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WHITE HOUSE STAFFING MEMORANDUM

DATE: 10/22/91 ACTION/CONCURRENCE/COMMENT DUE BY: TODAY, 10/22/91 5:30pm

SUBJECT: SENIOR ADVISOR'S VETO THREAT ON S. 1745, THE CIVIL RIGHTS ACT OF 1991 SPONSORED BY SENATOR DANFORTH

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	HORNER	☐	☐
SUNUNU	☐	☑	MCCLURE	☐	☑
SCOWCROFT	☐	☐	PETERSMEYER	☐	☐
DARMAN	☐	☐	PORTER See ONB	☑	☐
BRADY	☐	☑	ROGICH	☐	☐
BROMLEY	☐	☐	SMITH	☐	☐
CARD	☐	☑	CLERK	☐	☑
DEMAREST See ONT	☑	☐		☐	☐
FITZWATER	☐	☑		☐	☐
GRAY	☑	☐		☐	☐
HOLIDAY N/C	☑	☐		☐	☐

REMARKS:

Please forward your comments directly to Fred McClure, x2230, no later than 5:30 p.m., TODAY, TUESDAY, OCTOBER 22nd, with a copy to this office. Thank you.

RESPONSE:

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

THE WHITE HOUSE

WASHINGTON

91 OCT 22 P3:39

October 22, 1991

MEMORANDUM FOR PHIL BRADY

FROM: FRED McCLURE

SUBJECT: Statement of Administration Policy

RE: **Senior Advisors Veto Threat on S.1745, the Civil Rights Act of 1991 sponsored by Senator Danforth.**

We have just received the attached Statement of Administrative Policy from OMB. We would appreciate your comments by **5:30 p.m., Today, 10/22/91**.

Please direct all comments to my office at x2230.

October 22, 1991
(Senate)

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

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

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

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

The Administration's Proposal

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Like S. 1745, the Administration bill would overturn the Lorance and Patterson decisions; overturn Wards Cove by shifting the burden of proof to the employer in defending "business necessity;" authorize expert witness fees in civil rights cases; and extend the statute of limitations and authorize the award of interest against the U.S. Government.

The Administration bill would make available new monetary remedies under Title VII, up to $150,000, for victims of sexual harassment in the workplace. The Administration bill also includes special provisions creating incentives for employers to prevent and correct sexual harassment without waiting for lawsuits to be filed. Finally, the Administration bill extends Title VII to apply to Congress.

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

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

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

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

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

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

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

Other Provisions of S. 1745

In addition, S. 1745 would:

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

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

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

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

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

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

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

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

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

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Administration Position to Date

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

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

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

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

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

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

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

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

THE WHITE HOUSE

WASHINGTON

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Document No. _____

91 OCT 22 P6:02

WHITE HOUSE STAFFING MEMORANDUM

DATE: 10/22/91 ACTION/CONCURRENCE/COMMENT DUE BY: TODAY, 10/22/91 5:30pm

SUBJECT: SENIOR ADVISOR'S VETO THREAT ON S. 1745, THE CIVIL RIGHTS ACT OF 1991 SPONSORED BY SENATOR DANFORTH

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	HORNER	☐	☐
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RESPONSE:

Seems unnecessarily harsh - "e.s." misleading & unmerited

PHILLIP D. BRADY
Assistant to the President
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Ext. 2702

THE WHITE HOUSE

WASHINGTON

91 OCT 22 P3:39

October 22, 1991

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THE WHITE HOUSE

WASHINGTON

October 22, 1991 91 OCT 22 P8:30

MEMORANDUM FOR FRED McCLURE

FROM: ROGER B. PORTER RBP

SUBJECT: Senior Advisor's Veto Threat on S. 1745, the Civil Rights Act of 1991 Sponsored by Senator Danforth

We have reviewed the attached memorandum and have noted a few suggested changes on the draft.

Please let us know if you have any questions or if we can be of further assistance.

cc: Phillip D. Brady

Document No. _____

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DARMAN	☐	☐	PORTER	☐	☐
BRADY	☐	☑	ROGICH	☐	☐
BROMLEY	☐	☐	SMITH	☐	☐
CARD	☐	☑	CLERK	☐	☑
DEMAREST	☑	☐	_____	☐	☐
FITZWATER	☐	☑	_____	☐	☐
GRAY	☑	☐	_____	☐	☐
HOLIDAY	☑	☐	_____	☐	☐

REMARKS:

Please forward your comments directly to Fred McClure, x2230, no later than 5:30 p.m., TODAY, TUESDAY, OCTOBER 22nd, with a copy to this office. Thank you.

RESPONSE:

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

THE WHITE HOUSE

WASHINGTON

91 OCT 22 P3:39

October 22, 1991

MEMORANDUM FOR PHIL BRADY

FROM: FRED McCLURE

SUBJECT: Statement of Administration Policy

RE: **Senior Advisors Veto Threat on S.1745, the Civil Rights Act of 1991 sponsored by Senator Danforth.**

We have just received the attached Statement of Administrative Policy from OMB. We would appreciate your comments by **5:30 p.m., Today, 10/22/91**.

Please direct all comments to my office at x2230.

October 22, 1991
(Senate)

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

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

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

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

To suggest that the addition represents a significant improvement ~~The bill's use~~ of eight words taken from the Americans with Disabilities Act ("ADA") is ~~a~~ misleading ~~gimmick~~. These words do not define "business necessity" either in the ADA (which uses "business necessity" as an undefined term) or in S. 1745. Nor does the use of these eight words materially alter the definition in S. 1745's predecessor bill (S. 1408). The same words could be inserted into the President's bill without changing its meaning; ~~accordingly~~, the Administration ~~has~~ no objection to ~~their~~ inclu~~sion~~ding them in the President's bill. would have

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

S. 1745 would also create a lawyers' bonanza. It provides for jury trials and compensatory damages in all cases under Title VII of the Civil Rights Act of 1964, along with punitive damages in many cases. (As currently written, the bill would even make damages available in disparate impact cases, which goes beyond H.R. 1 and last year's Kennedy-Hawkins bill.) These damages provisions would transform Title VII from its original design, which emphasizes conciliation and make-whole relief, into an entirely different structure modeled on our Nation's tort system -- which is now widely recognized to be in a state of crisis.

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

The Administration's Proposal

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

Like S. 1745, the Administration bill would overturn the Lorance and Patterson decisions; overturn Wards Cove by shifting the burden of proof to the employer in defending "business necessity;" authorize expert witness fees in civil rights cases; and extend the statute of limitations and authorize the award of interest against the U.S. Government.

