33 U.S.C. § 905, §§ 28(a), (c) discussed in legislative history notes to 33 U.S.C. § 901) *and* Handicapped Children's Protection Act of 1986 ("HCPA"), Pub.L. No. 99–372, §§ 2, 5, 100 Stat. 796, 796–97, 798 (§ 2 codified as amended at 20 U.S.C. § 1415(e)(4); § 5 discussed in legislative history notes to 20 U.S.C. § 1415). *See also* H.R.Conf Rep. No. 1027, 98th Cong., 2d Sess. 24, *reprinted in* 1984 U.S.Code Cong. & Admin. News 2774 (§ 5 amendment of LHWCA disapproves *Washington Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984), and provides a special effective date so amend-

tions were not continuing. In any event, an ambiguous statement in the Senate report on the need for action does not amount to the clear intent required to invoke retroactivity. We therefore hold that the statutory language and authoritative legislative history of the Restoration Act do not evidence a clear congressional intent that courts apply retroactively the Act's amendments to section 504 of the Rehabilitation Act.

We recognize that our holding conflicts with the decisions of the Second Circuit in *Leake v. Long Island Jewish Medical Center*, 869 F.2d 130 (2d Cir.1989) (per curiam), and the Fifth Circuit in *Ayers v. Allain*, 893 F.2d 732, *reh'g en banc granted*, 898 F.2d 1014 (5th Cir.1990). After scrutinizing these opinions, however, we find their analysis unpersuasive.

The Second Circuit's opinion in *Leake* affirmed per curiam the reasoning of the district court in *Leake v. Long Island Jewish Medical Center*, 695 F.Supp. 1414 (E.D. N.Y.1988). *See Leake*, 869 F.2d at 131. We therefore focus on the district court's opinion in *Leake*.

Plaintiff Robert Leake sued his employer under section 504 of the Rehabilitation Act. The issue as framed by the district court was "whether the Restoration Act should be applied retroactively to enable plaintiff, who initiated his suit before its passage, to sue." *Leake*, 695 F.Supp. at 1416.

The *Leake* district court began its analysis by specifically finding that "the Restoration Act itself does not indicate any intent of Congress for retroactive application." *Id.* However, the court found some indication of congressional intent that courts were to retroactively apply the Restoration Act in the floor statement of the bill's sponsor, Congressman Edwards, who said "[t]his bill applies to all pending cases . . .," 134 Cong.Rec. H583 (daily ed. Mar. 2, 1988), and the floor statements of Senators Packwood [8] and Stafford.[9] *Leake*, 695 F. Supp at 1416–17. The *Leake* court then went back to the language of the Restoration Act, which it had previously found to be ambiguous on the retroactivity issue, and focused on the terms "restore" and "clarify." Analogizing to the Second Circuit's analysis of the congressional intent behind these words in *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir.1987) (examining the Handicapped Children's Protection Act of 1986 ("HCPA")), the *Leake* district court concluded that Congress must have intended the Restoration Act to apply retroactively.

We are not persuaded by the *Leake* district court's analysis for two reasons. First, Congress's intended meaning and use of the terms "restore" and "clarify" in the HCPA is rooted in the specific context of the HCPA's statutory language and legislative history. We therefore reject the notion that congressional intent for the Restoration Act may be discerned by analogy to a different statute enacted by a different Congress.

[9] Second, where the statutory language of the Restoration Act and the Senate report simply do not address retroactive application of the Act, we refuse to resolve this important issue solely on the basis of the floor statement of Congressman Edwards that the Act was to apply to pending cases. *See Brock v. Pierce County*, 476 U.S. 253, 263, 106 S.Ct. 1834, 1840, 90 L.Ed.2d 248 (1986) ("statements by individual legislators should not be given controlling effect" for purposes of discerning congressional intent); *Weinberger v. Rossi*, 456 U.S. 25, 35 n. 15, 102 S.Ct. 1510, 1517 n. 15, 71 L.Ed.2d 715 ("contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history"). As for the floor statements of Senators Packwood and Stafford, *see supra* notes 8–9, we find that these re-

8. During the floor debate to override President Reagan's veto of the Restoration Act, Senator Packwood stated: "all we have done is change the law back to what we thought it was. We have not expanded it beyond what we thought it was." 134 Cong.Rec. § 2735 (daily ed. Mar. 22, 1988).

9. Senator Stafford, an original sponsor of section 504 of the Rehabilitation Act, stated: "[the] institution-wide definition [was] originally intended by legislators." 134 Cong.Rec. § 2739 (daily ed. Mar. 22, 1988).

marks do not directly address the retroactivity issue, much less dispose of it. Furthermore, the *Leake* district court's reliance on *Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589, 595–97, 108 S.Ct. 1404, 1409, 99 L.Ed.2d 664 (1988), for the proposition that "[c]ongressional intent may be inferred from the statement of a sponsor on the floor," *Leake*, 695 F.Supp. at 1417, is misplaced, for this rule of statutory construction only applies where the statement is consistent with the statutory language and other legislative history. *See Brock*, 476 U.S. at 263, 106 S.Ct. at 1840; *see also Regan v. Wald*, 468 U.S. 222, 236–38, 104 S.Ct. 3026, 3034–36, 82 L.Ed.2d 171 (1984) (statements of subcommittee hearings, mark up sessions, floor debates, and House and Senate reports cannot overcome plain meaning of statute). In *Regents of the University of California*, the Court primarily "rel[ied] on the normal meaning of the [statutory] language chosen by Congress," 108 S.Ct. at 1409, and then went on to discuss how this interpretation was consistent with the legislative history, including the statement of a floor sponsor, *see id.* at 1409–10. In contrast, the floor statement of Congressman Edwards speaks to an issue, retroactive application, which the *Leake* district court had already determined was not addressed in the statutory language of the Restoration Act. We refuse to rely on such a slender thread to fashion out of whole cloth a cloak of retroactivity for the Restoration Act

We next turn to the Fifth Circuit's opinion in *Ayers v. Allain*, 893 F.2d 732 (5th Cir.1990). In *Ayers* the plaintiffs alleged that the policies and practices of various Mississippi state officials perpetuated a racially based dual system of public higher education in violation of the equal protection clause of the fourteenth amendment, U.S. Const. amend XIV, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d The district court ruled for the defendants on the issue of liability and dismissed the plaintiffs' case. The issue before the Fifth Circuit regarding the plaintiffs' Title VI claim was "whether *Grove City* controls the outcome of this case or whether the [Restoration Act] legislation applies retroactively." *Ayers*, 893 F.2d at 754. The Fifth Circuit resolved the issue in favor of retroactivity:

> Retroactive application of a statute is appropriate when Congress enacts the statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture. This rule flows from two of the Supreme Court's canons of statutory construction. First, subsequent legislation declaring the intent of an earlier statute is entitled to great weight.... Second, the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.

Id. at 754–75 (footnotes omitted).

[10–13] We disagree with the *Ayers* ruling because it resolves the retroactivity issue based on congressional intent *implied* from the circumstances motivating Congress to act rather than from the *directly relevant* statements of Congress in the statute's language or authoritative legislative history. The standard of "clear congressional intent" for the retroactive application of statutes requires articulated and clear statements on retroactivity, not inferences drawn from the general purpose of the legislation. We simply cannot derive a "clear congressional intent" solely from the circumstance that Congress acted to amend existing law in response to a Supreme Court opinion, particularly where Congress acting under the same motivating circumstances has expressly and specifically stated that its newly enacted amendment was to apply to pending cases. *See supra* note 7.

Moreover, the logic behind the Fifth Circuit's rule is inconsistent with the constitutional division of authority between Congress and the Supreme Court. Under our view of the separation of powers, it is Congress's prerogative to make the law by enacting legislation. It is, however, "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803); *see also The*

Federalist No. 78, at 116 (A. Hamilton) (H. Commager ed. 1949) ("The interpretation of the laws is the proper and *peculiar* province of the courts.") (emphasis added). Once the Supreme Court has interpreted a statute, that construction becomes a part of the statute, and the Court's interpretation applies retroactively to pending cases. *See infra* note 11. This rule of retroactive application of judicial decisions flows directly from the Court's function of interpretating law. Stated simply, what the Court interprets the law as saying is what the law says. Congress, of course, has the power to change the law and may amend the law to comport with either its own or the (perceived) intentions of the Congress which originally enacted the law. These congressional amendments, however, cannot undo the Supreme Court's authoritative construction of the original statute. When a subsequent Congress amends the law in response to the Supreme Court's interpretation, it does not revive the original enacting Congress's interpretation of the statute which existed before the Supreme Court's interpretation. Rather, the result of a subsequent Congress's "restoration" efforts is newly created law. As with any newly enacted legislation, Congress must state clearly its intentions with regard to retroactivity. We therefore disagree with the Fifth Circuit's approach to the extent that it creates a special rule for the situation where Congress rejects a judicial interpretation; this approach implicitly treats Congress as a court of revision rather than as the law-making branch of the federal government.

[14, 15] There is nothing jurisprudentially unique about the situation where Congress amends a statute in response to the Supreme Court's interpretation. Regardless of whether Congress enacts a new law or amends an existing one, our analysis remains the same. We must examine whether Congress clearly and expressly intended the new law to apply retroactively, as shown by statutory language or authoritative legislative history. We will not imply such an intent where Congress chose to remain silent. For us to "imply" intent derogates from Congress's power to determine the retroactive effect of its own laws. Therefore, in the absence of such clear congressional intent, we apply the appropriate Supreme Court precedent setting forth presumptions governing the retroactive application of newly enacted legislation.

C.

[16] Having determined that the language and legislative history of the Restoration Act do not evidence a clear congressional intent for or against its retroactive application, we turn to Supreme Court precedent for guidance. Our research reveals two lines of authority setting forth conflicting presumptions regarding the retroactive application of a newly enacted federal statute where congressional intent is unclear. The court's most recent articulations of these opposing presumptions are found in *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988).

Bradley was the product of a protracted class action suit brought to desegregate the Richmond, Virginia school system. The court in *Bradley* addressed whether an appellate court should retroactively apply an attorneys' fees statute that came into effect during the pendency of the appeal. The district court had awarded attorneys' fees to the plaintiffs based on the court's general equitable powers. After the initial submission of the case to the Fourth Circuit Court of Appeals, but prior to that court's decision, Congress enacted section 718 of Title VII of the Emergency School Aid Act, 20 U.S.C. § 1617, which granted federal courts the authority to award reasonable attorneys' fees in a school desegregation case. The Fourth Circuit held that section 718 could not be applied retroactively to sustain the attorneys' fees award. The Supreme Court reversed, holding that "a court is to apply the law in effect at th time it renders its decision...." *Bradl*

416 U.S. at 711, 94 S.Ct. at 2016.[10] The *Bradley* court read *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969), as standing for the proposition that "even where the inter[vening] law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." *Bradley*, 416 U.S. at 715, 94 S.Ct. at 2018. *Bradley* expressly rejected the contention that "a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." *Id.*

In direct conflict with the *Bradley* presumption is another line of Supreme Court precedent, the most recent illustration of which is *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). *Bowen* examined the authority of the Secretary of Health and Human Services ("Secretary") to promulgate retroactive regulations setting limits on the level of reimbursable medicare costs. In 1981, the Secretary issued a new cost-limit schedule that contained a change in the method for calculating the "wage index," which reflects the salary levels for hospital employees in different parts of the country. The new calculation excluded federal hospital wages from the wage index. Various hospitals sued to enjoin enforcement of the 1981 cost-limit schedule. The district court struck down the 1981 wage-index rule on the ground that the Secretary had failed to provide notice and an opportunity for comment as required by the Administrative Procedure Act, 5 U.S.C. § 551. In 1984, ten months after the district court's ruling, the Secretary sought public comment on a proposal to reissue the 1981 wage index rule, retroactive to July 1, 1981. After considering the comments submitted, the Secretary reissued the 1981 cost-limit schedule and required a group of seven hospitals who had benefited from the invalidation of the 1981 schedule to return over $2 million in reimbursement payments. *See Bowen*, 109 S.Ct. at 471.

The *Bowen* Court struck down the retroactive cost-limit rules on the ground that Congress had not authorized the Secretary in the Medicare Act to issue retroactive rules. In so doing, the Supreme Court reaffirmed the rule that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.*

The Supreme Court recently acknowledged that an "apparent tension" exists between the *Bradley* and *Bowen* lines of precedent in *Kaiser Aluminum & Chemi-*

10. To soften the potentially harsh impact of *Bradley*'s presumption favoring the retroactive application of federal statutes, the Court recognized two exceptions to the presumption that appellate courts are to apply the law in effect at the time of decision. First, the presumption does not apply where there is clear congressional intent to the contrary. *Bradley*, 416 U.S. at 711, 94 S.Ct. at 2016. Second, the presumption does not govern where retroactive application of the new law would result in "manifest injustice" to one of the parties. *Id.; see also Kaiser*, 110 S.Ct. at 1577.

Bradley held that courts are to determine whether manifest injustice exists by examining "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Bradley*, 416 U.S. at 717, 94 S.Ct. at 2019. The meaning of the *Bradley* "manifest injustice" test has been obfuscated by subsequent Supreme Court opinions, however. For example, the *Bradley* Court originally stated that the *Bradley* presumption would not be applied to "deprive a person of a right that had matured or become unconditional." *Id.* at 720, 94 S.Ct. at 2020. However, in *Bennett v. New Jersey*, 470 U.S. 632, 105 S.Ct. 1555, 84 L.Ed.2d 572 (1985), the Court stated that this limitation on *Bradley* "comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Id.* at 639, 105 S.Ct. at 1560. Thus, the *Bennett* court either declined to enter the *Bradley* analysis at all or else possibly revised prong (b) of the *Bradley* manifest injustice test from what appeared to be "vested rights" to any "substantive right or liability," *see Kaiser*, 110 S.Ct. at 1585 (Scalia, J. concurring). *But see id.* at 1593 (White, J., dissenting) (plaintiff did not have a "vested" right to postjudgment interest under the *Bradley* "manifest injustice" test). Given these ambiguous signals from the Court, we are inclined to agree with Justice Scalia's criticism that "manifest injustice" means "almost anything" and is in fact nothing more than "a surrogate for policy preferences." *Kaiser*, 110 S.Ct. at 1587 (Scalia, J., concurring).

cal Corp. v. Bonjorno, — U.S. ——, ——, 110 S.Ct. 1570, 1577, 108 L.Ed.2d 842 (1990). The majority found that it did not need to reconcile the apparent conflict, however, "because under either view, where the congressional intent is clear, it governs." *Id.* The *Kaiser* court went on to hold that the plain language of the statute at issue evidenced clear congressional intent against retroactivity. *Id.* at 1577–78.

Having found in Part III.A. of this opinion that the language and legislative history of the Restoration Act do not evidence a clear congressional intent for or against its retroactive application, we have struggled in vain to reconcile the *Bradley* and *Bowen* lines of precedent. We have concluded, however, that under the circumstances of this case the *Bradley* and *Bowen* line of cases are in "irreconcilable contradiction," *see Kaiser*, 110 S.Ct. at 1579 (Scalia, J., concurring). Where congressional intent on retroactivity is ambiguous, we simply cannot harmonize the presumption that a new statute should be applied retroactively even if it "does not explicitedly recite that it is to be applied to pending cases," *Bradley*, 416 U.S. at 715, 94 S.Ct. at 2018, with the contrary presumption that "congressional enactments ... will not be construed to have retroactive effect unless their language requires this result," *Bowen*, 109 S.Ct. at 471. Application of either principle directly countermands the other in the situation where, as before us, congressional intent on retroactivity is unclear.

We recognize the possibility that even where congressional intent on retroactivity is unclear, application of either the *Bradley* or *Bowen* presumption may result in the same outcome by virtue of *Bradley*'s "manifest injustice" exception. *See supra* note 10. However, we agree with Justice Scalia's observation in *Kaiser* that "[i]n the rules of construction they announce, if not in the results they produce, these two lines of cases are ... in irreconcilable contradiction." *Kaiser*, 110 S.Ct. at 1579 (Scalia, J., concurring). In our view, the appropriate legal analysis is to decide first whether the *Bradley* presumption applies before going on to analyze whether the case nevertheless falls within the "manifest injustice" exception. *See Bradley*, 416 U.S. at 711–21, 94 S.Ct. at 2016–21 (deciding first that presumption governs, then examining whether "manifest injustice" exception applies). Thus, we are faced squarely with the issue recognized but left unresolved in *Kaiser;* namely, when congressional intent on retroactivity is unclear, which presumption—*Bradley* or *Bowen*—is to govern?