The Administration bill would make available new monetary remedies under Title VII, up to $150,000, for victims of sexual harassment in the workplace. The Administration bill also includes special provisions creating incentives for employers to prevent and correct sexual harassment without waiting for lawsuits to be filed. Finally, the Administration bill extends Title VII to apply to Congress.

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

* * * * *

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

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

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

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

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

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

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

Recent Supreme Court Decisions and Related Provisions of S. 1745

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

-- Wards Cove

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

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

-- Price Waterhouse

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

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

-- Wilks

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

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

-- Lorance

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

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

-- Patterson

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

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

-- Shaw

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

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

Other Provisions of S. 1745

In addition, S. 1745 would:

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

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

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

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

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

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

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

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

Administration Bill

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

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

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

Administration Position to Date

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

1990 Presidential Statement

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

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

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

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

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

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

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

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

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: 10/22/91 ACTION/CONCURRENCE/COMMENT DUE BY: TODAY, 10/22/91 5:30pm

SUBJECT: SENIOR ADVISOR'S VETO THREAT ON S. 1745, THE CIVIL RIGHTS ACT OF 1991 SPONSORED BY SENATOR DANFORTH

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

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RESPONSE:

PHILLIP D. BRADY
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and Staff Secretary
Ext. 2702

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WASHINGTON

91 OCT 22 P3:39

October 22, 1991

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October 22, 1991
(Senate)

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(Danforth (R) Missouri and 6 others)

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The bill's use of eight words taken from the Americans with Disabilities Act ("ADA") is a misleading gimmick. These words do not define "business necessity" either in the ADA (which uses "business necessity" as an undefined term) or in S. 1745. Nor does the use of these eight words materially alter the definition in S. 1745's predecessor bill (S. 1408). The same words could be inserted into the President's bill without changing its meaning; accordingly, the Administration has no objection to their inclusion in the President's bill.

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

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* * * * *

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

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

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Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: 10/22/91 91 OCT 23 P1:13 ACTION/CONCURRENCE/COMMENT DUE BY: TODAY, 10/22/91 5:30pm

SUBJECT: SENIOR ADVISOR'S VETO THREAT ON S. 1745, THE CIVIL RIGHTS ACT OF 1991 SPONSORED BY SENATOR DANFORTH

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

REMARKS:

Please forward your comments directly to Fred McClure, x2230, no later than 5:30 p.m., TODAY, TUESDAY, OCTOBER 22nd, with a copy to this office. Thank you.

RESPONSE: No comment.

Thanks,

Elizabeth Luttig

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

EK

Document No. 27452155

HU010

WHITE HOUSE STAFFING MEMORANDUM

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

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

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	HORNER	☐	☐
SUNUNU	☐	☑	MCCLURE	☐	☑
SCOWCROFT	☐	☐	PETERSMEYER N/C	☐	☐
DARMAN	☐	☐	PORTER ~~[illegible]~~	☑	☐
BRADY	☐	☑	ROGICH	☐	☐
BROMLEY	☐	☐	SMITH	☐	☐
CARD	☑	☐	CLERK	☐	☑
DEMAREST N/C	☑	☐		☐	☐
FITZWATER	☐	☑		☐	☐
GRAY	☑	☐		☐	☐
HOLIDAY see comment	☑	☐		☐	☐

REMARKS:

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

THANK YOU!

RESPONSE:

PHILLIP D. BRADY
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THE WHITE HOUSE

WASHINGTON

91 SEP 26 P8:55

September 26, 1991

MEMORANDUM FOR PHIL BRADY

FROM: FRED McCLURE

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

From: Acting Attorney General William Barr

To: Senators Dole and Hatch

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

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

Please direct all comments to my office at x2230.

Dear :

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

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

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

The Goals of Civil Rights Legislation

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

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

S. 1745 Promotes Quotas

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

Creating New Quotas

The most widely discussed Title VII decision by the Supreme Court in 1989 is Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). That case addressed the manner of litigating disparate impact cases -- that is, cases arising out of facially neutral

employment practices that have a statistically adverse impact upon a racial, religious, national origin or gender group. President Bush supports legislation accomplishing the originally stated objections to Wards Cove -- that it changed the placement of the burden of proof on the business necessity issue in disparate impact cases under Griggs v. Duke Power Co., 401 U.S. 424 (1971). However, the President vetoed the Kennedy-Hawkins bill, in part, because it radically altered the disparate impact standard established in Griggs. Like H.R. 1 and Kennedy-Hawkins, S. 1745 would overrule Griggs and fundamentally change the law that existed before Wards Cove in a manner that would promote the adoption of quotas.

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

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

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

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

Senator Kennedy's original bill limited "business necessity" solely to "job performance." In the face of substantial opposition, new versions were proposed but each suffered from the original defect of unduly limiting an employer's ability to defend facially neutral employment practices. Senator Danforth now purports to use the Griggs language, but then defines the

critical language to mean essentially the same thing as the language originally proposed by Senator Kennedy last year. S. 1745 accomplishes this narrowing of the business necessity defense by an elaborate definitional bifurcation. First, the bill defines "business necessity" as meaning, in the case of selection criteria, "a manifest relationship to the employment in question." This, of course, is the Griggs standard. He then, however, adds a sub-definition of "employment in question" narrowing it to include only job performance criteria in virtually all employment decisions. It is this unjustified departure from Griggs that unacceptably restricts the "business necessity" defense. In short, S. 1745 adopts the Griggs language and then redefines it to reflect the definitions contained in H.R. 1 and Kennedy-Hawkins. From a legal standpoint, there simply is no question that S. 1745 proposes a definition of "business necessity" which is much narrower than that found in Griggs and its Supreme Court progeny.

Similarly, the statement in S. 1745 that the definition of business necessity is intended to codify Griggs cannot alter the inconsistency between the bill's text and the language of Griggs, or the inconsistency between the text of S. 1745 and almost two decades of Supreme Court precedent interpreting Griggs. Instead, it merely guarantees confusion as courts attempt to sort out precisely what Congress had in mind in S. 1745. This confusion

will be time-consuming and very expensive. And it will bring no benefit to the victims of discrimination.