Forced to elect between these contradictory presumptions, we choose *Bowen*. We find that the *Bowen* line of cases is well-entrenched in the history of the Supreme Court jurisprudence, whereas *Bradley* is largely unsupported by its cited authorities.

We are strongly persuaded by Justice Scalia's observation in his concurring opinion in *Kaiser* that the presumption of prospective application of statutes is supported by over 150 years of Supreme Court precedent, stretching from the early part of the nineteenth century to the middle of this century. *See Kaiser*, 110 S.Ct. at 1579–81 (Scalia, J., concurring) (citing in part: *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413, 2 L.Ed. 479 (1806) ("Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied"); *Miller v. United States*, 294 U.S. 435, 439, 55 S.Ct. 440, 442, 79 L.Ed. 977 (1935) ("[A] statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears")).

In contrast with this long line of precedent, with the exception of *Thorpe*, 393 U.S. 268, 89 S.Ct. 518, none of the cases cited by *Bradley* stand for the proposition that statutes are presumed to apply retroactively. Instead, the cited decisions involve either: the retroactive application of judicial decisions,[11] *see Vandenbark v. Ow-*

11. That judicial decisions operate retroactively lends no support to the argument that there is a presumption for retroactive operation of statutes. *See United States v. Security Industrial*

ens–Illinois Glass Co., 311 U.S. 538, 542, 61 S.Ct. 347, 349, 85 L.Ed. 327 (1941); *Patterson v. Alabama*, 294 U.S. 600, 607, 55 S.Ct. 575, 578, 79 L.Ed. 1082 (1935); *Sioux County v. National Surety Co.*, 276 U.S. 238, 240, 48 S.Ct. 239, 239, 72 L.Ed. 547 (1928); *Dorchy v. Kansas*, 264 U.S. 286, 291, 44 S.Ct. 323, 325, 68 L.Ed. 686 (1924); *Moores v. National Bank*, 104 U.S. 625, 629, 26 L.Ed. 870 (1882), the retroactive application of statutes that contain express language requiring this result, *see Dickinson Industrial Site, Inc. v. Cowan*, 309 U.S. 382, 383, 60 S.Ct. 595, 596, 84 L.Ed. 819 (1940); *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23, 27, 60 S.Ct. 416, 418, 84 L.Ed. 558 (1940); *Stephens v. Cherokee Nation*, 174 U.S. 445, 477–78, 19 S.Ct. 722, 734, 43 L.Ed. 1041 (1899); *Freeborn v. Smith*, 69 U.S. (2 Wall.) 160, 162, 17 L.Ed. 922 (1865), a statute that must necessarily be applied prospectively because the dispute involves either injunctive relief, *see Dinsmore v. Southern Express Co.*, 183 U.S. 115, 120, 22 S.Ct. 45, 46, 46 L.Ed. 111 (1901), or a permit for future action, *see Ziffrin v. United States*, 318 U.S. 73, 78, 63 S.Ct. 465, 468, 87 L.Ed. 621 (1943), a case remanding to a state court in order for the *state court* to determine the effect of a newly enacted state statute, *see Missouri ex rel. Wabash Ry. Co. v. Public Service Comm'n*, 273 U.S. 126, 131, 47 S.Ct. 311, 313, 71 L.Ed. 575 (1927), a case involving the general rule that criminal penalties cannot be enforced following the repeal of the statute that proscribed the conduct giving rise to the penalty, *see United States v. Chambers*, 291 U.S. 217, 222–23, 54 S.Ct. 434, 435, 78 L.Ed. 763 (1934), and a case staying further proceedings where the outbreak of World War I, made it impossible for the citizen of a belligerent nation to continue to represent himself, *see Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 248 U.S. 9, 22–23, 39 S.Ct. 1, 2–3, 63 L.Ed. 100 (1918). *See also Kaiser*, 110 S.Ct. at 1583–84 (Scalia, J., concurring) (discussing above cases).

The rule that, absent clear congressional intent to the contrary, statutes are presumed to apply prospectively was uncontroverted until the Supreme Court decided *Thorpe* in 1969. *See Kaiser*, 110 S.Ct. at 1581 (Scalia, J., concurring). *Thorpe* involved a federal regulation requiring landlords to inform tenants of the reasons for eviction. The *Thorpe* court retroactively applied the regulation and invalidated an eviction order issued eighteen months prior to the promulgation of the regulation. In contrast to the longstanding presumption of prospective application of statutes, *Thorpe* held that "[t]he general rule ... is that an appellate court must apply the law in effect at the time it renders its decision." *Thorpe*, 393 U.S. at 281, 89 S.Ct. at 525. In support of this rule, *Thorpe* cited five cases, four of which, *Vandenbark*, *Carpenter*, *Chambers*, and *Ziffrin*, we have already examined and found unsupportive. The fifth case *Thorpe* cited was *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801), which involved the question of whether the United States could condemn a captured French vessel. After the lower court ruled in the affirmative, and before the Supreme Court heard the case, the United States entered into a convention with France providing for the return of French "property captured and not yet *definitively* condemned...." *Id.* at 103 (emphasis in original). The Court discussed the lower court's ruling and concluded that it did not constitute a "definitive" condemnation of the vessel within the meaning of the treaty:

> The argument at the bar which contends that because the sentence of the circuit court is denominated a final sentence, therefore its condemnation is definitive in the sense in which that term is used in the treaty, is not deemed a correct argument.... The last decree of an inferior court is final in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced under. The terms used in the treaty

Bank, 459 U.S. 70, 79, 103 S.Ct. 407, 413, 74 L.Ed.2d 235 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student"). Judicial decisions operate retroactively because we generally regard them as an expression of pre-existing law. *See Kaiser*, 110 S.Ct. at 1582 (Scalia, J., concurring).

> seem to apply to the actual condition of the property, and to direct a restoration of that which is still in controversy between the parties.... In this case the sentence of condemnation was appealed from. It might have been reversed, and therefore was not such a sentence as in the contemplation of the contracting parties, on a fair and honest construction of the contract, was designated as a definitive condemnation.

Id. at 108–09. On this basis, the Court stated: "if, subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed...." *Id.* at 110. The Court's reference to a law which "intervenes and positively changes the rule which governs" must be taken in context. The terms of law before the *The Schooner Peggy* Court required retroactive application to "all property captured and not yet definitively condemned" by the courts. Thus, under the actual facts of *The Schooner Peggy*, a change in the law while a case was pending was applied by the Supreme Court where by its terms, the law was to be applied retroactively to pending cases, a position entirely in keeping with the *Bowen* line of cases. *Thorpe* marked the first departure from this long line of precendent when it broadened the rule set forth in *The Schooner Peggy:* "*Thorpe* thus stands for the proposition that even where the inter[vening] law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." *Bradley*, 416 U.S. at 715, 94 S.Ct. at 2018.

We conclude that *Thorpe* rested its holding on cases that either offer no support for that proposition or lend support to the opposite proposition. Faced with a choice between the longstanding and authoritative *Bowen* line of precedent and *Bradley*, which has only *Thorpe* in support, we elect the presumption reflected in the more recent decision in *Bowen* that "[a] statute is deemed to be effective only for the future unless a contrary intent appears." *Kaiser*, 110 S.Ct. at 1588 (Scalia, J., concurring).

Our decision not to apply the *Bradley* presumption is supported by the Supreme Court's decision in *Bennett v. New Jersey*, 470 U.S. 632, 105 S.Ct. 1555, 84 L.Ed.2d 572 (1985). *Bennett* involved an attempt by the Secretary of Education to recover from the state of New Jersey Title I funds that the Secretary of Education had determined New Jersey misused during the years 1970 to 1972. New Jersey argued, relying on *Bradley*, that the 1978 amendments to Title I, which relaxed the eligibility requirements for Title I funds, should be applied retroactively to determine whether the 1970–72 funds were misused. The Third Circuit agreed, and remanded the case to the Department of Education to determine whether the disputed expenditures conformed to the more lenient 1978 Title I standards. The Supreme Court reversed, concluding that the Third Circuit's reliance on the *Bradley* presumption was inappropriate.

Although *Bennett* in part based its holding on the unique contractual nature of the obligations arising under the Title I program, the Court also concluded that "*Bradley* itself suggest[s] that changes in substantive requirements for federal grants should not be presumed to operate retroactively." *Id.* at 638, 105 S.Ct. at 1559. The Court elaborated:

> [The *Bradley*] holding rested on the general principle that a court must apply the law in effect at the time of its decision, which *Bradley* concluded holds true even if the intervening law does not expressly state that it applies to pending cases. *Bradley*, however, expressly acknowledged limits to this principle. "The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." This limitation comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.

Id. at 639, 105 S.Ct. at 1560 (citations omitted).

[17] In this case DeVargas seeks to impose substantive liability on the LANL defendants in their individual capacities through a retroactive application of the Restoration Act to section 504. As in *Bennett*, we find compelling grounds for not invoking *Bradley* where to do otherwise would conflict the "venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect," *Bennett*, 470 U.S. at 639, 105 S.Ct. at 1560. *But see Leake*, 695 F.Supp. 1414, 1417 (E.D.N.Y.1988) (stating that the Restoration Act must be retroactively applied and *Bennett* is not controlling because the Restoration Act merely gives plaintiff a remedy to redress the violation of his rights), *aff'd*, 869 F.2d at 131 (affirming *Leake* for substantially the reasons given by the district court). We hold that the Restoration Act should not be applied retroactively.

IV.

[18] We next address the remaining federal defendant, Gary Granere, the Acting Area Manager for the DOE's LANL office. DeVargas states that his "only claim against any federal defendant on this appeal is that Defendant Granere failed to adequately perform his duty to properly administer the University of California—Mason & Hanger contract and failed to properly supervise the state and private defendants." We are uncertain whether DeVargas intends this statement to relate to his section 504 claim. Assuming arguendo that DeVargas can bring a section 504 suit against a federal employee for nonintentional conduct, we conclude that the analysis applicable to the individual LANL defendants is equally applicable here. Prior to the Restoration Act, section 504 was program-specific and did not encompass the actions of Granere. We affirm the dismissal of DeVargas's claims against Granere.

V.

[19] We rest our holding that the district court properly dismissed DeVargas's section 504 claim on the applicable law and the intent of Congress. We therefore conclude that further factual development was unnecessary and that the district court did not abuse its discretion in rejecting DeVargas's request for further discovery under Federal Rule of Civil Procedure 56(f). *See Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260, 1264 (10th Cir.1984) (reviewing trial court's Rule 56(f) determination under an abuse of discretion standard).[12]

VI.

We now address DeVargas's argument that the application of IMD 6102 constituted a deprivation of his clearly established right to substantive due process of law under the fifth and fourteenth amendments. In *DeVargas I* we rejected a similar argument: that the application of IMD 6102 violated DeVaragas's clearly established rights under the equal protection clause of the fourteenth amendment. *See DeVargas I*, 844 F.2d 714 (10th Cir.1988). *DeVargas I* ruled that because the defendants' actions did not implicate a fundamental constitutional right, there could be no constitutional violation if there was a rational relationship between the govern-

12. Because of our holding in this case, we need not resolve the open issue of whether section 504 permits the recovery of monetary damages for intentional discrimination. *Compare Smith v. Robinson*, 468 U.S. 992, 1020 n. 24, 104 S.Ct. 3457, 3472 n. 24, 82 L.Ed.2d 746 (1984) ("Without expressing an opinion on the matter, we note that courts generally agree that damages are available under § 504.") *and Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1107 (9th Cir.1987) (assuming availability of damages) *and Carter v. Orleans Parish Pub. Schools*, 725 F.2d 261, 264 (5th Cir.1984) (per curiam) (assuming availability of damages for intentional violations) *and Miener v. Missouri*, 673 F.2d 969, 977–79 (8th Cir.), *cert. denied*, 459 U.S. 909, 916, 103 S.Ct. 215, 239, 74 L.Ed.2d 171 (1982) *with Board of Educ. of E. Windsor Regional School Dist. v. Diamond*, 808 F.2d 987, 996 n. 5 (3d Cir.1986) (reserving question) *and Manecke v. School Bd. of Pinellas County*, 762 F.2d 912, 921–22 & n. 8 (11th Cir. 1985) (availability of damages an "open" and "murky" question), *cert. denied* 474 U.S. 1062, 106 S.Ct. 809, 88 L.Ed.2d 784 (1986) *and Hurry v. Jones*, 734 F.2d 879, 886 (1st Cir.1984) (reserving question).

mental objective and the conduct in question. We held that it was rational for the DOE to conclude that fully sighted persons would more capably guard the nuclear and classified material at LANL than persons with visual handicaps. *See DeVargas I*, 844 F.2d at 725.

[20, 21] We engage in a similar analysis for a substantive due process challenge. *See Oklahoma Ed. Ass'n v. Alcoholic Beverage Enforcement Comm'n*, 889 F.2d 929, 935 (10th Cir.1989). We first determine whether IMD 6102 infringes on any fundamental constitutional right. We conclude that it does not. *See id.; Coleman v. Darden*, 595 F.2d 533, 538 (10th Cir.) (no fundamental constitutional right to government employment), *cert. denied* 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed.2d 184 (1979); *Oklahoma Ed. Ass'n*, 889 F.2d at 932–33 (no fundamental constitutional right to private employment). We also note that IMD 6102 is not like the statutory conclusive presumption struck down in *Cleveland Board of Education v. LaFluer*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), which required school teachers to take maternity leave without pay beginning five months before the expected birth of child. *LaFluer* rested on the importance of restricting governmental intrusion into "matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 640 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349 (1972)). *See also Weinberger v. Salfi*, 422 U.S. 749, 771, 95 S.Ct. 2457, 2469, 45 L.Ed.2d 522 (1975). There is no governmental intrusion concerning a fundamental right at issue in this case. We therefore require only that IMD 6102 bear a rational relationship to a legitimate governmental purpose, *see Oklahoma Ed. Ass'n*, 889 F.2d at 935. The governmental concern with protecting the classified and nuclear material at LANL, together with "the logical inference that a fully sighted person may perform those security functions more capably than an individual only partially sighted, go far to show such a rational basis." *DeVargas I*, 844 F.2d at 725.

VII.

Finally, we address DeVargas's claim under 42 U.S.C. section 1983. Because there is no violation of either section 504 of the Rehabilitation Act or substantive due process under the Constitution, no violation of law exists upon which DeVargas may rest a section 1983 suit. We hold that the district court properly dismissed the section 1983 claim.

VIII.

We AFFIRM the district court's grant of summary judgment in favor of the defendants.

THE WHITE HOUSE

WASHINGTON

October 31, 1991

AC HAS SEEN

JHS has seen too.

288234

Hand

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: DORRANCE SMITH

SUBJECT: **Civil Rights Op-Ed**

I had talked to Boyden about writing an Op-Ed that would refute the points made in the attached pieces.

I thought we needed a White House version?

WASH. POST: 10/30/91

Rowland Evans and Robert Novak

It Was a Surrender On Quotas

264/122/1

George Bush's capitulation on racial quotas has again chilled conservative Republicans still suffering from the year-old wound of his tax retreat.

Party leaders were stunned that the president reacted to his sudden drop in the polls with a show of weakness, and one—Rep. Vin Weber—was willing to be quoted. "It's a sign," Weber, a member of the House Republican leadership, told us, "that their reactions in times of political difficulties are not good."

To disheartened aides inside the White House who certainly do not want to be quoted, it is a sign of much worse: that the president, one week after Clarence Thomas's confirmation, has chosen not to advance but to fall back.

Bush was advised to capitalize on public revulsion at the senatorial process with a populistic program: congressional, lawyer and school reform plus an economic growth package. Instead, he retreated on quotas, where public sentiment was clearly on his side.

In truth, Bush and many close advisers were highly uncomfortable vetoing a bill bearing the "civil rights" label. So, those aides praying that he would stand firm were properly concerned when Sens. John Danforth and Arlen Specter, both stalwarts in the Thomas fight, visited him three days after the confirmation to urge what amounted to "compromise" on quotas.

Less than a week later, the president signed on to what he now heatedly declares is not a "quota bill." But conservative congressmen, the U.S. Chamber of Commerce, the Labor Policy Association formed to fight quotas and even presidential aides all know that, by any realistic definition, it is.

If it is not, then neither was the bill Bush vetoed last year. Exposure of up to $300,000 in damages will require employers to avoid lawsuits by establishing quotas for racial minorities. Sen. Edward M. Kennedy, the bill's sponsor, and Senate Majority Leader George Mitchell may be ungenerous in claiming "retreat" by the president, but they are accurate.

Why he retreated goes to Bush's nature, not staff advice. He was sensitive to feminist outcries against the Thomas confirmation and claims by the news media and Democrats that the rise of racist David Duke in Louisiana was the product of Bush's 1988 campaign.

Bush always has been shaky on the issue. While his anti-quota rhetoric has been stentorian, his own civil rights bill has been suspect, and his own administration has moved inexorably toward quotas. Chester Finn, a Reagan-era assistant secretary of education, writes in this month's Commentary that "the Bush administration may not have figured out that the American public would welcome vigorous, principled leadership on this increasingly bitter front."

Failure to comprehend that reality, reflected in last week's retreat, impinges on other elements of the proposed post-Thomas offensive by the president. It is hard to press for educational reform when Bush is backing a civil rights bill that in some circumstances could limit the ability of an employer to ask for a high school diploma. Opening employers to tort suits runs counter to attempts at lawyer control spearheaded by Vice President Quayle. As for term limits, a key wedge for congressional reform, the president seems to be supporting it without conviction.

That leaves the needed tax package, and here Bush has concluded something must be done as the economy fails to recover. That imperative has been driven home to him by Bobby Holt, his fellow oilman from Midland, Texas, now in Washington to raise funds for the Bush reelection, and by Commerce Secretary Robert Mosbacher, who will run the campaign.

But at his press conference last Friday, the president offered no road map for getting lower capital gains rates. Republicans in Congress believe that if there is any plan to save the economy, it will have to be written on Capitol Hill.

That leaves the president with anti-crime and transportation proposals, stirring few pulses. The polls are erasing smugness from White House faces, but the surrender on quotas tells Republicans that political trouble ahead may be serious indeed.

WASH.TIMES:10/30/91

Pre-emptive surrender?

PATRICK BUCHANAN

How can you tell for certain when the White House has caved in? Well, one sure sign is when you are being patronized by Sen. Teddy Kennedy.

In a statement dripping with condescension, Mr. Kennedy last Friday welcomed the Prodigal Son back into the company of decent men, for having finally seen the light on civil rights: "I think President Bush deserves credit for rejecting at long last the advice of those who have been urging him to divide the nation over race."

Majority Leader George Mitchell could not resist sticking the needle in. "They were afraid of losing on a veto override. ... If these few [changed] words provide the president with a fig leaf to cover his retreat, that's fine." "Saying he had not caved in over civil rights, President Bush has caved in," exulted the New York Times.

Mr. Kennedy, Mr. Mitchell and the Times have a right to gloat. The White House surrender is abject and total; the attempt to depict it as a compromise fools no one. "This is a quota bill," said Republican Sen. Robert Smith of New Hampshire; the language a "fig leaf" to cover the stark nakedness of the capitulation.

Watching the sorry scenario, one's attitude ranges from disgust to puzzlement. Why? What is it with these Beltway Republicans?

Is their guilt rooted in the fact that some of their ancestors were involved in the slave trade? Is Mr. Bush trying to compensate for his lack of support of the Civil Rights Act of 1964? Is he trying to make amends for the Willie Horton ads? Have the liberal columnists ("Bush is responsible for David Duke!") Mau Maued him? Why is it that if the left tosses up a charge of racist politics, your country club Republican will do somersaults to obtain absolution?

A wag once described the big foundations, Ford, Rockefeller and Carnegie, as the "useful fruit of a late penitence," a splendid phrase. To deceive posterity, ease an old man's conscience, or perhaps smooth the path to a successful plea bargain at the Last Judgment, the old Robber Barons left part of their plunder to uplift the downtrodden whose condition had not been a paramount concern.

Moderate Republicans have a different tradition. They do not yield up their own wealth, power or position. Rather, to salve their stricken social consciences, they sell down the river the people who elected them. Makes sense. If you double-cross these folks, they still have no place to go in the next general election.

Mr. Bush says he can't wait to sign the compromise civil rights bill. And what does it say? Well, the burden of proof as to whether an employer is a bigot or not is shifted from the accuser to the accused, a practice once considered un-American. A man with a work force whose racial composition does not pass muster will have to prove that the criteria he used in hiring a white over a black were necessary to the job. If he fails the test, he can be branded a racist and forced to pay punitive damages that could ruin his company and destroy his reputation.

Watching the ordeal of Clarence Thomas, as he tried to prove a negative — i.e., that he had not engaged in repulsive conduct in a private meeting with Anita Hill 10 years before — businessmen will take the easy way out, hiring blacks, women, Hispanics, etc., as insurance against shakedown suits, telling the white male who shows up, "Sorry, if I hire you first, I risk too much grief."

The new law will overturn six decisions of the Rehnquist Court, for which conservatives worked for years. It will generate a flood of civil suits against business and create a bonanza for lawyers. It will force business to impose de facto quotas. It throws away one of the Republican Party's winning arguments: We oppose reverse discrimination, and we will stand up to the special interests.

You wonder why businessmen and businesswomen continue to back the GOP.

Under Mr. Bush, the party signed on to a 25 percent increase in a minimum wage that Republicans once argued was a job destroyer. Business was hit with a $40 billion Clean Air Act sculpted to let Mr. Bush pose as the "Environmental President." In January, an aid-to-the-handicapped law takes effect that will impose added billions in business costs. Mr. Bush broke his campaign promise and slammed business last year with a major tax increase in the middle of a recession. Now, he has signed on to a law that puts business at the mercy of every minority malcontent and shyster lawyer in America.

Any wonder private enterprise is no longer creating the millions of jobs each year that were the marvel of the Reagan Era? Mr. Bush helped to create the very recession that may yet kill his presidency.

With the Thomas victory, the GOP had the Democrats divided, defeated, on the run. How sweet it was! With a chance to turn victory over Kennedy & Co. into rout, Mr. Bush rushed out to cut a deal, and give back his ill-gotten gains. Unable to believe their good luck, Mr. Kennedy and Mr. Mitchell are now mocking the man who made it possible. Is there a clinical term to describe a terror of winning?

Using the incantatory phrase "civil rights" — which the GOP has proven powerless to resist — the left has made private enterprise a virtual dependency of a federal bureaucracy, most of whose drones would starve if they had to go out and find jobs. Using the totemic term "fairness," neo-socialists have effected an immense transfer of wealth from producers to a parasitic government. Elected by small business and Middle America, this administration has betrayed both. It is today the willing accomplice of Big Government, providing liberalism with political cover as it gradually extends its vast dominion.

Again, there is no true conservative party in Washington today.

Patrick Buchanan is a nationally syndicated columnist.

WASH.POST:10/30/91

William Raspberry 302/122/1

Bush, Civil Rights and The Specter of David Duke

President Bush has cleared the way for a compromise civil rights bill.

Cynics will say it's because he couldn't count up to 34—the number of Senate votes needed to sustain a presidential veto of the legislation.

My guess is that the reason could be stated in two words: David Duke. When it came right down to it, George Bush may have decided he'd rather have a civil rights bill he could sign than to hitch his political wagon to hard-core bigots.

The legislation at issue is designed to restore civil rights law to approximately what it was before a series of late-1980s Supreme Court rulings made it more difficult for minorities and women to prove job discrimination. Bush has opposed Democratic-led efforts to achieve that result—vetoing a 1990 attempt and threatening to veto similar legislation this time. He also rebuffed efforts by Sen. John Danforth, the Missouri Republican, to produce a compromise that both Democrats and the White House could live with.

For Bush, anything except his own flawed proposal was a "quota bill" unfit for passage. Until late last week, when the compromise agreement was announced.

A number of influences—including the prospect of an overridden veto—may have contributed to that decision. For instance, the president may have wanted to do Danforth a good turn as a reward for his efforts in getting the Clarence Thomas Supreme Court nomination through the Senate. He may actually believe that the earlier proposal was a quota bill and that the compromise isn't.

My own belief is that quotas were never more than a ploy for the president—a way of claiming to support civil rights without signing a civil rights bill, while also signaling to economically frightened whites that he was their guy.

It seems obvious that the compromise apparently achieved could have been reached at any time in the last year or more, but for one thing: Both Bush and the Democrats decided they'd rather have a political issue than a signed bill.

It may even have been good politics. The Democrats could lambaste Bush as a man who, since his days in Congress, had opposed every civil rights act that had come his way. Bush could pretend to care about civil rights while avoiding signing legislation to do anything about civil rights.

At any rate I think the president has looked at David Duke and had second thoughts.

It will strike many as naive to imagine Bush conscience-stricken over racial division. He has played racial politics with skill and apparent relish.

I have no doubt that his decision to name Thomas to the Supreme Court was motivated less by any judgment that he was "best" for the job than by the prospect of black (and liberal) discomfiture. ("They want a black to replace Thurgood Marshall? So I'll give them a black conservative they despise. Let them go crazy deciding whether to support a conservative or take responsibility for an all-white court.")

"I think the president was scared straight."

But to say that Bush enjoys confusing his enemies is not to say he's a practicing racist or is indifferent to being seen as one. He'd liked to expand the Republican Party, but not by recruiting bigots.

And then came David Duke, giving comfort to worried low-income whites, telling them their joblessness had nothing to do with a rotten economy or inadequate skills but with unfair competition from blacks. Quotas.

Bush disavowed Duke, said he wasn't a Republican. But he heard Duke and recognized the lines as his own.

The president will give you a hundred reasons for his change of heart on the civil rights bill. The Democrats caved, the compromise language made quota hiring less likely, business saw the deal as something it could live with, the civil rights establishment and women's groups finally showed some flexibility.

But the real reason may be that the similarities between him and David Duke frightened him into principled action. I think the president was scared straight.

ID# 288683

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

HU 010

INCOMING

DATE RECEIVED: NOVEMBER 25, 1991

NAME OF CORRESPONDENT: THE HONORABLE JOHN C. DANFORTH

SUBJECT: APPRECIATION FOR CIVIL RIGHTS BILL

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
FREDERICK MCCLURE	ORG	91/11/25		C	91/12/12
REFERRAL NOTE: NRN [redacted]					
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COMMENTS: Potus has seen

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 1220 ___ ___

__ MAIL USER CODES: (A)_____ (B)_____ (C)_____

*ACTION CODES:	*DISPOSITION	*OUTGOING CORRESPONDENCE:
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS OF SIGNER
*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	* CODE = A
*D-DRAFT RESPONSE	*C-COMPLETED	*COMPLETED = DATE OF
*F-FURNISH FACT SHEET	*S-SUSPENDED	* OUTGOING
*I-INFO COPY/NO ACT NEC		
*R-DIRECT REPLY W/COPY		
*S-FOR-SIGNATURE		
*X-INTERIM REPLY		

REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE (ROOM 75,OEOB) EXT-2590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

PHOTOCOPY
GB HANDWRITING

288683

THE PRESIDENT HAS SEEN

UNITED STATES SENATE
WASHINGTON, D. C.

JOHN C. DANFORTH
MISSOURI

November 21, 1991

J McClure

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

Putting it mildly, thanks for the new pen!

I want to express my appreciation for your strong insistence that we pass a civil rights bill that you could sign. Today was a big step toward putting the politization of civil rights behind us.

Especially, I want to tell you how gratified I am by the work of Roger Porter this past day. His effort to change the signing statement prevented a real disaster from happening.

Again, my thanks for your leadership and for your support during this long process.

Sincerely,

Jack

289001
HU010

THE WHITE HOUSE
WASHINGTON

July 2, 1991

Dear Congressman Boehlert:

Thank you for your letter on behalf of your constituent Mr. Raymond Ruszkowski, regarding the Small Business Administration's 8(a) program. I have enclosed a copy of my response to Mr. Ruszkowski for your information.

The Administration understands Mr. Ruszkowski's concerns regarding his application to the 8(a) program. I have forwarded Mr. Ruszkowski's letter to Ms. Patricia Saiki and Mr. Robert Kyler of the SBA. Based on your statement that you have supported Mr. Ruszkowski's efforts to participate in the 8(a) program for the last eighteen months, I have requested that they investigate his complaint placing particular emphasis on the lengthy processing time of his application.

While 8(a) program participants are predominantly from traditional minority groups, there is a small (1%) group of other participants including Caucasian women, Iranian Americans, Hasidic Jews and disabled individuals.

Applicants who are not members of those minority groups with presumptive social disadvantage are admitted on a case-by-case basis based on their supplying "clear and convincing" evidence that they have experienced chronic, substantial and long term disadvantage that has negatively impacted their entry and advancement in the business world.

We want to ensure that the 8(a) program is available to all individuals who are eligible to participate. Again, thank you for sharing your concerns.

Warmest regards,

Lawrence B. Lindsey

Lawrence B. Lindsey
Special Assistant to the President
for Policy Development

The Honorable Sherwood Boehlert
House of Representatives
1127 Longworth House Office Building
Washington, DC 20515

cc: The Honorable John J. LaFalce
Chairman, Committee on Small Business

THE WHITE HOUSE

WASHINGTON

July 2, 1991

Dear Mr. Ruszkowski:

Thank you for your letter to the President regarding the Small Business Administration's 8(a) program. We understand and share your concerns with respect to the involvement of disabled Americans in the 8(a) program.

The legislative history of the 8(a) program includes participation, on a case-by-case basis, by disabled individuals. Regulations outlining procedures for application to the program by those individuals who are not members of groups granted presumptive social disadvantage status are outlined in the Federal Register dated August 21, 1989. I have included a copy of the relevant portions of the document for your information.

The Administration cannot act as an advocate for an individual applicant to any government program. Hence, I have forwarded your letter to Ms. Patricia Saiki, Administrator of the Small Business Administration (SBA). Since the 8(a) program is under the jurisdiction of SBA's Minority Small Business and Capital Ownership Development (MSB & COD), your letter has also been forwarded to Mr. Robert Kyler, Acting Associate Administrator for MSB & COB.

Again, thank you for sharing your concerns.

Warmest regards,

Lawrence B. Lindsey

Lawrence B. Lindsey
Special Assistant to the President
for Policy Development

Mr. Raymond Ruszkowski
President
Encon Sealtite Corporation
P.O. Box 741
Oriskany, NY 13424

cc: The Honorable Sherwood Boehlert

THE WHITE HOUSE

WASHINGTON

July 2, 1991

Dear Ms. Saiki:

Enclosed please find letters from Mr. Raymond Ruszkowski and his representative Sherwood Boehlert of New York. Mr. Ruszkowski has applied to participate in the SBA's 8(a) program. While his application was approved at the state level, it was denied by the Washington office. Mr. Ruszkowski has applied for reconsideration.

My primary concern is to ensure that all eligible applicants are admitted into the program in a timely fashion. As you know, the Business Opportunity Development Reform Act of 1988 has a statute which mandates the processing time frame for 8(a) applications at 90 days for completed initial applications and 45 days for reconsiderations if initially denied. Congressman Boehlert states in his letter that he has supported Mr. Ruszkowski's efforts to participate in the 8(a) program for eighteen months. As such, Mr. Ruszkowski's application process far exceeds the statute.

While I do not intend to act as an advocate for Mr. Ruszkowski, it is of the utmost importance that the program be administered as mandated by the Congress. I would appreciate your assistance in ensuring that all applications are given thoughtful, timely and equitable consideration.

Thank you for your attention in this matter. Please keep my office apprised of your findings.