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

We note in passing that there is no merit to the claim that the Danforth definition of "business necessity" is acceptable because it is taken from the Americans with Disabilities Act (ADA). The plain fact is that it is impossible to take a "business necessity" definition from the ADA and transfer it to Title VII because there is no "business necessity" definition in the ADA. The eight words which the Danforth bill lifts from the ADA -- "qualification standards, employment tests or other selection criteria" -- in no way define "business necessity" in either place. They merely describe the kind of employment practices to which the operative language (which appears elsewhere) applies. In that regard, the eight words say virtually the same thing as the words used in the legislation introduced by Senator Danforth earlier this year -- "employment

practices used as job qualifications or used to measure the ability to perform the job." The eight words from the ADA do not alter the key operative part of the "business necessity" definition which is the narrowing language in the subdefinition of "employment in question". In short, Senator Danforth has neither incorporated any definition of "business necessity" from the ADA nor adopted any sort of key language from the ADA. Rather, he has merely repackaged the same definition he offered last time using eight words that could be inserted into the President's bill without changing its meaning.

There are also serious social and policy implications in narrowing Title VII's definition of "business necessity." Most important, S. 1745 would fundamentally undermine our Nation's educational policies. Employers would be restricted in their ability to consider educational criteria that might be necessary for promotion to higher levels of employment or appropriate to serve some important, legitimate and nondiscriminatory purpose. The attached letters from Secretary of Education Lamar Alexander and EEOC Chairman Evan Kemp elaborate these concerns. Further, among other uncertainties, the definition of "business necessity" in S. 1745 could deny the employer a defense in each of the following examples: A law firm hires as interns only people who will be eligible to become associates (i.e., law students); a mining company gives a preference to employees who don't smoke or drink (on or off the job), because it lowers health insurance

costs; at the mayor's request, to discourage dropping out of school, a fast food chain rejects dropouts below age 18 for jobs during school hours; a metropolitan transit authority does not want to hire heroin addicts who are receiving methadone maintenance treatments.

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

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

Wards Cove reaffirmed the traditional rule that a plaintiff should identify the particular employment practice that allegedly caused the disparate impact. This particularity requirement is especially critical if, as the President has agreed, Wards Cove

is to be overruled so that the employer will now bear the burden of proving "business necessity."

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

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

allow a prima facie case to be established without proof the defendant's practices caused a disparate impact.)

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

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

Protecting Old Quotas

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

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

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

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

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

S. 1745 Would Promote Excessive Litigation

In addition to promoting and institutionalizing quotas, S. 1745 would radically alter the carefully crafted remedial provisions of Title VII and convert them into a tort-style litigation system by introducing, for the first time, broad compensatory and punitive damages and jury trials. S. 1745 would also eliminate the need for causation in employment discrimination cases -- allowing lawyers, but not their clients, to recover even where the employer could show that their actions were justified by legitimate, nondiscriminatory reasons. No one could even pretend that these changes are aimed at restoring pre-1989 law; rather, they are fundamental changes that will create an entirely new regime for employment discrimination cases. The

net result of these changes would be to encourage excessive and costly litigation, primarily for the benefit of lawyers. Coupled with the changes in the "business necessity" defense described above, these changes will increase the pressure on employers to adopt quotas as the only means to avoid expensive litigation. We discuss these problems in turn.

Transforming Title VII To A Tort-Style System

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

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

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

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

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

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

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

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

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

Injunctions and backpay work. They encourage conciliation and discourage discrimination. They provide effective recovery

for victims of discrimination without promising a high-risk proposition for those willing to gamble on litigation.

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

We also note that, while the Danforth bill is said to be aimed at making damages available in cases of intentional discrimination under Title VII and certain sections of the Americans with Disabilities Act of 1990, it is drafted in such a way that practices intentionally adopted, but without discriminatory intent, would also give rise to liability for damages. For instance, if an employer explicitly required job applicants to have a high school diploma, yet had no discriminatory intent, he could still be held to have "intentionally engaged in an unlawful employment practice" -- i.e., he intentionally required the diploma, albeit for nondiscriminatory reasons -- and would be liable for damages. This goes far beyond even H.R. 1, and would make damages available in disparate impact cases. Coupled with the reality that most disparate impact lawsuits also contain claims for

disparate treatment in which statistical evidence plays a major role, this critical departure from established case law would prompt many employers to conclude that numerical hiring, i.e. quotas, is necessary to avoid these new forms of damages.

Eliminating "Causation" Requirement

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

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

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

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

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

Congress Should Live By Its Enactments

In his May 17, 1990, Rose Garden address, President Bush said that "Congress, with respect, should live by the same requirements it prescribes for others." The Executive branch, like private employers and state and local governments, is forbidden by law to discriminate on the basis of race, color, religion, sex, or national origin. The Congress, however, has exempted itself from the law. As President Bush has noted, "this inconsistency should be remedied to give congressional employees

and applicants the full protection of the law to send a strong signal that it's both the Executive branch and Congress that are in this together. And the Congress should join the Executive branch in setting an example for these private employers."

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

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

Pass the President's Bill

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

The Administration also recognizes the fact that equal opportunity can never be a reality until there are decent

schools, safe streets, and revitalized local economies. Therefore, in addition to passage of the President's civil rights bill, we seek Congressional action to promote individual opportunity on several fronts: educational choice and flexibility; home-ownership opportunity; enterprise zones and community opportunity areas; and heightened anti-crime efforts.

Conclusion

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

Sincerely,

William P. Barr
Acting Attorney General

THE WHITE HOUSE

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF THE CHAIRMAN

JUN 24 1991

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

Dear Governor:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

position.

According to the Hudson Institute's 1988 report Opportunity 2000, more than half of all new jobs created over the next 10 years will require some education beyond high school and almost a third will be filled by college graduates (compared with only 22% of all occupations today). Notwithstanding employers' ever increasing dependance on individual competence in order to remain competitive, students, parents and teachers will not be able to point to a reward for learning if employers are for all practical purposes precluded from even inquiring about degree status much less rewarding academic achievement. As the Secretary of Labor's Commission on Workforce Quality and Labor Market Efficiency has recently urged:

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

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

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

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

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

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

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

Best regards,

Evan

Evan J. Kemp, Jr.
Chairman

UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

JUL 25 1991

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

Dear Senator Hatch:

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

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

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

nations routinely examine the educational credentials of prospective employees.

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

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

Sincerely,

Lamar Alexander

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

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

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

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

102D CONGRESS
1ST SESSION

S. 1745

IN THE SENATE OF THE UNITED STATES

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

A BILL

To amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.

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

SECTION 1. SHORT TITLE.

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

SEC. 2. FINDINGS.

The Congress finds that—

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

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

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

SEC. 3. PURPOSES.