Warmest regards,

Lawrence B. Lindsey

Lawrence B. Lindsey
Special Assistant to the President
for Policy Development

Ms. Patricia Saiki
Administrator
Small Business Administration
409 Third Street, SW
Washington, DC 20416

cc: Mr. Robert Kyler, SBA MSB & COD

THE WHITE HOUSE
WASHINGTON

Date: 6-28-91

FOR: LARRY LINDSEY

FROM: ROGER B. PORTER

- ☐ Action
- ☐ Draft Response
- ☑ Direct Response
- ☐ FYI
- ☐ Please See Me

COMMENTS: Please check into this and respond appropriately. Thanks.

SHERWOOD BOEHLERT
25TH DISTRICT, NEW YORK

COMMITTEES:
SCIENCE, SPACE, AND TECHNOLOGY
VICE CHAIRMAN, SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT
PUBLIC WORKS AND TRANSPORTATION
SELECT COMMITTEE ON AGING

U.S. DELEGATION, NORTH ATLANTIC ASSEMBLY
CHAIRMAN, NORTHEAST AGRICULTURE CAUCUS
CHAIRMAN, WORKING GROUP ON ACID RAIN
NORTHEAST-MIDWEST CONGRESSIONAL COALITION

Congress of the United States
House of Representatives
Washington, DC 20515

RESPOND TO:

WASHINGTON OFFICE:
☐ 1127 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-3665

CENTRAL OFFICE:
☐ ALEXANDER PIRNIE FEDERAL BUILDING
10 BROAD STREET
UTICA, NEW YORK 13501
(315) 793-8146

TOLL FREE: 1-800-235-2525

June 26, 1991

Mr. Roger B. Porter
Assistant to the President
Economic and Domestic Policy
Executive Office of the President
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Mr. Porter:

Raymond A. Ruszkowski, President, Encon Sealtite Corporation, has asked that I forward the enclosed letter to the attention of President Bush.

During the past 18 months, I have been supporting Mr. Ruszkowski's efforts to obtain approval of his application for eligibility as a disadvantaged business enterprise under the Small Business Administration's (SBA) 8(a) program.

As you will note, the first application he submitted was approved at the state level but denied after its final review in Washington. He has requested a reconsideration of this decision.

Mr. Ruszkowski is severely hearing impaired. He believes that this has put him at a distinct disadvantage when soliciting contracts, and has provided documentation from former clients attesting to this.

Because his disability is not readily evident, he feels that its full impact on his ability to secure work is not taken seriously.

Mr. Ruszkowski would like President Bush to be made aware of his situation and of his continuing efforts to secure approval to participate in the 8(a) program.

CORTLAND
17 MAIN STREET
CORTLAND, NEW YORK 13045

MANLEY HOUSE
42 S. BROAD STREET
NORWICH, NEW YORK 13815

41 S. MAIN STREET
ROOM 203
ONEONTA, NEW YORK 13820

I have informed Mr. Ruszkowski that I have brought his concerns to the President's attention. Thank you for your assistance and cooperation in this matter.

With warmest regards,

Sincerely,

Sherwood Boehlert
Member of Congress

SB:jhd
Enclosure

Raymond Ruszkowski, President
Encon Sealtite Corp.
PO Box 741
Oriskany, N.Y. 13424
May 17, 1991

Executive Office of the President
1600 Pennsylvania Ave.
Wash. D.C. 20500

Dear President Bush:

I am writing to you in regard to difficulties I am having with the Small Business Administration and my application for eligibility as a disadvantaged business enterprise under section 8a.

I have a severe disability as classified under federal guidelines for the New York State Office of Vocational Educational Services for Individuals with Disabilities. I have a hearing loss for pure tones in the speech range of 88 decibels left and 83 decibles right with discrimination scores of 44 percent right and 20 percent left. This would classify me as deaf according to federal guidelines at the N.T.I.D. in Rochester, N.Y. and at Gallaudet University. I also qualify for the New York State 55B program, which would indicate that I would have some severe limitations vocationally.

I have been found eligible by the SBA in New York State but was then denied at the SBA Office in Washington, D.C.. The reasons for this are not clear to me at this time. I have submitted all requested information and have documented discriminatory situations. The local office of Vocational Educational Services for Individuals with Disabilities, my New York State Senator, and Congressman Boehlert are behind me 100 % .

President Bush, I truly believe that when you signed into law the Americans with Disabilities Act you did so to help remove barriers for people such as myself and to open doors for all people with disabilities. Needless to say, it is frustrating to find that the Wahington D.C. branch of the Small Business Administration seems to be discriminatory in their approach to disabled individuals.

I am enclosing parts of the package that I submitted to the SBA for your information and consideration.

Sincerely;

Raymond A. Ruszkowski

THE WHITE HOUSE

WASHINGTON

ORM OPTICAL DISK NETWORK

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Comments:

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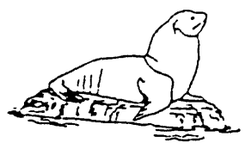
SIDEWALKS

CURBS

MANHOLES



TESTING OF ALL
PIPELINES
MANHOLES, ETC.

March 1, 1990

Raymond A. Werts
Business Opportunity Specialist
U.S. Small Business Administration
Federal Building-Room 1071
Syracuse, N.Y. 13260-0014

Dear Mr. Werts:

I am writing in regards to my application for eligibility as a disadvantaged business enterprise.

I have a severe disability as classified under federal guidelines for the New York State Office of Vocational Rehabilitation. I have a hearing loss for pure tones in the speech range of 88 decibels left and 83 decibels right with discrimination scores of 44 percent right and 20 percent left. This would classify me as deaf according to federal Institute for the Deaf in Rochester, N.Y. or Gallaudet University. I also qualify for the New York State 55B program, which would indicate that I would have some severe limitations vocationally.

Rubin and Rossler in "Foundations of the Vocational Rehabilitation Process," found that people with a severe handicap such as myself have been treated much like other minority groups such as blacks or spanish speaking people. I-norance and misinformation, plus negative societal attitudes and beliefs has caused prejudice that results in fear of handicapped people such as myself and my exculusion from many aspects of society. The United States Commission on Civil Rights in 1983, p. 21 found for the most part, deaf persons have been insolated from the mainstream of American life for the past 200 years.

Negative attitudes toward disabled people have prevailed for many years and reflected in all forms of communication and media from the bible to comic books, television and the newspapers. In the newspapers you often see the use of statements such as deaf mute or deaf and dumb, when just plain deaf or hearing impaired would suffice.

If I want to attend a place of worship I am excluded

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because most do not have assistive listening devices, or it is too costly, or people are just plain ignorant of my needs. I had wanted to serve on the governing body at my place of worship but was told I could not because I could not hear well enough and they would not install an assistive listening device. This forced me to change churches and also caused me much embarrassment and emotional hardship.

If I want to go to a movie, lecture, broadway show, concert, etc., I am denied access since again few assistive listening devices are available. People who are black or hispanic do not face this problem as long as they understand English.

Two weeks ago I went to hear an Itchat Perlman concert which cost me forty dollars. The theatre had not set up the assistive listening devices properly, so I was unable to hear. When I explained to them they had forgotten to turn on the microphone and make adjustments, they refused to take care of this during intermission, saying it would disrupt their schedule. They also refused to refund my money.

Clubs and public organizations can no longer discriminate on the basis of racial or gender differences. Men's clubs must now admit women and build separate restroom facilities. I am not denied membership as a disabled person but I am denied access. The dictionary describes the word "Access", as the right to approach, enter, and use. I am denied access since most such places refuse to spend the money to purchase assistive listening devices or provide interpreters.

TESTING OF ALL PIPELINES MANHOLES, ETC.

I recently became a member of the Knights of Phythias which is a group of professional businessmen state wide in nature. This group has many social gatherings luncheons, and conferances that I am denied equal access to because this group does not have any assistive listening devices, nor are there any provisions for future installation of these devices. Henceforth, I cannot participate on an equal basis in the election processes or parlimentary procedures of this group. The simple task of serving on a small commitee can be almost impossible due to communication problems. Just as I used the example of women now being able to join former "all men's" clubs and that facility bearing the costs of accessibility for each women, ie; the installation of restroom facilities. Is it up to individuals such as myself to bear the costs of making each club or social

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organization that I join accessable to us? I am making these statements in referance to your statement that I have not been denied entrance to any socal, educational organizations and institutions. To further emphasize my point. It is important to note that handicapped individuals are protected under Federal Law; Section 504, and are described in Title 5 of that law as any person who has a physical or mental impairment which substantially limits "one or more of lifes major activities and can substantiate such impairment . (United States Commission on Civil Rights, 1983 p.6)

If I want to utilize public transportation I am discriminated against since I can't hear anouncements of departures or schedule changes. Today public transportation is largely accessible to blacks or hispanics as long as they can understand English. On one occassion I missed a flight due to inability to hear an announcement and ended up having to stay over night and fly out the next day. On another occassion I ended up flying to the wrong city when my boarding gate was changed and the attendant failed to notice I was going to a different destination. Therefore I ended up in the wrong city and had to stay over night. This caused me to miss appointments and incure financial loss.

Immigration policy for the United States forbids people with physical, mental, or emotional disabilities from entering this country. Although I have not been affected by this personally it is another example of discrimination against handicapped individuals.

TESTING OF ALL PIPELINES MANHOLES, ETC.

I have been seen by many potential employers and contractors as an economic liability because of fear of injury to myself or others, damage to machinery or fear of increased insurance rates. There was a recent story in the New York Times dated March 19, 1989 about a 1986 survay by Louis Harris & Associates, 920 companies were polled and half said they had hired people with disabilites but three out of four admitted to discrimination against handicapped people. I will describe many of my own experiences later in this letter.

Several years ago I was looking for an apartment and finally found one I liked, I was ready to sogn a rental agreement but the landlord refused to rent to me when he learned I had a hearing ear dog. Later I found out this was not legal under current state and federal guidlines. This is another example of discrimination against me as a disable member of society.

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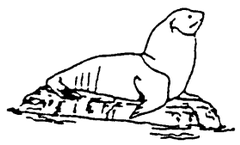
Several years ago I was looking for an apartment and finally found one I liked. I was ready to sign a rental agreement but the landlord refused to rent to me whwn he learned I had a hearing ear dog. Later I found out this was not legal under current state and federal guidlines. This is another example of discrimination against me as a disable member of society.

Another problem due to my disability is the inability to overhear. This is important since at many group meetings such as Mohawk Valley Builders Exchange much useful information can be gained this way. Due to this problem and the inaccessability of the organization I am unable to have equal access to their meetings.

I also have a problem especially on initial contact with people since body language and easy communication are so important and make a difference in how person percieves me. Because I must stand very close to someone I am often seen as invading that persons personal space and make people feel uncomfortable. When I have to keep asking people to repeat and I misunderstand things people see me as being stupid or bothersome. They them may choose not to deal with me at all in order to avoid this feeling of discomfort. This puts me at further disadvantage.

Prejudice in the job market has prevented me from reaching myfull potential. Many employers see me as an economic liability. Employers dear injury to machinery or workers. In a recent article in the New York Times dated March 19, 1989 about a 1986 survey by Louis Harris & Associates, 920 companies said they had hired people with disabilities but three out of four admitted to discrimination against handicapped employees.



TESTING OF ALL
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MANHOLES, ETC.

My personal experience indicates that the survey reflects reality in the job market. During the summer after my first year of college, I took a job as a bus boy at the Old City Club of Utica. Even tough I made very few mistakes, the head waiter would constantly yell and call me stone ears in front of the other waiters. He did not like to repeat himself. After a brief period, he asked the supervisor if he could fire me. The supervisor approved the request and the head waiter fired me.

In May, 1973, I began working for Synder Construction, a pipeline construction firm. Upon accepting employment. I explained that I could not hear two way radios.

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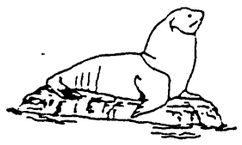
Despite the warning, a foreman tried to contact me through a radio in a truck. The Foreman became incensed when I did not answer. When I arrived at the job site, the foreman pulled me out of the truck and screamed "you keep your deaf ass out of my trucks if you can't use the radios. The foreman made the abusive remark in front of the wntire crew.

In July, 1974, I worked on a project for Steele-Perkins Construction Company The company showed a video to demonstrate a critical, project method. The firm did not have captioning or assistive listening devices. I complained, but the project manager stated "shut up and watch the film". "You are quickly becoming a burden to the company." Later, the company terminated my employment on the project.

During high school, coaches and teachers felt I was a solid candidate for an athletic scholarship. However, colleges denied me admission because of my hearing impairment. They refused to make minor accommodations to provide disabled person access. I~ May, 1968 an interviewer at LeMoyne College stated that he would not recommend me for admission because of my hearing difficulty. At Cortland State Teachers College, negotiations concerning an athletic scholarship ceased when they found out about my hearing impairment. During an interview with the Ithaca College football coach, the coach became irritated with the communication difficulty. He said that the hearing difficulty would be a big problem.



TESTING OF ALL PIPELINES MANHOLES, ETC.

Concerned with the treatment at prior interviews, my high school football coach set up an interview at Harford Junior College. The college happily granted admission with a guaranteed football position. However when I began playing football, the coaches refused to make concessions I needed to play. I ended up not playing much.

When I entered my first college English class, the professor immediately put me in back of the class because of my height, despite many requests to sit in the front. After one request, the professor stated, in front of the class, "Mr. Ruszkowski, because you are deaf and are trying to play football, surely there is true meaning behind the words deaf and dumb!" The class laughed heartily at my expense.

I~ American history, the professor gave oral exams.

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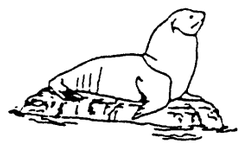
During the first oral test, I kept asking the professor to repeat the questions. The professor quickly asked me to stay after class and take the exam. I felt humiliated in front of my classmates. I received an F in American History.

Societal discrimination limits my ability to participate in social and business activities. Clubs and organizations can no longer discriminate on the basis of racial or gender difference. Men's clubs must admit women and build separate restroom facilities. In recent debate over whether men's clubs should be required to admit women, proponents of open admission argued that women will lose business opportunities if they are not admitted to clubs. Social clubs provide the perfect opportunity to network and make business contacts. though clubs do not deny me membership as a disable person, I am denied access. The dictionary defines "access" as the right to approach, enter, and use. I denied access since most clubs refuse to purchase assistive learning devices or provide interpreters.



I recently became a member of the Knights of Phythias, a state wide group of professional businessmen. The group holds many social gatherings, luncheons, and conferences which I am denied access to because the group does not have any assistive listening devices. When I requested that the group obtain listening devices, they voted down the proposition. Organizations force handicapped members to bear the cost of making clubs accessable. Without listening devices, I cannot participate in conferences, election processes, or parliamentary procedure. Communication problems make the simple task of serving on a commitee impossible. Due to the frustration I encountered in trying to participating in the club, I resigned.

TESTING OF ALL PIPELINES MANHOLES, ETC.

The same problem occurs when I try and participate in Mohawk Valley Builders functions. At the meetings, useful information can be obtained through conferences and conversations with other builders. This club also does not have equal access to their meetings.

For a hearing impaired individual,the consequencesof being denied access are equal to being denied membership. To emphasize the point, handicapped individuals are protected under Federal Law; Section 504, and are described in Title 5 of that law as any person who has a physical or mental impairment which substantially limits "one or more of lifes major activities and can

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substantiate such impairment (United States Commission on Civil Rights, 1983 p. 6).

Everyday activites are hampered by the ignorance or disregard of society. If I want to utilize public transportation. I cannot use the telephone to call and be able to hear. Further, I cannot hear announcements of departures or schedule changes. Today blacks and hispanics have complete access to public transportation. In March, 1899, I reserved a flight from Chicago to Tulsa, Oklahoma to look at a potential project with Hycon Construction. United Airlines originally scheduled the flight to leave at 8:40 from gate 22. However,the airline announced a gate change because the hydraulic passenger ramp malfunctioned. I did not hear the change and the attendant at gate 22 did not check my ticket well. Thus, I boarded the wrong plane and ended up in Atlanta, Georgia.