The purposes of this Act are—

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

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

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

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

SEC. 4. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

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

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

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

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

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

SEC. 5. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

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

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

"(a) RIGHT OF RECOVERY.—

"(1) CIVIL RIGHTS.—In an action brought by a complaining party under section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5) against a respondent who intentionally engaged in an unlawful employment practice prohibited under section 703 or 704 of the Act (42 U.S.C. 2000e–2 or 2000e–3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

"(2) DISABILITY.—In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a))) against a respondent who intentionally engaged in a practice that constitutes discrimination under section 102 of the Act (42 U.S.C. 12112), other than discrimination described in paragraph (3)(A) or (6) of subsection (b) of the section

(except for practices intended to screen out individuals with disabilities), against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

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

"(b) COMPENSATORY AND PUNITIVE DAMAGES.—

"(1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with

malice or with reckless indifference to the federally protected rights of an aggrieved individual.

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

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

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

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

"(C) in the case of a respondent who has more than 500 employees in each of 20 or more

calendar weeks in the current or preceding calendar year, $300,000.

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

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

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

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

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

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

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

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

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

SEC. 6. ATTORNEY'S FEES.

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

SEC. 7. DEFINITIONS.

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

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

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

"(n) The term 'the employment in question' means—

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

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

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

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

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

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

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

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

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

"(i) a complaining party demonstrates that a particular employment practice or particular employment practices (or decisionmaking process as described in subparagraph (B)(i)) cause a disparate

impact on the basis of race, color, religion, sex, or national origin; and

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

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

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

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

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

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

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

an intent to discriminate because of race, color, religion, sex, or national origin.".

SEC. 9. PROHIBITION AGAINST DISCRIMINATORY USE OF TEST SCORES.

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

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

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

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

"(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion,

sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.".

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

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

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

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

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

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

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

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

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

"(n)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (3), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

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

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

"(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to

present objections to such judgment or order by a future date certain; and

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

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

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

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

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

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or

fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

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

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

SEC. 12. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

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

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

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

(2) by adding at the end the following:

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

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

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

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

"(A) the interrelation of operations;

"(B) the common management;

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

"(D) the common ownership or financial control,

of the employer and the corporation.".

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

SEC. 13. EDUCATION AND OUTREACH.

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

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

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

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

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

"(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination,

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

SEC. 14. EXPANSION OF RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS.

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

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

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

"(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.".

SEC. 15. AUTHORIZING AWARD OF EXPERT FEES.

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

SEC. 16. PROVIDING FOR INTEREST AND EXTENDING THE STATUTE OF LIMITATIONS IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.

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

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

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

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

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

(1) by striking paragraph (2);

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

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

(4) by adding at the end the following:

"If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought

under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice.".

SEC. 18. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION, AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.

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

(a) COVERAGE OF THE SENATE.—

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

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

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

"(b) discharge an individual; or

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

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

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

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

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

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

(7) EXERCISE OF RULEMAKING POWER.—Notwithstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in paragraphs (2) and (6)(A) shall be within the exclusive jurisdiction of the United States Senate. The provisions of paragraphs (1), (3), (4), (5), (6)(B), and (6)(C) are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

(b) COVERAGE OF THE HOUSE OF REPRESENTATIVES.—

(1) IN GENERAL.—Notwithstanding any provision of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or of other law, the purposes of such title shall, subject to paragraph (2), apply in their entirety to the House of Representatives.

(2) EMPLOYMENT IN THE HOUSE.—

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

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

(B) ADMINISTRATION.—

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

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

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

ner, and to the same extent as in the case of any other rule of the House.

(c) INSTRUMENTALITIES OF CONGRESS.—

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

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

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

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

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

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

SEC. 20. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

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

SEC. 21. SEVERABILITY.

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

SEC. 22. EFFECTIVE DATE.

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

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

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

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

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

REMARKS:

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

THANK YOU!

RESPONSE:

NC JD

called in NC SB 9/27

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

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: 9/26/91 ACTION/CONCURRENCE/COMMENT DUE BY: 91 SEP 27 P12:02 10:00AM, TODAY, SEPT.

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

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

REMARKS:

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

THANK YOU!

RESPONSE:

General comment was relayed verbally. Thanks.

Paul Korfonta
09/27/91

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

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

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

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

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

REMARKS:

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

THANK YOU!

RESPONSE:

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

Document No. 1745215S
HU010

WHITE HOUSE STAFFING MEMORANDUM

DATE: 10/22/91 ACTION/CONCURRENCE/COMMENT DUE BY: TODAY, 10/22/91 5:30pm

SUBJECT: SENIOR ADVISOR'S VETO THREAT ON S. 1745, THE CIVIL RIGHTS ACT OF 1991 SPONSORED BY SENATOR DANFORTH

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

REMARKS:

Please forward your comments directly to Fred McClure, x2230, no later than 5:30 p.m., TODAY, TUESDAY, OCTOBER 22nd, with a copy to this office. Thank you.

RESPONSE:

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

THE WHITE HOUSE

WASHINGTON

91 OCT 22 P3:39

October 22, 1991

MEMORANDUM FOR PHIL BRADY

FROM: FRED McCLURE

SUBJECT: Statement of Administration Policy

RE: **Senior Advisors Veto Threat on S.1745, the Civil Rights Act of 1991 sponsored by Senator Danforth.**

We have just received the attached Statement of Administrative Policy from OMB. We would appreciate your comments by **5:30 p.m., Today, 10/22/91**.

Please direct all comments to my office at x2230.

October 22, 1991
(Senate)

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

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

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

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

The bill's use of eight words taken from the Americans with Disabilities Act ("ADA") is a misleading gimmick. These words do not define "business necessity" either in the ADA (which uses "business necessity" as an undefined term) or in S. 1745. Nor does the use of these eight words materially alter the definition in S. 1745's predecessor bill (S. 1408). The same words could be inserted into the President's bill without changing its meaning; accordingly, the Administration has no objection to their inclusion in the President's bill.

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

S. 1745 would also create a lawyers' bonanza. It provides for jury trials and compensatory damages in all cases under Title VII of the Civil Rights Act of 1964, along with punitive damages in many cases. (As currently written, the bill would even make damages available in disparate impact cases, which goes beyond H.R. 1 and last year's Kennedy-Hawkins bill.) These damages provisions would transform Title VII from its original design, which emphasizes conciliation and make-whole relief, into an entirely different structure modeled on our Nation's tort system -- which is now widely recognized to be in a state of crisis.

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

The Administration's Proposal

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

Like S. 1745, the Administration bill would overturn the Lorance and Patterson decisions; overturn Wards Cove by shifting the burden of proof to the employer in defending "business necessity;" authorize expert witness fees in civil rights cases; and extend the statute of limitations and authorize the award of interest against the U.S. Government.

The Administration bill would make available new monetary remedies under Title VII, up to $150,000, for victims of sexual harassment in the workplace. The Administration bill also includes special provisions creating incentives for employers to prevent and correct sexual harassment without waiting for lawsuits to be filed. Finally, the Administration bill extends Title VII to apply to Congress.

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

* * * * *

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

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

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

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

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

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

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

Recent Supreme Court Decisions and Related Provisions of S. 1745

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

-- Wards Cove

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

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

-- Price Waterhouse

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

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

-- Wilks

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

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

-- Lorance

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

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

-- Patterson

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

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

-- Shaw

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

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

Other Provisions of S. 1745

In addition, S. 1745 would:

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

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

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

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

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

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

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

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

Administration Bill

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

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

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

Administration Position to Date

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

1990 Presidential Statement

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

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

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

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

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

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

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

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

Document No. 27452155
HU010

WHITE HOUSE STAFFING MEMORANDUM

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

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

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

REMARKS:

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

THANK YOU!

RESPONSE:

Noted
7/11
rcg

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

THE WHITE HOUSE

WASHINGTON

91 SEP 26 P8:55

September 26, 1991

MEMORANDUM FOR PHIL BRADY

FROM: FRED McCLURE

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

From: Acting Attorney General William Barr

To: Senators Dole and Hatch

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

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

Please direct all comments to my office at x2230.

Dear :

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

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

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

The Goals of Civil Rights Legislation

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

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

S. 1745 Promotes Quotas

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

Creating New Quotas

The most widely discussed Title VII decision by the Supreme Court in 1989 is Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). That case addressed the manner of litigating disparate impact cases -- that is, cases arising out of facially neutral

employment practices that have a statistically adverse impact upon a racial, religious, national origin or gender group. President Bush supports legislation accomplishing the originally stated objections to Wards Cove -- that it changed the placement of the burden of proof on the business necessity issue in disparate impact cases under Griggs v. Duke Power Co., 401 U.S. 424 (1971). However, the President vetoed the Kennedy-Hawkins bill, in part, because it radically altered the disparate impact standard established in Griggs. Like H.R. 1 and Kennedy-Hawkins, S. 1745 would overrule Griggs and fundamentally change the law that existed before Wards Cove in a manner that would promote the adoption of quotas.

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

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

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

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

Senator Kennedy's original bill limited "business necessity" solely to "job performance." In the face of substantial opposition, new versions were proposed but each suffered from the original defect of unduly limiting an employer's ability to defend facially neutral employment practices. Senator Danforth now purports to use the Griggs language, but then defines the

critical language to mean essentially the same thing as the language originally proposed by Senator Kennedy last year. S. 1745 accomplishes this narrowing of the business necessity defense by an elaborate definitional bifurcation. First, the bill defines "business necessity" as meaning, in the case of selection criteria, "a manifest relationship to the employment in question." This, of course, is the Griggs standard. He then, however, adds a sub-definition of "employment in question" narrowing it to include only job performance criteria in virtually all employment decisions. It is this unjustified departure from Griggs that unacceptably restricts the "business necessity" defense. In short, S. 1745 adopts the Griggs language and then redefines it to reflect the definitions contained in H.R. 1 and Kennedy-Hawkins. From a legal standpoint, there simply is no question that S. 1745 proposes a definition of "business necessity" which is much narrower than that found in Griggs and its Supreme Court progeny.

Similarly, the statement in S. 1745 that the definition of business necessity is intended to codify Griggs cannot alter the inconsistency between the bill's text and the language of Griggs, or the inconsistency between the text of S. 1745 and almost two decades of Supreme Court precedent interpreting Griggs. Instead, it merely guarantees confusion as courts attempt to sort out precisely what Congress had in mind in S. 1745. This confusion

will be time-consuming and very expensive. And it will bring no benefit to the victims of discrimination.

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

We note in passing that there is no merit to the claim that the Danforth definition of "business necessity" is acceptable because it is taken from the Americans with Disabilities Act (ADA). The plain fact is that it is impossible to take a "business necessity" definition from the ADA and transfer it to Title VII because there is no "business necessity" definition in the ADA. The eight words which the Danforth bill lifts from the ADA -- "qualification standards, employment tests or other selection criteria" -- in no way define "business necessity" in either place. They merely describe the kind of employment practices to which the operative language (which appears elsewhere) applies. In that regard, the eight words say virtually the same thing as the words used in the legislation introduced by Senator Danforth earlier this year -- "employment

practices used as job qualifications or used to measure the ability to perform the job." The eight words from the ADA do not alter the key operative part of the "business necessity" definition which is the narrowing language in the subdefinition of "employment in question". In short, Senator Danforth has neither incorporated any definition of "business necessity" from the ADA nor adopted any sort of key language from the ADA. Rather, he has merely repackaged the same definition he offered last time using eight words that could be inserted into the President's bill without changing its meaning.

There are also serious social and policy implications in narrowing Title VII's definition of "business necessity." Most important, S. 1745 would fundamentally undermine our Nation's educational policies. Employers would be restricted in their ability to consider educational criteria that might be necessary for promotion to higher levels of employment or appropriate to serve some important, legitimate and nondiscriminatory purpose. The attached letters from Secretary of Education Lamar Alexander and EEOC Chairman Evan Kemp elaborate these concerns. Further, among other uncertainties, the definition of "business necessity" in S. 1745 could deny the employer a defense in each of the following examples: A law firm hires as interns only people who will be eligible to become associates (i.e., law students); a mining company gives a preference to employees who don't smoke or drink (on or off the job), because it lowers health insurance

costs; at the mayor's request, to discourage dropping out of school, a fast food chain rejects dropouts below age 18 for jobs during school hours; a metropolitan transit authority does not want to hire heroin addicts who are receiving methadone maintenance treatments.

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

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

Wards Cove reaffirmed the traditional rule that a plaintiff should identify the particular employment practice that allegedly caused the disparate impact. This particularity requirement is especially critical if, as the President has agreed, Wards Cove

is to be overruled so that the employer will now bear the burden of proving "business necessity."

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

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

allow a prima facie case to be established without proof the defendant's practices caused a disparate impact.)

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

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

Protecting Old Quotas

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

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

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

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

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

S. 1745 Would Promote Excessive Litigation

In addition to promoting and institutionalizing quotas, S. 1745 would radically alter the carefully crafted remedial provisions of Title VII and convert them into a tort-style litigation system by introducing, for the first time, broad compensatory and punitive damages and jury trials. S. 1745 would also eliminate the need for causation in employment discrimination cases -- allowing lawyers, but not their clients, to recover even where the employer could show that their actions were justified by legitimate, nondiscriminatory reasons. No one could even pretend that these changes are aimed at restoring pre-1989 law; rather, they are fundamental changes that will create an entirely new regime for employment discrimination cases. The

net result of these changes would be to encourage excessive and costly litigation, primarily for the benefit of lawyers. Coupled with the changes in the "business necessity" defense described above, these changes will increase the pressure on employers to adopt quotas as the only means to avoid expensive litigation. We discuss these problems in turn.