In January, 1983 I ttended a Deerfield Zooning Board meeting to get information on a residence so I could make a construction estimate. I could not hear the proceedings. When I requested a copy of the transcript, they stated that the Town of Deerfield does not give transcripts. For whatever reasons the Town does not acknowledge this ever happening. Several years ago I rented an apartment. During my tenancy, I accidently allowed the sink to overflow. I could not hear the water running in order to turn off the faucet. The landlord evicted me. He stated, "If you had good hearing, I would let it slide but I can't take a chance on it happening again because of your hearing impairment." A few months ago, another landlord refused to rent me an apartment when he learned I had a hearing ear dog. Later, I found out that this refusal violated state and federal guidelines.

I I wanted to attend a religious service, I am excluded because most do not have assistive listening devices or interpreters. During a prenuptial conference in May, 1971, I expresse[redacted]concern to the pastor about reacting on cue during the wedding, but the Pastor wanted to follow certain guidelines. Consequently, I could not hear the vows and the ceremony became fragmented and embarrassing. Further, I wanted to serve on the governing body of my church but I could not. The council would not install listening devices and I could not hear well enough to be an effective member of the council. The incident caused me much embarrassment and I have since changed churches.

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Society discriminates against the hearing impaired even at general social events. If I attend a movie, lecture, broadway show, or a concert, I am denied access since few assistive listening devices are available. Blacks, hispanics, or people who have good hearing do not have this obstacle. In April, 1989, I attended a concert by the famed violinist Itchak Perlman with a potential customer. The ticket cost forty dollars. When I arrived at the concert, the assistive listening devices were improperly installed. Therefore, I could not hear the first half of the concert. At the intermission, I asked personnel to adjust the listening devices but they refused. They stated, "It would not look good and it would disrupt our schedule." This caused me much embarassment in front of the client.

My hearing impairment limits the number of people willing to become a social companion. In college, I took a young women to dinner. During the evening we had difficulty communicating, even though I tried to explain, many times, how she should communicate with me. She asked me to take her home and she said on the way she could not see me anymore. I found out later that she told all her friends about the communication problem. As result, none of her friends would date me. On another occassion, during Christmas break from college, a high school friend stated she could not see me anymore. When I asked her why, she replied "because I can talk to other people easier than you." In November, 1972, I ate Thanksgiving dinner at my former wife's, parent's home. My mother-in-law found it difficult to communicate with me. During dinner she blurted out, in front of twenty people, "Sue, why did you marry Ray? He's so deaf! Although, these are examples of social interaction, it proves that these instances can greatly contribute to a negative image of myself and my business.

Even our court system has manifested ignorance to the plight of the hearing impaired. I appeared in the Uica City Traffic Court to answer for minor traffic violations. When the judge called me to the bench, I did not hear him. As people began to leave, I approached the bench and I asked the judge if he called my name. After checking the list, the judge replied, "I called your name twice, if you didn't hear, that's your problem. You will have to reschedule at a later date. Due to this incident, I had to pay extra fines and miss work for the second court appearance.

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The manner I use to communicate alienates some people upon initial contact. I must stand very close to people in order to hear limited tones. People perceive the close contact as an invasion of private space. When I have to ask people to repeat or I misunderstand, people think I am stupid. The limited way I can communicate alienates potential clients. Clients choose to deal with people they feel comfortable with and if I communicate in an odd manner or appear stupid they will hire other businesses. The minority business status intends to combact discrimination to allow minority businesses to reach their full potential. Ignorance of societal minorities, such as hearing impaired citizens, perpetuates stereotypes and discrimination. Without added incentives, the false view that hearing impaired people are stupid or less capable will continue and their businesses will flounder under discrimination.

Most people do not understand the degree of limitations society imposes on handicapped individuals. In "Foundations of the Vocational Rehabilitation Process", Rubin and Rossler found that people with a severe handicap are treated like traditional minority groups such as blacks and spanish speaking citizens. Society excludes handicapped people from many activities because of ignorance, misinformation, negative societal attitudes, and false stereotyping. The United States Commission on Civil Rights in 1983, p. 21, found that American society has been excluding disabled citizens since founding of our democracy. As a result, nondisabled individuals know little about the abilities of handicapped citizens.

Negative attitudes are manifested in all facets of society. Prejudice exists in circumstances ranging from the job market to social functions. Newspapers use statments such as deaf mute or deaf and dumb when "hearing impaired" will suffice. Personally, I am exposed to prejudice daily.

Sincerely,

Raymond A. Ruszkowski

TESTING OF ALL PIPELINES MANHOLES, ETC.

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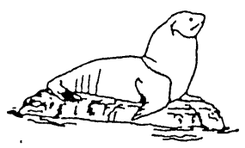

TESTING OF ALL
PIPELINES
MANHOLES, ETC.

Brief Company History And Description

Encon Sealtite Corporation was incorporated in 1988, As a Specialty Masonry Company.

The company specializes in all types of masonry such as Foundations, Brick Block, Flat work-ie: Sidewalks, Driveways, Curbs,Trench Gutters etc. The company has been trying to expand into the Waterproofing industry, and our work has been very well received by various engineers.

Encon currently has a seven vehicle fleet, that is always road ready, and available for all types of emergencies, such as collapsed sewer lines or manholes, installation of new pipelines and its appurtances.

BLASLAND & BOUCK ENGINEERS, P.C.
5793 Widewaters Parkway/Box 66 Syracuse, New York 13214 (315) 446-9120
White Plains, NY • Edison, NJ • Boca Raton, FL • 230 Park Avenue, NYC • Columbus, OH

March 17, 1988

To Whom It May Concern:

It is the purpose of this letter to advise you that Mr. Raymond Ruszkowski has worked as a subcontractor on manhole repairs on a number of projects for which I have had inspection responsibilities.

His work has been consistently found to be of the best quality.

Feel free to contact me should you so desire.

Very truly yours,

BLASLAND & BOUCK ENGINEERS, P.C.

Donald E. Kenney, P.E.
Manager, Construction Services

DEK:vmj

VILLAGE OF MAMARONECK

Village Hall
Mamaroneck, N.Y. 10543

March 23. 1988

To Whom it May Concern:

It is the purpose of this letter to advise you that Mr Raymond Ruszkowski has worked as a subcontractor on manhole repairs on a major project for which I was the owners representative.

The quality of his work has consistently reflected such a high quality. and pride in a job well done that I have subsequently asked him to do other work directly for the Village.

Please feel free to contact me if you have any questions.

Very truly yours.

Keith W Furey
Deputy Village Engineer

KWF/gd

CITY OF ONEIDA
DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS

W. ROBERT MAYER
City Engineer

109 North Main Street
Oneida, New York 13421
Tel. 315-363-7222

August 30, 1988

To Whom It May Concern:

Pleased be advised that Raymond Ruszkowski has worked in the City of Oneida for the past two years rehabilitating sanitary sewer manholes.

His performance and workmanship has been commendable.

I highly recommend him for this type of work.

W. Robert Mayer

W. Robert Mayer, P.E.
City Engineer

HAZEN AND SAWYER, P.C.
ENGINEERS

730 BROADWAY • NEW YORK, N.Y. 10003 • (212) 777-8400
CABLE: HAZANSAW, N.Y. • TWX: 710-581-2179

September 1, 1989

To Whom it May Concern:

Mr. Raymond Ruszkowski has worked as a subcontractor on manhole repairs for the Joint Meeting of Essex and Union Counties, Sewer System Rehabilitation Project, Elizabeth, New Jersey.

We have found his work to be of high quality, and on numerous occasions he has offered recommendations which have improved the overall quality of the project. His knowledge in construction practices regarding manhole and sewer repair and construction has been valuable.

It has been a pleasure to work with him.

Very truly yours,

HAZEN AND SAWYER, P.C.

Alexander J. Varas, P.E.
Associate

AJV:jd
4-(039)

BAT-CON, INC.

4277 SLATE HILL ROAD • P.O. BOX 155
MARCELLUS, NEW YORK 13108

January 26, 1988

New York State Department of Transportation
Certification Review Panel
State Office Campus
Building 5, Room 509
1220 Washington Avenue
Albany, New York 12223

Re: Application of NYSDOT D/M/WBE
Encon Seal-Tite Co.

Dear Sir/Madam:

I am writing this letter in response to questions posed by Attorney James Kernan regarding the denial of sub-contract work to a business operated by Raymond Ruszkowski known as Encon Seal-Tite Co. I am the President of Bat-Con, Inc., which is a firm specializing in underground utility construction. Bat-Con, Inc. does approximately $8,000,000.00 worth of work per year. A portion of the work contracted by Bat-Con, Inc. is sub-contracted to firms specializing in manhole rehabilitation as well as other masonary and concrete construction, the sort of work which Mr. Ruszkowski said his firm was capable of doing.

Mr. Ruszkowski d/b/a Encon Seal-Tite Co. approached me in the Spring of 1986 and offered a bid to sub-contract manhole rehabilitation and concrete construction on a project known as "Village of New Hartford Sewer Rehabilitation, Contract #1", a $1.5 million project. This project was publicly funded through the New York State Department of Environmental Conservation. The work was awarded to another sub-contractor out of concern that Mr. Ruszkowski would not be able to complete the work in a timely manner and had not demonstrated his ability to perform the work despite his hearing handicap. I was unwilling to risk the work on a disabled individual. In attempting to communicate with Mr. Ruszkowski, I became very frustrated and impatient and decided that I could not afford to devote the extra effort which was needed to work with Mr. Ruszkowski. I had other

BAT-CON, INC.
4277 SLATE HILL ROAD • P.O. BOX 155
MARCELLUS, NEW YORK 13108

prices for the work on which Mr. Ruszkowski was bidding which were competitive with Encon Seal-Tite Co., but without the hassle of dealing with a disabled individual.

Mr. Ruszkowski, d/b/a Encon Seal-Tite Co., again approached me in October, 1986 while Bat-Con, Inc. was doing a multi-million dollar sewer rehabilitation contract for the City of Utica, "Contract 1 & 3 Sewer Rehabilitation", seeking sub-contract work for manhole rehabilitation, sidewalks and curbs. These projects were also funded publicly through the New York State Department of Environmental Conservation. I again rejected the bid of Encon Seal-Tite Co. for the same reason set forth in the previous paragraph.

In June, 1987, Mr. Ruszkowski d/b/a Encon Seal-Tite Co. again appoached me while Bat-Con, Inc. was doing sewer rehabilitation work in the Village of Oriskany, likewise publicly funded through the New York State Department of Environmental Conservation. As in the past, I rejected the bid of Encon Seal-Tite Co. for the reasons previously stated, and awarded the work to other sub-contractors. I was unwilling to take a chance with Mr. Ruszkowski.

Each of the projects mentioned above require D/M/WBE participation. I would have taken the risk on Mr. Ruszkowski as part of my requirement to satisfy D/M/WBE goals. However, because Encon Seal-Tite Co. was not certified as a D/M/WBE, we satisfied our goals using other sub-contractors.

Sincerely,

David Irwin, President
Bat-Con, Inc.

ICOS
Corporation of America

124 South Van Brunt Street, P.O. Box 749
Englewood, New Jersey 07631

Robert M Watson
Vice President
and Chief Financial Officer

Tel. (201) 568-4411
Telex: 139332 ICOS USA
FAX: (201) 568-9794

March 31, 1989

State of New York
Department of Transportation
Office of Equal Opportunity
Development and Compliance
Albany, N.Y. 12232

Gentlemen:

I am writing this letter in regards to Mr. Raymond Ruszkowski (Encon Sealtite Co.) application for classification as a D/M/WBE. We have worked with Mr. Ruszkowski for the past several years. Most recently Mr. Ruszkowski is our subcontractor for a $3.4 million project in Essex County. In the past Mr. Ruszkowski has worked for us on several small projects in the New York State area. For the project in Newark it was necessary for us to provide financing for his company so he could participate in this venture.

I would like to state unequivocally that we have been satisfied with the quality of work that Mr. Ruszkowski has provided. He is an individual with unquestionable integrity and a work ethic that is unmatched in this field. Unfortunately as you are aware Mr. Ruszkowski has a severe hearing problem. This problem came to light during the performance of the Newark/Essex project. The project entailed sewerage rehabilitation for nine different city locations. During this time communication between various cities was critical. Often communication is only viable through a walkie talkie or separate radio communications hooked up to our vehicles. At certain times in the project we were unable to contact Ray as a result of his hearing disability. In construction time is money. Although everyone in our company and on the project is aware of Ray's disability, at times, and in critical situations when it was essential to contact Ray, we were unable to do so.

In summary, I would like to say that on projects of this size and scope where communication is essential, I do not believe we could justify the risk associated with using someone with a sever disability that has the potential to add significant cost and risk to the project.

The projects that Mr. Ruszkowski has worked on for us did require participation of a D/M/WBE. I believe if Mr. Ruszkowski was given favorable consideration for his disability application, we could give serious consideration using Mr. Ruszkowski on future projects.

ICOS

Now that we know the quality of Mr. Ruszkowski's work, I believe we would take the risks in using Mr. Ruszkowski if he was classified as a D/M/WBE.

In all my years of experience in construction if there is ever an individual that deserves disability classification it is Mr. Ruszkowski. It is amazing to see what this man has accomplished with the severe hearing impairment that the has.

If I can be of any assistance or you require any additional information, please do not hesitate to contact me.

Sincerely,

Robert M. Watson

Ronald H. Laberge, p.c.

CONSULTING CIVIL ENGINEERS & MUNICIPAL PLANNERS

3 COMPUTER DRIVE • ALBANY, NEW YORK 12205

(518) 458-7113

MUNICIPAL WORKS & SERVICES
STATE & FEDERAL GRANTS
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SANITARY SEWERS & TREATMENT
COMMUNITY DEVELOPMENT
PLANNING & RENEWAL
ENVIRONMENTAL STUDIES
RECREATIONAL FACILITIES
PARKS — ICE RINKS — POOLS
FIRE PROTECTION
INDUSTRIAL WASTE TREATMENT
SOLID WASTE DISPOSAL
STREETS AND HIGHWAYS
TRAFFIC AND PARKING
STORM DRAINAGE — DAMS
FLOOD CONTROL
SITE DEVELOPMENT
SUBDIVISION PLANNING
HOUSING — ZONING
MUNICIPAL BUILDINGS
AIRPORTS — BRIDGES
INDUSTRIAL PARKS
COMMERCIAL DEVELOPMENT
SURVEYS AND MAPPING
INVESTIGATIONS — TESTS
REPORTS — RATE STUDIES
DESIGN — SUPERVISION
CONSTRUCTION MANAGEMENT

— MEMBER —

AMERICAN SOCIETY OF CIVIL ENGINEERS
AMERICAN WATER WORKS ASSOC.
WATER POLLUTION CONTROL FEDERATION
AMERICAN CONSULTING ENGINEERS COUNCIL
NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS
AMERICAN SOCIETY OF PLANNING OFFICIALS
AMERICAN PUBLIC WORKS ASSOC.
AMERICAN MANAGEMENT ASSOC.

October 2, 1985

To Whom it May Concern:

Please be advised that Raymond Ruszkowski has worked for several years on Marcy and Deerfield Sewer Improvements Projects under the supervision of Laberge Engineering and Consulting Group. His workmanship on manhole stations, pipefitting and overall masonry construction has been of the highest quality.

It has been a pleasure being associated with him.

Very truly yours,

George W Russell

George W. Russell
Construction Manager

Central New York Construction Inc.
10324 Miller Rd.
Utica, New York 13502
(315) 724-1386

Katrina L. Hanna
President

Encon Seal Tite Co., Inc.
Raymond Ruszkowski, President
PO Box 5066
Utica, N.Y. 13505

March 31, 1989

Dear Ray,

This letter is to verify a situation of which we are both acutely aware; that your hearing disability is not condusive to an effective business relationship. While we have done business with your company in the past it has been extremely difficult to do so. Telephone conversations and 2-way radio conversations from project sites are almost impossible. Your hearing impairment has made on site communication inaccurate and caused difficulties. As you know, there are times on the job site when rapid and accurate communication between contractor and subcontractor is essential. It is not always possible to confer face to face and there are rarely fax machines present with which to verify information. For these reasons your hearing impairment puts you at a definite disadvantage in the construction business. While we make every effort to afford you the special considerations you require, there are some projects where this may not be possible.