Transforming Title VII To A Tort-Style System

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

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

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

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

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

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

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

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

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

Injunctions and backpay work. They encourage conciliation and discourage discrimination. They provide effective recovery

for victims of discrimination without promising a high-risk proposition for those willing to gamble on litigation.

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

We also note that, while the Danforth bill is said to be aimed at making damages available in cases of intentional discrimination under Title VII and certain sections of the Americans with Disabilities Act of 1990, it is drafted in such a way that practices intentionally adopted, but without discriminatory intent, would also give rise to liability for damages. For instance, if an employer explicitly required job applicants to have a high school diploma, yet had no discriminatory intent, he could still be held to have "intentionally engaged in an unlawful employment practice" -- i.e., he intentionally required the diploma, albeit for nondiscriminatory reasons -- and would be liable for damages. This goes far beyond even H.R. 1, and would make damages available in disparate impact cases. Coupled with the reality that most disparate impact lawsuits also contain claims for

disparate treatment in which statistical evidence plays a major role, this critical departure from established case law would prompt many employers to conclude that numerical hiring, i.e. quotas, is necessary to avoid these new forms of damages.

Eliminating "Causation" Requirement

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

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

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

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

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

Congress Should Live By Its Enactments

In his May 17, 1990, Rose Garden address, President Bush said that "Congress, with respect, should live by the same requirements it prescribes for others." The Executive branch, like private employers and state and local governments, is forbidden by law to discriminate on the basis of race, color, religion, sex, or national origin. The Congress, however, has exempted itself from the law. As President Bush has noted, "this inconsistency should be remedied to give congressional employees

and applicants the full protection of the law to send a strong signal that it's both the Executive branch and Congress that are in this together. And the Congress should join the Executive branch in setting an example for these private employers."

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

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

Pass the President's Bill

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

The Administration also recognizes the fact that equal opportunity can never be a reality until there are decent

schools, safe streets, and revitalized local economies. Therefore, in addition to passage of the President's civil rights bill, we seek Congressional action to promote individual opportunity on several fronts: educational choice and flexibility; home-ownership opportunity; enterprise zones and community opportunity areas; and heightened anti-crime efforts.

Conclusion

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

Sincerely,

William P. Barr
Acting Attorney General

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF THE CHAIRMAN

JUN 24 1991

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

Dear Governor:

As Chairman of the principal Federal agency charged with implementing civil rights laws as they apply to employment discrimination, I am urging that the Administration not accept the "business necessity" language proposed by Senator Danforth in his letters to you of June 18 & 20, 1991.

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

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

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

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

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

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

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

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

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

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

Yet as Chester Finn recently wrote in a New York Times op-ed piece (5/13/91) entitled "Educational Reform vs. Civil Rights Agendas," realizing the President's educational strategy will mean challenging the status quo:

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

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

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

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

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

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

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

position.

According to the Hudson Institute's 1988 report Opportunity 2000, more than half of all new jobs created over the next 10 years will require some education beyond high school and almost a third will be filled by college graduates (compared with only 22% of all occupations today). Notwithstanding employers' ever increasing dependance on individual competence in order to remain competitive, students, parents and teachers will not be able to point to a reward for learning if employers are for all practical purposes precluded from even inquiring about degree status much less rewarding academic achievement. As the Secretary of Labor's Commission on Workforce Quality and Labor Market Efficiency has recently urged:

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

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

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

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

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

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

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

Best regards,

Evan H. Kemp, Jr.
Chairman

UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

JUL 25 1991

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

Dear Senator Hatch:

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

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

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

nations routinely examine the educational credentials of prospective employees.

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

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

Sincerely,

Lamar Alexander

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

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

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

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

102D CONGRESS
1ST SESSION

S. 1745

IN THE SENATE OF THE UNITED STATES

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

A BILL

To amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.

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

SECTION 1. SHORT TITLE.

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

SEC. 2. FINDINGS.

The Congress finds that—

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

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

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

SEC. 3. PURPOSES.

The purposes of this Act are—

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

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

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

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

SEC. 4. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

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

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

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

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

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

SEC. 5. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

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

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

"(a) RIGHT OF RECOVERY.—

"(1) CIVIL RIGHTS.—In an action brought by a complaining party under section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5) against a respondent who intentionally engaged in an unlawful employment practice prohibited under section 703 or 704 of the Act (42 U.S.C. 2000e–2 or 2000e–3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

"(2) DISABILITY.—In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a))) against a respondent who intentionally engaged in a practice that constitutes discrimination under section 102 of the Act (42 U.S.C. 12112), other than discrimination described in paragraph (3)(A) or (6) of subsection (b) of the section

(except for practices intended to screen out individuals with disabilities), against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

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

"(b) COMPENSATORY AND PUNITIVE DAMAGES.—

"(1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with

malice or with reckless indifference to the federally protected rights of an aggrieved individual.

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

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

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

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

"(C) in the case of a respondent who has more than 500 employees in each of 20 or more

calendar weeks in the current or preceding calendar year, $300,000.

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

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

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

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

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

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

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

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

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

SEC. 6. ATTORNEY'S FEES.

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

SEC. 7. DEFINITIONS.

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

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

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

"(n) The term 'the employment in question' means—

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

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

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

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

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

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

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

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

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

"(i) a complaining party demonstrates that a particular employment practice or particular employment practices (or decisionmaking process as described in subparagraph (B)(i)) cause a disparate

impact on the basis of race, color, religion, sex, or national origin; and

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

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

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

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

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

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

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

an intent to discriminate because of race, color, religion, sex, or national origin.".

SEC. 9. PROHIBITION AGAINST DISCRIMINATORY USE OF TEST SCORES.

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

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

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

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

"(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion,

sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.".

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

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

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

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

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

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

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

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

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

"(n)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (3), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

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

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

"(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to

present objections to such judgment or order by a future date certain; and

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

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

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

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

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

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or

fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

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

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

SEC. 12. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

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

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

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

(2) by adding at the end the following:

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

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

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

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

"(A) the interrelation of operations;

"(B) the common management;

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

"(D) the common ownership or financial control,

of the employer and the corporation.".

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

SEC. 13. EDUCATION AND OUTREACH.

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

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

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

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

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

"(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination,

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

SEC. 14. EXPANSION OF RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS.

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

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

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

"(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.".

SEC. 15. AUTHORIZING AWARD OF EXPERT FEES.

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

SEC. 16. PROVIDING FOR INTEREST AND EXTENDING THE STATUTE OF LIMITATIONS IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.

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

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

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

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

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

(1) by striking paragraph (2);

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

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

(4) by adding at the end the following:

"If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought

under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice.".

SEC. 18. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION, AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.

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

(a) COVERAGE OF THE SENATE.—

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

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

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

"(b) discharge an individual; or

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

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

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

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

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

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

(7) EXERCISE OF RULEMAKING POWER.—Notwithstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in paragraphs (2) and (6)(A) shall be within the exclusive jurisdiction of the United States Senate. The provisions of paragraphs (1), (3), (4), (5), (6)(B), and (6)(C) are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

(b) COVERAGE OF THE HOUSE OF REPRESENTATIVES.—

(1) IN GENERAL.—Notwithstanding any provision of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or of other law, the purposes of such title shall, subject to paragraph (2), apply in their entirety to the House of Representatives.

(2) EMPLOYMENT IN THE HOUSE.—

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

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

(B) ADMINISTRATION.—

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

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

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

ner, and to the same extent as in the case of any other rule of the House.

(c) INSTRUMENTALITIES OF CONGRESS.—

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

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

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

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

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

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

SEC. 20. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

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

SEC. 21. SEVERABILITY.

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

SEC. 22. EFFECTIVE DATE.

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

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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Subject: Draft Statement of Administration Policy re: S. 1745 -- the Civil Rights Act of 1991

ROUTE TO: Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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CUAT 10	A	91/10/22		C	91/10/22 CS
	Referral Note:	10/22/91 NL Memo for the file			
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5/81

THE WHITE HOUSE

WASHINGTON

October 22, 1991

MEMORANDUM FOR THE FILE

FROM: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Draft Statement of Administration Policy Re: S. 1745 -- The Civil Rights Act of 1991

I gave the changes marked on the attached hard copy to Jim Jukes orally.

This matter may be closed out.

Attachment

Nelson
Lund

FACSIMILE TRANSMITTAL SHEET

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FROM: S.Oliphant ESGG

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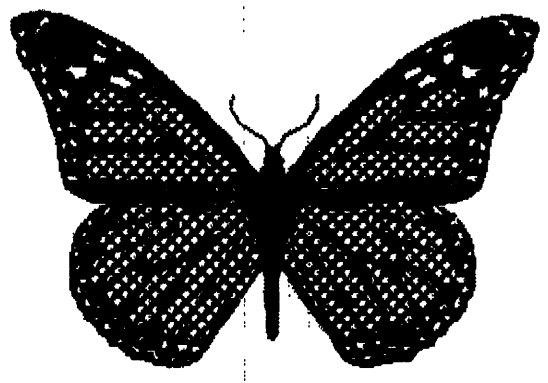

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To: Nelson Lund

Agency:

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* * * * * *

From: Jim Jukes

Legislative Reference Division
Economics, Science, and General Government Branch
Room 7220

Phone:

Number of Pages (NOT INCLUDING THIS COVER SHEET) 7

Date:

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Comments:

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

October 10, 1991
(Senate)

STATEMENT OF ADMINISTRATION POLICY

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

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

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

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

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

The bill's use of eight words taken from the Americans with Disabilities Act ("ADA") is a misleading gimmick. These words do not define "business necessity" either in the ADA (which uses "business necessity" as an undefined term) or in S. 1745. Nor does the use of these eight words materially alter the definition in S. 1745's predecessor bill (S. 1408). The same words could be inserted into the President's bill without changing its meaning; accordingly, the Administration has no objection to their inclusion in the President's bill.

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

S. 1745 would also create a lawyers' bonanza. It provides for jury trials and compensatory damages in all cases under Title VII

of the Civil Rights Act of 1964, along with punitive damages in many cases. (As currently written, the bill would even make damages available in disparate impact cases, which goes beyond H.R. 1 and last year's Kennedy-Hawkins bill.) These damages provisions would transform Title VII from its original design, which emphasizes conciliation and make-whole relief, into an entirely different structure modeled on our Nation's tort system -- which is now widely recognized to be in a state of crisis.

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

the Administration bill also contains special provisions ~~including~~ incentives for employers to prevent and correct sexual harassment in the workplace without waiving any lawsuits to be filed. Finally, the Administration bill extends

The Administration's Proposal

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

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

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

* * * * *

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

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

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

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

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

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

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

Recent Supreme Court Decisions and Related Provisions of S. 1745

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

-- Wards Cove

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

inadvertent, disparate impact based on race, color, religion, sex, or national origin.)

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

-- Price Waterhouse

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

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

-- Wilks

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

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

-- Lorance

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

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

-- Patterson

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

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

-- Shaw

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

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

Other Provisions of S. 1745

In addition, S. 1745 would:

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

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

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

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

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

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

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

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

Administration Bill

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

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

The bill would make available new monetary remedies for victims of sexual harassment in the workplace. The provision provides for bench trials, and caps awards at $150,000. S. 1745, by contrast, would grant women and religious minorities the right to

jury trials and monetary damages of up to $300,000 (or less, in the case of employers with less than 500 employees) for intentional discrimination.

Administration Position to Date

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

1990 Presidential Statement

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

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

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

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

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

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

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

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

CS

ID # 274526 CU
R: 9/27
5:00P

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

HU010

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

Name of Correspondent: James J. Jukes

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

Subject: Draft Statement of Administration Policy Re: S 1745, Civil Rights Act of 1991.