Sincerely yours,

Katrina

Katrina L. Hanna
President

ROME SAVINGS BANK
100 On The Mall
Rome, New York 13440
315 - 336-7300

Application of: **Date:** June 23, 1988

Encon Seal Tite Company
PO Box 5066
Utica, NY 13502

requesting credit as follows: (describe) $20,000.00 line of credit
Guaranteed by Raymond A. Ruszkowski

We regret that your recent credit application cannot be granted at this time and has been declined.

Principal reason(s) for credit denial, termination, or other action taken concerning credit. **This section must be completed in all instances.**

- ☐ Credit application incomplete
- ☐ Insufficient number of credit references provided
- ☐ Unacceptable type of credit references provided
- ☐ Unable to verify credit references
- ☐ Temporary or irregular employment
- ☐ Unable to verify employment
- ☐ Length of employment
- ☐ Income insufficient for amount of credit requested
- ☐ Excessive obligations in relation to income
- ☐ Unable to verify income
- ☐ Length of residence
- ☐ Temporary residence
- ☐ Unable to verify residence
- ☐ No credit file
- ☐ Limited credit experience
- ☐ Poor credit performance with us (Guarantor)
- ☒ Delinquent past or present credit obligations with others
- ☐ Garnishment, attachment, foreclosure, repossession, collection action, or judgment
- ☐ Bankruptcy
- ☐ Value or type of collateral not sufficient
- ☐ We do not grant credit to any applicant on the terms and conditions you request.
- ☒ Other, specify: Insufficient financial data on Company

DISCLOSURE OF USE OF INFORMATION OBTAINED FROM AN OUTSIDE SOURCE

This section should be completed if the credit decision was based in whole or in part on information that has been obtained from an outside source.

☒ Our credit decision was based in whole or in part on information obtained in a report from the consumer reporting agency listed below. You have a right under the Fair Credit Reporting Act to know the information contained in your credit file at the consumer reporting agency. The reporting agency played no part in our decision and is unable to supply specific reasons why we have denied credit to you.

The Credit Bureau of Utica, Inc.
326 Catherine St., PO Box 138
Utica, NY 13501

☐ Our credit decision was based in whole or in part on information obtained from an outside source other than a consumer reporting agency. Under the Fair Credit Reporting Act, you have the right to make a written request, no later than 60 days after you receive this notice, for disclosure of the nature of this information.

If you have any questions regarding this notice, you should contact us at the above address.

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided that the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with this law concerning this creditor is:

Regional Director
Federal Deposit Insurance Corporation/452 Fifth Avenue/21st Floor/New York, NY 10018

NAME Rucz Rowski Raymond ADDRESS
(LAST) (FIRST) (MIDDLE) (NUMBER) (STREET) (COMMUNITY)

REMARKS

Grade 4 - Raymond had been enrolled in Fifth Grade but was in serious difficulty. He is not well-adjusted and does not belong to the group. He has real or imaginary problems - hearing, general health and clumsiness. He is unfortunate as he does not hear well and in sports is shunned by others. He likes to read library books but seems to avoid hard work.

June, 1960 M. Nuss

Gr. 5. Raymond has done very little work this year. He is a misfit with the group and will do anything to gain attention of any kind. Ridicule or disgust on the part of other children seem not to bother him if he can "put on the show". Days at a time he is on "cloud nine" somewhere and we can't get through to him. He has an unequalled imagination which abounds in morbid punishments distributed by angels of vengance.

Helen Hanson

Grade 6 - Raymond has not done well scholastically but has gained class recognition in sports. He is 3rd in the system 6th grade wrestling champions and has done well in soft-ball. He has a good personality. 6/62 Eleanor Musarczyk

SECONDARY-SCHOOL RECORD—TRANSCRIPT

UNOFFICIAL

STUDENT INFORMATION

Last Name Ruszkowski, *First Name* Raymond *Middle Name* A.

Home Address 8 Tharratt Place, Whitesboro, New York

Parent or Guardian R. J. Ruszkowski

Previous Secondary School Attended (if any) | *Date Left*

Date of Birth 2/13/50 | *Sex* M | ☐ *Withdrew* ☒ *Was Graduated* *Month Year* June 1968

SCHOOL INFORMATION

School Name **WHITESBORO SENIOR HIGH SCHOOL**

School Address **Marcy, New York 13403**

School Accredited By ☒ *State System* ☒ *Reg. Accred. Assoc.* | *School Phone Number* 315 - 736-3065

NON-PUBLIC	PUBLIC	*Enrollment in Grades*		*Percent Graduates Entering College*			
				4 Yr. Col.		2 Yr. Col. and Other	
☒	☐	1100	10—12	30%		20%	

Passing Mark	*Honors Mark (if any)*	LOWEST NUMERICAL EQUIVALENT			
		A	B	C	D
D	A+,A,B	90	83	74	65

CLASS RECORD
Include Subjects Failed or Repeated

YEAR	SUBJECTS	IDENTIFY LAB TV SEMINAR SUMMER	IDENTIFY HONORS ACCEL AD. PL. ETC.	MARKS 1ST. SEM.	MARKS FINAL OR 2ND SEM.	CRED OR UNIT	STATE EXAM. SCORES
9	English 1		C		C	1	
	Social Studies 1		C		D	1	
	General Math				F	0	
	General Science				D	1	
	General Shop				D	1	
19 64							
19 65							
10	English 2		C		B	1	
	Social Studies 2		C		C	1	
	General Math				D	1	
	Art 1				D	1	
	Wood Shop				D	1	
19 65	Religion	Withdrew Failing					
19 66							
11	English 3				D	1	
	Social Studies 3		C		C	1	
	Creative Writing				E	0	
	Communism				E	0	
	Typing				D	½	
19 66	Metal Shop				D	1	
19 67	Driver Education				C	½	
12	English 4				C	1	
	Social Studies 4		C		D	1	
	Business Law				C	1	
	Mech. Drawing 1				D	½	
	" " 2				D	½	
19 67							
19 68							

C - Individual Assistance Group

EXPLANATION OF HONORS COURSES

A+ 96

Honors in English and Social Studies — top 6%; selected by ability tests, past achievement, faculty recommendation. Enriched content some emphasis on independent study.

Acceleration or Early Eligibility in Mathematics and Science — top 6%; grades 7-12; selected by past performance, ability tests, achievement in standard tests including reading, faculty recommendation. Enriched content in grades 7-11; extended college level content grade 12, state approved for Regents credit.

Class marks and ranks are not weighted locally for students in honors or accelerated courses.

RANK IN CLASS

BASED ON 6 SEMESTERS

☒ EXACTLY ☐ APPROX. 290 IN CLASS OF 360

FINAL RANK 284 in class of 338

Check Appropriate Rank Information

☒ ALL SUBJECTS GIVEN CREDIT ☒ ALL STUDENTS

☐ MAJOR SUBJECTS ONLY ☐ COLL. PREP. STUDENTS ONLY

Explain Weighting of Marks in Determining Rank

OUTSTANDING ACTIVITIES. HONORS. AWARDS

Student Council Representative 10,11, Alternate 12; Football, Wrestling 9-12; Wrestling Awards

TEST RECORD

DATE	NAME OF TEST	RAW OR STD. SCORE	PERCENTILE SCORE	NORM GROUP
12-62	Lorge-Thorndike Total I.Q.		98	
10-66	" " "	"	104	
10-65	D.A.T. V.R.+N.A.		1	
3-64	" " "		45	

DATE	NAME OF TEST	RAW OR STD. SCORE	PERCENTILE SCORE	NORM GROUP
5-68	ACT %-iles: Eng. 46; Math 15; Soc.S. 55; N. Sci. 24; Comp. 33.			

Date *Signature* *Title*

Principal

NAME [illegible] (Last) [illegible] (First) [illegible] (Middle) BIRTH DATE 2 17 50 (Month Day Year) ADDRESS [illegible] (Street) [illegible] (Community)

A. GENERAL ABILITY

DATE	GR.	FORM	C.A.	NEW CALIFORNIA TOTAL M.A.	TOTAL I.Q.	TOTAL %-ile	LANGUAGE M.A.	LANGUAGE I.Q.	LANGUAGE %-ile	NON-LANG. M.A.	NON-LANG. I.Q.	NON-LANG. %-ile
-/62	7	4-A	12 10		98			103	65		91	30
6/62	7	BB	12 11		98			103	65		91	30
2/66	11	BB	16-8		104		16-1	112	78	14-7	95	33

OTHER

DATE	GR.	TEST	C.A.	M.A.	I.Q.	%-ile Rank
		LORGE-THORNDIKE				

REGENTS SCHOLARSHIP AND COLLEGE QUALIFICATION TEST — OCTOBER 1967

	COUNTY CODE	PART 1—APTITUDE RAW SCORE	PART 2—ACHIEVEMENT RAW SCORE	TOTAL TEST RAW SCORE
RUSZKOWSKI	41	000	064	064
RAYMOND A	806345	01-10	36-53	01-10
	IDENTIFICATION NUMBER	PERCENTILE BAND	PERCENTILE BAND	PERCENTILE BAND

B. PROGNOSTIC

DATE	GR.	TEST	FORM	SCORE	%-ILE RANK	CLASS RANK

RUSZKOWSKI RAYMOND — NAME OF STUDENT

05 68 — MO YR DATE TESTED

C C C C — ENG MATH SOC S N SCI HIGH SCHOOL GRADES

American College Testing Program

C T

STANDARD SCORES 1 ENG	2 MATH	3 SOC S	4 N SCI	COMP
19	13	22	16	18

COLLEGE BOUND PERCENTILES 1 ENG	2 MATH	3 SOC S	4 N SCI	COMP
46	15	55	24	33

C. DIFFERENTIAL APTITUDE

DATE	GR.	FORM	PERCENTILE RANKS Verb.	Num.	Abstr.	Space	Mech.	Cler.	Spell.	Sents.	V+N
3/64	8	B	85	10	80	20	50		99	70	45
10/65	10	A	3	01		20	20		95	41	01

D. COLLEGE BOARD EXAMINATIONS

DATE	GR.	APTITUDE VERBAL Score	VERBAL %-ile	MATH. Score	MATH. %-ile	SPACE Score	SPACE %-ile	Pre-Eng. Sci. Score	Pre-Eng. Sci. %-ile

ACHIEVEMENT	ENGLISH Score	ENGLISH %-ile	SOC. STUD. Score	SOC. STUD. %-ile	FRENCH Score	FRENCH %-ile	GERMAN Score	GERMAN %-ile	LATIN Score	LATIN %-ile	SPANISH Score	SPANISH %-ile	BIOLOGY Score	BIOLOGY %-ile	CHEM. Score	CHEM. %-ile	PHYSICS Score	PHYSICS %-ile	INT. MATH. Score	INT. MATH. %-ile	ADV. MATH. Score	ADV. MATH. %-ile

E. MUSIC — Seashore

DATE	GR.	%-ILE RANKS Pitch	Rhythm	T. Mem.

F. READING — Coates Survey

DATE	GR.	FORM	AVE.	VOCAB.	COMP.	SPEED	ACC.
2/64	8	M3	10.7	10.4	10.3	11.5	V.H.
3-66	10		Eng 4		Titan		VEng
			44-62		72-88		62-76

G. INTEREST — Kuder Vocational (%-ile Ratings)

DATE	GR.	0 Out	1 Mec.	2 Com.	3 Sci.	4 Per.	5 Art	6 Lit.	7 Mus.	8 Soc.	9 Clo.

TABLE 9-1
CLASSES OF HEARING HANDICAP

Hearing Threshold Level dB (ISO)	Class	Degree of Handicap	Average Hearing Threshold Level for 500, 1000, and 2000 Hz in the Better Ear[a]		Ability to Understand Speech
			More Than	Not More than	
25	A	Not significant		25 dB (ISO)	No significant difficulty with faint speech
40	B	Slight handicap	25 dB (ISO)	40 dB	Difficulty only with faint speech
55	C	Mild handicap	40 dB	55 dB	Frequent difficulty with normal speech
70	D	Marked handicap	55 dB	70 dB	Frequent difficulty with loud speech
90	E	Severe handicap	70 dB	90 dB	Can understand only shouted or amplified speech
	F	Extreme handicap	90 dB		Usually cannot understand even amplified speech

[a] Whenever the average for the poorer ear is 25 dB or more greater than that of the better ear in this frequency range, 5 dB is added to the average for the better ear. This adjusted average determines the degree and class of handicap. For example, if a person's average hearing-threshold level for 500, 1000, and 2000 Hz is 37 dB in one ear and 62 dB or more in the other his adjusted average hearing-threshold level is 42 dB and his handicap is Class C instead of Class B.

CS

ID # 289130 CU

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

HU010

☒ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) __/__/__

Name of Correspondent: GENE C. SCHAERR

☐ **MI Mail Report** **User Codes: (A)** ____ **(B)** ____ **(C)** ____

Subject: Foley Memorandum -- Speaker Foley's Remarks on "Meet the Press"

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOFC	ORIGINATOR	91/11/05		C	91/11/05 CS
	Referral Note:				
CUAT 30	D	91/11/05		C	91/11/05
	Referral Note:	11/05/91 GCS Memo to Gray			CS
CUGray	A	91/11/05		C	91/11/05
	Referral Note:	11/05/91 CBG Memo to POTUS			
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Con
D - Dra
F - Furn
to
I - Info Copy Only/No Action Necessary

DISPOSITION CODES:
A - Answered
C - Completed
S - Suspended

PONDENCE:
itials of Signer
"
ate of Outgoing

Comments: ____

File

Keep this worksheet
Send all routing upda
Always return comple
Refer questions abou

5/81

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01a. Memo	Case Number 289130CU From Gene C. Schaerr to C. Boyden Gray RE: Foley Memorandum (1 pp.)	11/05/91	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Records Management, White House Office of (WHORM)
Series: Subject File - General
Subseries: Scanned
WHORM Cat.: HU010
File Location: 287200CU to 289282CU

Open on Expiration of PRA
(Document Follows)
By JC (NLGB) on 2.14.05

Date Closed:	1/12/1999	**OA/ID Number:**	00002-001
FOIA/SYS Case #:	1999-0285-F	**Appeal Case #:**	
Re-review Case #:		**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

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

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

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

PRM. Removed as a personal record misfile.

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

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

THE WHITE HOUSE

WASHINGTON

November 5, 1991

MEMORANDUM FOR C. BOYDEN GRAY

FROM: GENE C. SCHAERR GCS

SUBJECT: Foley Memorandum

Attached is a draft memorandum from you to the President responding to Speaker Foley's allegations during last Sunday's "Meet the Press." At Nelson's request, the memorandum also responds to the President's recent question regarding the application of the new civil rights bill to the EOP.

For reasons discussed in the draft, Lee, Nelson and I have concluded that we need a formal OLC opinion regarding the applicability of existing civil rights statutes to the WHO and other EOP entities. If you agree, I will be happy to draft a memorandum to Tim Flanigan requesting such an opinion.

Given the number and importance of the issues discussed, the memo is about as terse as I felt I could make it. You may well have other ideas for shortening it. I will be happy to implement those and any other suggestions as soon as you like.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01b. Memo	Case Number 289130CU From C. Boyden Gray to POTUS RE: Speaker Foley's Remarks on "Meet the Press" (3 pp.)	11/05/91	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Records Management, White House Office of (WHORM)
Series: Subject File - General
Subseries: Scanned
WHORM Cat.: HU010
File Location: 287200CU to 289282CU

Open on Expiration of PRA
(Document Follows)
By JL (NLGB) on 2.14.05

Date Closed:	1/12/1999	**OA/ID Number:**	00002-001
FOIA/SYS Case #:	1999-0285-F	**Appeal Case #:**	
Re-review Case #:		**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

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

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

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

PRM. Removed as a personal record misfile.

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

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

28913053
Hu010

THE PRESIDENT HAS SEEN
11/13/91

keep handy

DG

THE WHITE HOUSE

WASHINGTON

November 5, 1991 91 NOV 5 P5:48

MEMORANDUM FOR THE PRESIDENT

FROM: C. BOYDEN GRAY

SUBJECT: Speaker Foley's Remarks On "Meet The Press"

This memorandum responds to three allegations made by Speaker Foley on last Sunday's Meet the Press regarding the application of certain statutes to the White House and Congress. (In so doing, it also discusses the application of the new civil rights bill to the Executive Office of the President, which you asked about in a recent note.) Foley's assertions are for the most part flatly incorrect or misleading.

1. Referring to the Ethics Reform Act of 1989, Foley asserted that you had asked for an exemption for yourself and the Vice President "from post-employment lobbying restrictions that apply to every member of Congress." Neither you nor your staff ever asked for an exemption for the Vice President, and the Vice President is covered by the same post-employment restrictions as apply to Members of Congress.

Both my staff and the Office of Government Ethics, however, did object to a provision of the Senate's initial draft extending those provisions to the President on the ground that subjecting former Presidents to a cooling off period would have a chilling effect on important communications of former Presidents and subsequent Presidents and senior Administration officials. This rationale was never challenged by any Member of Congress, and the President was accordingly excluded. Given that most Presidents have retired from active employment after leaving the Presidency, it is preposterous for Foley to suggest that former Presidents should be subjected to a risk of criminal liability for communicating with subsequent Administrations.

2. Foley also asserted that a number of the employment statutes you mentioned in your speech -- including the Rehabilitation Act, the Civil Rights Act of 1964, the Equal Pay Act (which is part of the Fair Labor Standards Act (FSLA)), and the Americans with Disabilities Act -- "have been applied to the House of Representatives, in both their objectives and their terms." Foley was wrong for two reasons.

First, the House has never even pretended to apply the Civil Rights Act of 1964 or the Rehabilitation Act to itself (although it passed a resolution in 1988 urging Members to adhere to the substantive standards of those statutes). By contrast,

Congressional bodies have purported to apply other employee protection statutes to themselves. In 1989, for example, Congress purported to apply the FSLA to the House, although not to the Senate. See 2 U.S.C. 60k. In Section 509 of the ADA, Congress purported to apply the ADA to both chambers. The same section also purported to apply the Civil Rights Act of 1964 and the Rehabilitation Act to the Senate, but not to the House. Foley is therefore clearly wrong as to these two statutes.

Second, even where Congress has purported to apply employee protection statutes to itself, each such effort has been a charade. As shown in the attached summary, none of the measures discussed above gives congressional employees any legally enforceable rights -- not even the right to go to court. Each measure leaves congressional employees entirely in the hands of congressionally-appointed panels: in the Senate, the Select Committee on Ethics; in the House, the House-appointed Office of Fair Employment Practices and a Members-only Review Panel.

Thus, the statement in your speech -- that "Congress does not have to comply" with these laws -- was absolutely correct. Because the measures purporting to apply various employee-protection laws to the House or Senate create no judicially enforceable rights, they do not require Congress to comply, as private employers and the Executive branch are required to do.

3. Finally, Foley suggested (without stating directly) that White House staff are exempt from some or all of these employee protection statutes. Others have made this argument explicitly.

With respect to most of the larger entities within the Executive Office of the President (OMB, NSC, USTR, etc.), Foley is simply wrong. These entities have always considered themselves covered by these statutes to the same extent as other Executive agencies. Moreover, the Senate last week rejected an Administration-supported amendment by Senator Nickles that would have placed all employees of all Executive agencies, as well as Congress, on the same footing as private-sector employees. Thus, to the extent there is any difference between private-sector employees and Executive branch employees (or Congressional employees), that is Congress' fault, not yours.

With respect to a small number of EOP entities (e.g., the White House Office and the Office of the Vice President) the coverage issue has never been resolved. In the broadest sense, this is now a moot point. As shown in the attached summary, the new civil rights legislation will extend these employee-protection statutes to all Executive Branch employees except those serving in the military, on advisory boards, or in positions requiring Senate confirmation.

In a narrower sense, the coverage of various EOP entities under existing law retains considerable importance, but only because of the Senate's failure to adopt the Nickles amendment. As a result of that failure, the civil rights bill effectively results in three "tiers" of coverage. Private-sector employees have the greatest protection, including jury trials and punitive damages. Executive branch employees who are covered under existing law have somewhat less protection -- in particular, no punitive damages. Employees of the Senate as well as any Presidential appointees (with the exceptions noted above) who are not already covered fall into a third tier. Employees in this group are not only barred from seeking punitive damages, but also are not entitled to jury trials and are limited to a restrictive form of judicial review that requires the court to accord a presumption of validity to a decisionmaking body internal to the Senate or Executive branch, as the case may be.

As an administrative matter, therefore, it will be important to determine which EOP employees are covered under existing law and which are covered only under the new legislation. Because the legal issues are complex, I recommend we ask the Justice Department for a formal opinion addressing the application of existing employee-protection statutes to the White House Office and other units of the EOP.

The important point, however, is that any difference among Executive branch employees is Congress' fault. Congress clearly did not want to give its own employees the same protections currently enjoyed by employees in the private sector and most Executive agencies. Accordingly, contrary to your own strong recommendation, Congress created a new, bottom-tier category into which it placed some Presidential appointees in addition to its own employees. These Presidential appointees thus became the "fig leaf" by which Congress has attempted to conceal its inequitable treatment of its own employees.

Congressional Coverage of Existing Employee Protection Laws

Senate

- Section 509(a)(2) of the Americans with Disabilities Act (ADA) states that the "rights and protections" of the ADA, the Civil Rights Acts of 1964 and 1990, the Age Discrimination in Employment Act of 1967 (ADEA), and the Rehabilitation Act of 1973 "shall apply to employment by the United States Senate."

- However, these "rights and protections" are eviscerated by two additional provisions. Section 509(a)(3) requires that all claims under these statutes be investigated and adjudicated by the Senate Select Committee on Ethics (pursuant to S. Res. 338, 88th Cong.). And Section 509(a)(7) provides that "enforcement and adjudication of the rights and protections" of these statutes "shall be within the exclusive jurisdiction of the United States Senate." Thus, there is no independent review of the Senate's enforcement -- i.e., no review by the EEOC or any other agency of the Executive Branch, and no judicial review.

- Section 509(a) of the ADA does not mention the Fair Labor Standards Act (FSLA) (or the Equal Pay Act, which is part of the FSLA). We are aware of no other provision applying the FSLA to the Senate.

House of Representatives

- Section 509(b)(2) of the ADA purports to extend the "rights and protections" of that Act to employees of the House. However, Section 509(b)(2)(B) provides that the exclusive "remedies and procedures" for enforcing it are those provided in the Fair Employment Practices Resolution (H. R. 558, 100th Cong.) (as continued in force by H.R. 15, 100th Cong.). This Resolution requires aggrieved parties to bring their claims before an Office of Fair Employment Practices that is entirely under the control of the House, with appeals to a Review Panel composed entirely of House Members. There is no judicial independent review.

- Unlike Section 509(a), which applies to the Senate, Section 509(b) does not extend the ADEA, the Rehabilitation Act, or either of the Civil Rights Acts to the House. We are aware of no other provisions applying those laws to the House.

- Congress recently purported to extend the FSLA (including provisions of the Equal Pay Act) to the House. However, the exclusive enforcement mechanism is the House-controlled Fair Employment Practices Resolution described above. See 2 U.S.C. 60k. Again, there is no independent review.

Coverage of Senate and EOP Employees Under Civil Rights Bill

Senate

- The bill declares that personnel actions are to be taken without discrimination on the basis of race, color, religion, sex, national origin, age or disability.

- Senators are specifically permitted to consider domicile, party affiliation, and "political compatibility."

- Complaints will be handled by a new Senate bureaucracy, with review available by the Ethics Committee (at its discretion). The bill purports to offer Senate employees the same remedies that private plaintiffs can seek, although there is no provision for jury trials.

- Aggrieved parties could ultimately seek review by the U.S. Court of Appeals for the Federal Circuit. However, the court is to grant a presumption of validity to whatever decision was made internally in the Senate. (This scheme may be unconstitutional.) Judicial review is therefore considerably narrower than in actions brought by employees of private-sector firms or Executive branch agencies.

- Senators must reimburse the Government for any payments (apparently including the plaintiff's attorney fees) arising from unfair employment practices they commit.

Presidential Appointees

- Except for members of the uniformed services and advisory committees, and positions requiring Senate confirmation, the bill extends protections against discrimination on the basis of race, color, religion, sex, national origin, age, and disability to every Executive branch employee who is not already entitled to bring an action under the relevant statutes.

- The President will be responsible for assigning some entity (such as the EEOC) to adjudicate complaints for employees covered by the new statute. Judicial review will be available in the Federal Circuit, just as for Senate employees, and is similarly limited in scope.

- Like Senators, the President must pay from his own pocket any judgments (probably including attorney fees) arising from unfair employment practices he commits.

- In summary, the scheme the Senate has proposed for itself is a sham. The scheme it has proposed for Presidential appointees may not be, depending upon the body the President selects to adjudicate claims.

CS

ID # 289137 CU

HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) __/__/__

Name of Correspondent: NELSON LUND

☐ **MI Mail Report** **User Codes: (A)** ____ **(B)** ____ **(C)** ____

Subject: Amendment to the Civil Rights Bill

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOFC	ORIGINATOR	91,10,30		C	91,10,30 CS
	Referral Note:				
CUAT 10	A	91,10,30		C	91,10,30
	Referral Note:	10/30/91 NL Memo to the file			
	_	/ /		_	/ /
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				

ACTION

DISPOSITION

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
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FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
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Comments: _____

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5/81

THE WHITE HOUSE
WASHINGTON

October 30, 1991

MEMORANDUM FOR THE FILE

FROM: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Amendment to the Civil Rights Bill

Senator Jeffords called repeatedly seeking clearance of this amendment to the Civil Rights Bill. After sharing the language with Nick Wise at DOJ, and consulting with Nick as to the proper response, I informed Jeffords that we would be unable to clear it in time for the vote because of concerns raised by DOJ lawyers. Senator Jeffords gave no indication that he was surprised or unhappy with this response.

10-30-91 03:30PM TO 94567929 P001/002

Office of the Vice President

LEGISLATIVE AFFAIRS

S212, The Capitol
Washington, D.C. 20510
(202) 224-8391

TO: Nelson Lund

FROM: Senetta Jeffords

PAGES TO FOLLOW: 1

Allen Mel... Lund

Delete from p. 4 line 11 "and" through p. 4 line 13 "(42 U.S.C. 1981)" and add on p. 4 line 17 after "respondent":

"provided that the complaining party does not ~~cannot~~ recover damages for the same claim of intentional discrimination under both this section and section 1977 of the Revised Statutes (42 U.S.C. 1981)."

Fax #
456-7929

Lee Leiberman
456-6257

CS

ID # 289210 CU

R: 11-27
5:30p

HU010

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- ☐ O - OUTGOING
- ☐ H - INTERNAL
- ☐ I - INCOMING

Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Carl Shipley

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Civil Rights - voices support for CBG

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOFC	ORIGINATOR DJ	91/11/25		C	91/12/05 CS
	Referral Note:		DJ		
CUAT10	A DJ	91/11/26		C	91/12/05 CS
	Referral Note:	see comments			
CUGray	I	91/11/26		C	91/11/26
	Referral Note: DJ				
	_	/ /		_	/ /
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				

ACTION / **DISPOSITION**

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Comments: No further action required per N. Lund 12-5-91

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WQCT (AM)
1520 khz, 500 w-D, 250 w-CH

WBNO (FM)
100 9 mhz, 6 kw

P O Box 603
Bryan, OH 43506

Luke Thaman, Manager

CARL SHIPLEY, President
1575 Eye Street, N W , Suite 325
Washington, DC 20005
Telephone 202-289-6972

28921Dcu

WLKM (AM)
1510 khz, 500 w-D

WLKM (FM)
95 9 mhz, 3 kw

59750 Constantine Road
Three Rivers, MI 49093

Dennis Rumsey, Manager

November 22, 1991

Honorable C. Boyden Gray
Counsel to the President
The White House
Washington, D.C. 20500

Mr. Gray:

It was nice to read in the N.Y. Times that you are trying to carry out the intent, purpose, spirit and language of Title VII and the civil rights laws generally, which in terms prohibit quotas in any form, as an "equal opportunity" strategem.

Every federal agency with "quota" regulations not only violates the law, but usurps the exclusive legislative prerogatives of Congress under Art. I, and is violating the Constitution.

Certainly there should be "equal opportunity" for Americans able and willing to work. Either they are absorbed into the work force and become taxpayers, or they are driven to a life of welfare-dependency and crime, both very costly. We want taxpayers, not taxeaters.

The so-called "minorities" are here, they are Americans, and they will not long support a system of government that by design, reality, or the competition of efficiency and productivity, shuts them out.

At the same time, the producers, capital managers and workers who make the free-enterprise system that provides the jobs, raises the standard of living and pays the taxes, work, will not support a government or an Administration that abuses governmental power to play "favorites", encourages the human instinct for "free-loading" at someone elses's expense and "buys votes" with their tax money, or which "redistributes" what some people have to others whose support on election day can be easily purchased by abuse of the tax and welfare system.

So what do we do? The President must use the "bully pulpit" to make business leaders understand that it is their responsibilty, in their own financial interest, as well as

their social obligation, to fit the willing but unemployed workers, regardless of competence, etc., into the productive system.

Their choice is to do it, or let the "tax and spend" madmen who have arranged for themselves life-tenure in Congress, stuff some kind of "quotas" up their noses under the threat of criminal and bankrupting civil penalties.

Yes, productivity will suffer, competency will be reduced, standards of performance will be lowered - but those social costs are better than having Congress and the bleeding-hearts dictate the agenda. If the fortunate, able, hard-working and competent managers of our social structure, who profess that the private sector should be larger and the government should be smaller, do not do what self-interest compels, then a bloated, dictatorial, arrogant and inefficient bureaucracy will. The question is, who is going to solve the problem - us, or them?

You are doing America a great service, even if the loud-mouthed left is drowning you out. Speak up, fight back, punch 'em in the eye, and the left-wing clack will fold up. They simply do not have broad-based support, but if not challenged, the press makes it look like they have.

The great hope lies in human nature itself. The vast majority of all people, regardless of race, religion or, gender, want to be good, not bad; to do their best, not their worst; to work honestly, not "free-load"; to meet their responsibilities, not shirk them; and to do the right thing, not the wrong thing.

The great weakness in human nature is that some small percentage of us of us can be seduced and misled away from personal responsibilty and accountability, and humbugged into believing that self-reliance is for somebody else, not them.

Sincerely,

Carl Shipley

CS

ID # 28923 CU

HU010

R: 11/27 5:30p

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Zachary D. Fasman

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Civil Rights - Op Ed piece he has submitted to Wall Street Journal -

ROUTE TO: | **ACTION** | **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CMOFC	ORIGINATOR	DJ 91/11/25		C	91/12/03 CS
	Referral Note:				
CMATIO	A	DJ 91/11/26	DJ	C	91/12/03 CS
	Referral Note:	91/12/03 memo to File from MA			
CMGRAY	I	91/11/26		C	91/11/26 CS
	Referral Note:	DJ			
CMATO7	I	91/11/26		C	91/11/26 CS
	Referral Note:	DJ			
	—	1 1		—	1 1
	Referral Note:				

ACTION CODES:
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C - Comment/Recommendation
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THE WHITE HOUSE

WASHINGTON

December 3, 1991

MEMORANDUM FOR THE FILE

FROM: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Op-Ed by Zachary D. Fasman Re: Civil Rights

At Boyden Gray's request, I called Fasman and made a number of suggestions. I then reported back to Boyden about our conversation.

COUNSEL
LEE G PAUL
ROBERT P HASTINGS
LEONARD S JANOFSKY
CHARLES M WALKER

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WRITER'S DIRECT DIAL NUMBER

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TORANOMON OHTORI BUILDING
4-3, TORANOMON 1-CHOME
MINATO-KU, TOKYO 105
TELEPHONE (03) 3507-0730

89231-cm

November 22, 1991

COUNSEL'S OFFICE
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NOV 25 1991

OUR FILE NO
09071.00001

VIA MESSENGER

C. Boyden Gray, Esq.
Counsel to the President
Old Executive Office Building
17th St. & Pennsylvania Avenue, N.W.
Room G-1
Washington, D.C. 20500

Dear Boyden:

Dick Fairbanks thought you might be interested in the enclosed op ed piece that I wrote on the Civil Rights Act. I have submitted it to the *Wall Street Journal* for publication. I would, of course, be interested in your thoughts.

Best regards,

Zack Fasman

Zachary D. Fasman
of PAUL, HASTINGS, JANOFSKY & WALKER

ZDF/djw
Enclosure

THE WHITE HOUSE

WASHINGTON

ORM OPTICAL DISK NETWORK

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____ Hardcopy pages are in poor condition (too light or too dark).

__√__ Remainder of case not scanned.

____ Oversize attachment not scanned.

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____ Proclamation not scanned.

____ Incoming letters(s) not scanned.

____ Proposal not scanned.

____ Statement not scanned.

____ Duplicate letters attached - not scanned.

____ Only table of contents scanned.

____ No incoming letter attached.

____ Only tracking sheet scanned.

____ Photo(s) not scanned.

____ Bill not scanned.

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Comments:

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What the Civil Rights Act Really Means

Zachary D. Fasman[1/]

President Bush's statement that he supports affirmative action, as he signed the Civil Rights Act of 1991, puts at rest for the moment the continuing controversy over the meaning of the new Civil Rights Act. The President's apparent repudiation of a proposed signing statement, which called into question the continuing legality of federal affirmative action laws and regulations, marks only the most recent chapter in a battle begun in Congress, where Senators placed into the Congressional Record wildly divergent views about the meaning of the new law. In a recent article on the editorial pages of the Washington Post, C. Boyden Gray, Counsel to the President, claimed that civil rights groups "caved" at the end while the Administration held firm to its convictions. William T. Coleman, Jr., and Vernon E. Jordan, Jr., respectively chairman of the NAACP Legal Defense and Education Fund and former president of the Urban League, disagreed in an answering editorial, arguing that the new act contains all

---

1/ Zachary D. Fasman is a partner in the law firm of Paul, Hastings, Janofsky & Walker in Washington, D.C. and represents management in employment matters. He represented the National Association of Manufacturers and the Society for Human Resource Management in connection with the Civil Rights Act of 1991. The views expressed herein are solely those of the author.

that civil rights organizations desired at the start of the legislative process.

How can there be such dispute about the meaning of this new law? Ordinarily, the starkly contrasting versions of events offered by Mr. Gray and Messrs. Coleman and Jordan would lead one to believe that someone is not being entirely candid. But might both versions of this bill be accurate? Is this perhaps an example of three Washington blind men describing one elephant? A fair reading of the bill and the debates that led to its passage illustrates that this bill can be discussed in such strikingly different terms because Congress, while it did pass a bill, simply did not decide many of the underlying issues.

One of the key questions in the bill was the appropriate definition of "business necessity." Business necessity refers to the level of justification that an employer must show to warrant continued use of an employment practice which selects candidates in a fashion that adversely affects members of groups protected by the law. Classic examples of questionable criteria include tests or educational requirements on which blacks are less successful than whites, or height or weight requirements that are more

difficult to surmount for women and members of some minority groups.

The legislative debate concerned the level of justification appropriate to allow continued use of such measures. The Administration contended that too high a level of justification would make it impossible to justify a test and thus force employers, in order to avoid costly litigation, to abandon objective measures and hire by the numbers. The civil rights community claimed that the Supreme Court's 1989 decision in the Wards Cove case -- in which the Court held that an employer need only adduce proof that the challenged practice "serves, in a significant way, the legitimate employment goals of the employer" -- weakened the law unacceptably.

The essential legislative task was crafting a definition of business necessity mediating these two viewpoints, one that did not force proportional employment decisions yet preserved the goals of the civil rights laws. To this end, any number of definitional phrases were considered; job requirements could be shown to have a "manifest relationship to the employment in question", be "essential to effective job performance", or "bear a

substantial and demonstrable relationship to effective job performance," to name just a few.

Yet Congress accepted none of these formulations, and refused to define the term business necessity at all. Rather than embodying the difficult legislative choices allocated by the Constitution to Congress, the Civil Rights Act of 1991 states that an employment practice with an adverse impact must be shown to be "job related for the position in question and consistent with business necessity." The bill merely restates the basic requirement underlying this branch of the law. The bill's "exclusive legislative history" on this critical section states that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in other Supreme Court decisions prior to Wards Cove v. Atonio, 490 U.S. 642 (1989)." But Congress did not repudiate the definition of business necessity espoused by the Supreme Court in Wards Cove, and so vigorously challenged by civil rights groups.

The bill thus does not overturn this portion of Wards Cove, as suggested by Messrs. Coleman and Jordan. The

Supreme Court in Wards Cove stated that the definition of business necessity contained in that case followed directly from prior High Court rulings, and those rulings specifically are preserved by the bill. In these circumstances, leaving the issue to the courts -- and ultimately to the Supreme Court that decided Wards Cove -- cannot be seen as a victory for civil rights groups, who wanted the term "business necessity" defined in the first place in order to circumscribe the choices of the courts. Even viewed in this fashion, however, the fact remains that the hard legislative choices on this subject, lying at the very heart of the bill, deliberately were handed off by Congress to the courts.

In fact, not only was this question left unanswered, but the Senate went to extraordinary lengths to preserve deliberate legislative vagueness. For example, the bill contains an express provision stating that only a two-page negotiated memorandum (which contains the vague language quoted above concerning the Wards Cove ruling) can be relied upon to interpret the Act with regard to the Wards Cove issues. During floor debates, the bill's principal Senate sponsor, Senator John Danforth (R.- Mo.) repeatedly sought to deflect concerns that "nonconforming" floor

statements would fracture the fragile compromise between the Administration and the civil rights groups. Apparently, the only way this bill could be passed was to allow contending parties to disagree about its central provisions.

Contrary to Administration critics, the bill's ambiguity does raise questions about the continuing legality of affirmative action. The bill makes it an unlawful employment practice for an employer to make a decision where "race, color, religion, sex or national origin was a motivating factor ... even though other factors also motivated the practice." The principal purpose of this section was to clarify that in mixed motive cases -- for example, where a woman is rejected in part because of her sex and in part because of a lack of qualifications -- any consideration of a prohibited factor violates the law.

But such consideration is a normal and accepted part of the affirmative action programs that repeatedly have been approved by the courts. Lawful affirmative action programs allow race or sex to be used, not as an absolute barrier to whites or males, but as one factor that the employer considers in making a decision. During congressional debates on the bill, commentators (including

the author) noted the tension between the race and sex conscious decision-making demanded by federal programs requiring affirmative action and the provisions of the new law prohibiting just such conduct, and suggested that language be inserted into the bill allowing an employer to observe the terms of a lawful affirmative action plan. This suggestion was disregarded, and the tension between the bill's language and affirmative action requirements never was resolved.

In fact, Congress could not even agree upon when the bill becomes effective, another critical (and one would think much simpler) matter. The five central Supreme Court decisions addressed by the bill were issued in 1989. Between that time and this many cases have been decided according to a view of the law that Congress -- in the several clear provisions of the bill -- now has altered. Are these cases subject to reversal by this law, or do the provisions of the new civil rights act apply only to conduct occurring after the date of the law? This vital issue affects thousands of people and businesses whose rights may be altered by the new law.

Yet Congress did not answer this question. The bill generally provides that the changes it makes "shall take effect upon enactment", but also contains two provisions which state that specific changes shall not apply to conduct occurring prior the effective date of the Act. Various Senators and the Administration disagreed violently about these provisions. On one hand, Senate Democrats led by Senator Kennedy (D.- Mass.) claimed that the bill's changes apply to all pending cases, except where specific exceptions preclude retroactive application. Senator Danforth, on the other hand, argued that "new statutes are to be given prospective application only, unless Congress explicitly directs otherwise, which we have not done in this instance." An interpretive memorandum introduced by Senator Dole (R.- Kan.) on behalf of the Administration and by Senator Danforth on behalf of the bill's Republican sponsors strongly supports the position that the amendments in the Act "will not apply to cases arising before the effective date of the Act." In short, Congress simply could not agree upon the effective date of the new law.

The Civil Rights Act of 1991 is not the first bill in which issues remain to be decided by the courts. Congressional passage of important legislation without

reaching complete consensus on the scope of the statute is not uncommon, given the far-reaching nature of modern laws and their application to our complex society. Moreover, this bill is a compromise, like so many other civil rights bills, and it may take some time before the relationship between the congressional trade-offs are sorted out by the courts.

But even compromise bills generally make clear what is being traded. This may be the first bill in which Congress not only failed to reach complete consensus on important issues, but deliberately passed a bill with the full knowledge that no agreement at all had been reached on the heart of the legislation. When used in this fashion, the judicial backstop allows Congress to pass laws containing words that Congress itself is unable or unwilling to define.

Perhaps the courts are better suited to governing the United States than is the Congress; that surely is the message sent by Congress when it determines that passage of a bill is so important that it does not matter what is contained in it. Perhaps passage of the civil rights act was important enough to warrant enacting a law that in large

measure remains to be constructed by the courts. And perhaps Congress cannot be faulted for failure to reach consensus on affirmative action, a question that for many years has continued to produce more heat than light.

But congressional critics of the Administration have little to complain about when they themselves could not reach agreement on the meaning of the bill, and left the task of shaping its contours to the Administration and to the courts. The real meaning of the civil rights act is that Congress failed to make the hard legislative choices underlying this bill.

Withdrawal/Redaction Sheet
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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. Letter with Attachment	Case Number 289235CU From Lela Wenckowski to POTUS RE: Personal problems (28 pp.)	11/21/91	(b)(6)	

Collection:

Record Group: Bush Presidential Records
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Date Closed: 1/12/1999	**OA/ID Number:** 00002-001
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(b)(9) Release would disclose geological or geophysical information

GR

289261
HU/IC

ABOARD AIR FORCE ONE

11-9-91 Hague to DC.

Lou -

I got your letter on Civil Rights. I was so pleased to get it.

Thanks, my friend

I'm very proud to have you at my side

George Bush

FROM
THE WHITE HOUSE
WASHINGTON, D.C.

cc: IN& OUT

John Sununu
Ede Holiday
Patty Presock

The Honorable Louis W. Sullivan
Secretary
U.S. Department of Health
and Human Services
Room 615 F
200 Independence Avenue, SW
Washington, DC 20201

Letter from Secretary Louis Sullivan

11-2-91

Dear Mr. President,

I send my sincerest congratulations to you for helping to bring about successful bipartisan support for the Civil Rights Bill of 1991.

Your support of this measure advances the nation toward a critical goal ensuring that both prospective and current employees will be able to work in a environment free of sexual, racial and religious prejudice.

Thank you for , once again, the leadership so very much needed on crucial issues facing the nation.

I am proud to be a member of your cabinet, and to count you as a friend.

Lou

THE WHITE HOUSE

WASHINGTON

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Comments:

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THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D. C. 20201

4

PHOTOCOPY
GB HANDWRITING

November 7, 1991

Dear Mr President,

I send my sincerest congratulations to you for helping to bring about successful bipartisan support for the Civil Rights Bill of 1991.

Your support of this measure advances the nation toward a critical goal - ensuring that both prospective and current employees will be able to work in an environment free of sexual, racial and religious prejudice.

Thank you for, once again, the leadership so very much needed on crucial issues facing the nation.

I am proud to be a member of your cabinet, and to count you as a friend.

Lou

CS

ID # 289278 CU

R: 11-29 8A.m

WHITE HOUSE HU010
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Richard Brulé

☐ MI Mail Report User Codes: (A) _____ (B) _____ (C) _____

Subject: Conservative who says "NO!" to Bush in '92 for signing special rights bill.

ROUTE TO:	ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CMOfc	ORIGINATOR DM	11/25		C	91/12/05 CS
CMAT 10	Referral Note:				
	RJ	91/11/26	DJ	B	91/12/05
	Referral Note:	see comments			
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing CS

Comments: No further action required per N. Luna 12-5-91

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Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

Dear Mr. Boyden Gray,

I believe George Bush is a coward, and a traitor to fairness and truth

This is one conservative who says "NO!" to Bush in '92 for signing that

Special

Rights

Bill

Sincerely,

Richard Brule

aside programs into that arena. He believes race discrimination in business is a major factor accounting for blacks' marginal economic position in American society.

Marshall's proposal is one example of feeble-minded attempts to reconcile differences in outcome between special-interest groups. Where would he propose that Congress draw the line on such government intrusions? Would he encourage Congress to witness the preponderance of blacks in professional basketball and track and set aside slots there for other minorities, women, and short-statured whites?

Simple logic dictates that equal outcomes are impossible when a free market in human activities is upheld, as is the purpose of the constitutional protection of life, liberty, and the pursuit of happiness. For Congress to try legislating equal outcomes is to further expose the irresolvable cause of unequal outcomes — genetics.

It seems distasteful to raise the issue of inherited differences among humans. It's a fact best not addressed at all, given the explosive ramifications in declaring those differences. Yet it is this very issue that set-aside and affirmative-action programs bring to the fore in the minds of non-selected groups, and in the minds of blacks who suffer the stares and suspicions of those who question their worthiness.

Whatever the reason for disparity in outcomes, it is unconstitutional to select certain citizens for special treatment based on their race or ethnicity. Such special "help" breeds race hatred and discrimination far beyond what the free market of ideas and outcomes may generate.

Raymond Marshall and like-minded legislators are treading on a cesspool of discontent in America over attempts to force equality of outcomes. I would like to be a champion basketball player, but nature dealt me only average stature. I would like to be a renowned physicist and uncover the secrets of the universe, but nature gave me only average intelligence. It is this very fact of life that they expose in their ignoble effort to remedy inequality of outcomes, as if it were solely a product of prejudice and bigotry.

RICHARD BRULÉ.

Special Preferences Create Racial Distrust

Editor, THE NEWS LEADER:

Possibly the greatest danger to American civil liberties is the current attempt by legislators to remedy differences in outcome among racial, ethnic, and gender groups.

Recently Raymond C. Marshall, Labor Secretary under President Jimmy Carter, proposed that Congress outlaw discrimination in private business by expanding set-

THE RICHMOND NEWS LEADER

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CS

ID # 289282 CU

R:11-27
8a.m.

WHITE HOUSE HUOTO
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☐ O - OUTGOING
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Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Pam Epling

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Civil Rights Act; quotas; actions are disgraceful

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Chron	ORIGINATOR DJ	91/11/25		C	91/12/05 CS
CLAT 10	Referral Note: ADJ	91/11/26	DJ	A	91/12/05 CS
	Referral Note: see comments	/ /			/ /
	Referral Note:	/ /			/ /
	Referral Note:	/ /			/ /
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12-5-91

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5/81

AP1882 en

Pam Epling
3477 Starwood Trail
Lilburn, GA 30247

November 22, 1991

President George Bush
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 202500

Dear President Bush:

Rarely do I write a politician. However, your political posturing of 11/20--11/22/91 has been a disgrace. I think you should question the advice you are receiving from aides who should be representing your best interests. They are not representing your best interests nor those of the majority of this country.

Specifically, you asked your departments to review and remove any hiring or promotion guidelines in existence that requires quotas. Many people in this country read this in Thursday morning papers and were extremely pleased that our leader had the guts to eliminate all discriminatory guidelines--including those that reverse discriminate against whites. However, by the evening news broadcasts, our President had reversed this decision in a wishy-washy manner in an effort to placate a few interest groups. What a majority of conservatives saw was a President who let the majority of the people in this country down to satisfy a few people. In doing this, he chose a continuing course of using discriminatory policies that create reverse discrimination--and this is simply wrong!

Mr. President, liberals and opposition in this country are working very hard to discredit your leadership. Your aides should not assist this element. If you do not stand up for what is right and retain the values that you possessed when the majority of this country elected you president, then you surely will not be re-elected. You lost more of your support with this recent boondoggle than you gained in the minority or liberal community--you've betrayed us when all the silent majority of this country desires is equal treatment for everyone.

Sadly, you did not choose equal treatment--you chose to continue reverse discrimination policies. You have lost many votes. Thankfully, individuals such as Pat Buchanan will give us another choice.

Sincerely,

Pam Epling

Pam Epling

cc: C. Boyden Gray