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	91/09/27		C	91/09/30
	Referral Note:				CS
CUATIO	A	91/09/27		C	91/09/30
	Referral Note:	see comments		5:00p	CS
	_	1 1		_	1 1
	Referral Note:				
	_	1 1		_	1 1
	Referral Note:				
	_	1 1		_	1 1
	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

Comments: The captioned was drafted by NL -- done CS

dml 9-20-91 - NL

Keep this worksheet attached to the original incoming letter.
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

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

PG 1 of 4

SEP 27 1991

LEGISLATIVE REFERRAL MEMORANDUM **LRM #I-1755**

TO: Legislative Liaison Officer -

JUSTICE - Paul McNulty - 514-2061 - 217
LABOR - Robert A. Shapiro - 523-8201 - 330
EDUCATION - John Kristy - 401-2670 - 207
SBA - Michael P. Forbes - 205-6702 - 315
EEOC - James C. Lafferty - 663-4900 - 213

FROM: JAMES J. JUKES (for) Jim
Assistant Director for Legislative Reference

OMB CONTACT: GERRI RATLIFF (395-3454)

SUBJECT: DRAFT Statement of Administration Policy RE:
S 1745, Civil Rights Act of 1991

DEADLINE: 5:00 P.M. TODAY SEP 27 1991

COMMENTS: S. 1745 may go to the floor on Monday, 9/30.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:
Nelson Lund
Boyden Gray
Marianne McGettigan
Elizabeth Luttig
Bob Damus
Ken Schwartz
Cora Beebe
Adrien Silas
Bernie Martin
Joe Wine
Lisa Fairfall

LRM #I-1755

RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

You may respond to this request for views by: (1) faxing us this response sheet; (2) if the response is simple (e.g., concur/no comment), leaving a message with the secretary of the foregoing analyst/attorney; (3) calling the analyst/attorney; or (4) sending us a memo or letter.

TO: GERRI RATLIFF
Office of Management and Budget
Fax Number: 395-3109
Phone Number: 395-3454

_____ (Date)

FROM: _____ (Name)

_____ (Agency)

_____ (Telephone)

SUBJECT: DRAFT Statement of Administration Policy RE:
S 1745, Civil Rights Act of 1991

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No objection

_____ No comment

_____ See proposed edits on pages _____

_____ Other: _____

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

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

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

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

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

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

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

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

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

The Administration's Proposal

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

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

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

* * * *

Document No. 27467955

HU010

WHITE HOUSE STAFFING MEMORANDUM

DATE: 09/30/91 ACTION/CONCURRENCE/COMMENT DUE BY: NOON Tuesday 10/01

SUBJECT: SAP: S. 1745 -- CIVIL RIGHTS ACT OF 1991

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

REMARKS:

Please provide any comments directly to Fred McClure by Noon on Tuesday, 10/01, with a copy to this office. Thanks.

RESPONSE:

Noted
JK
1/04

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

THE WHITE HOUSE

WASHINGTON

91 SEP 30 P7:25

September 30, 1991

MEMORANDUM FOR PHIL BRADY

FROM: FRED McCLURE

SUBJECT: Clearance for Statement of Administration Policy

RE: **Senior Advisor's Veto Threat on S. 1745, Senator Danforth's Civil Rights Bill. This SAP will serve as an Executive Summary for the 24 page letter from acting Attorney General, Bill Barr, currently in circulation.**

We have just received the attached Statement of Administration Policy from OMB. We would appreciate your comments by Noon, Tomorrow, 10/1/91.

Please direct all comments to my office at x2230.

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

September 30, 1991

MEMORANDUM TO FREDERICK D. McCLURE
Assistant to the President for Legislative Affairs

FROM: David Taylor
OMB Legislative Affairs

SUBJECT: West Wing Clearance of a Senior Advisers Veto Threat

S. 1745 -- Civil Rights Act of 1991

The attached draft SAP contains a senior advisers veto threat. The draft was prepared as an executive summary of a 24-page letter from Acting Attorney General Barr to the Senate Leadership. The Barr letter has been held pending clearance of the attached draft SAP so that the two documents can be released simultaneously. If approved, this SAP will be the first senior advisers veto threat issued on the latest Danforth compromise bill (S. 1745).

The Senate is not expected to act on this legislation prior to the Columbus Day Recess (October 5-15). However, White House Counsel and the Justice Department request that the attached draft be cleared for release by noon tomorrow. The attached draft has been cleared by Nelson Lund (White House Counsel), the Justice Department, and the EEOC.

Attachment

September 30, 1991
(Senate)

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

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

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

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

The bill's use of 8 words taken from the Americans with Disabilities Act ("ADA") is a misleading gimmick. These 8 words do not define "business necessity" either in the ADA (which uses "business necessity" as an undefined term) or in S. 1745. Nor does the use of these 8 words materially alter the definition in S. 1745's predecessor bill (S. 1408). The same 8 words could be inserted into the President's bill without changing its meaning, accordingly, the Administration has no objection to the inclusion of these 8 words in the President's bill.

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

S. 1745 would also create a lawyers' bonanza. It provides for jury trials and compensatory damages in all Title VII cases, along with punitive damages in many cases. (As currently written, the bill would

even make damages available in disparate impact cases, which goes beyond H.R. 1 and last year's Kennedy-Hawkins bill.) These damages provisions would transform Title VII from its original design, which emphasizes conciliation and make-whole relief, into an entirely different structure modeled on our Nation's tort system -- which is now widely recognized to be in a state of crisis.

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

The Administration's Proposal

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* * * * *

DOJ, EEOC, LWND

Document No. 274679SS
NK010

WHITE HOUSE STAFFING MEMORANDUM

DATE: 09/30/91 ACTION/CONCURRENCE/COMMENT DUE BY: NOON Tuesday 10/01

SUBJECT: SAP: S. 1745 -- CIVIL RIGHTS ACT OF 1991

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	HORNER	☐	☐
SUNUNU	☐	☑	MCCLURE	☐	☑
SCOWCROFT	☐	☐	PETERSMEYER	☐	☐
DARMAN	☐	☐	PORTER	☑	☐
BRADY	☐	☑	ROGICH	☐	☐
BROMLEY	☐	☐	SMITH	☐	☐
CARD	☐	☑	CLERK	☐	☑
DEMAREST NC	☑	☐		☐	☐
FITZWATER	☐	☑		☐	☐
GRAY see edits	☑	☐		☐	☐
HOLIDAY Sec ant	☑	☐		☐	☐

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Please provide any comments directly to Fred McClure by Noon on Tuesday, 10/01, with a copy to this office. Thanks.

RESPONSE:

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

THE WHITE HOUSE

WASHINGTON

October 1, 1991 91 OCT 1 AM : 43

MEMORANDUM FOR FREDERICK D. MCCLURE
ASSISTANT TO THE PRESIDENT FOR LEGISLATIVE AFFAIRS

FROM: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Statement of Administration Policy Re: S. 1745 - Civil Rights Act of 1991

At the request of Phillip D. Brady, Counsel's office has reviewed the captioned Statement of Administration Policy. Changes are marked on the attached hard copy.

We appreciate the opportunity to review this matter.

cc: Phillip D. Brady

Attachment

September 30, 1991
(Senate)

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

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purport

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excessively

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* * * * *

DOJ, EEOC, LWND

THE WHITE HOUSE

WASHINGTON

ORM OPTICAL DISK NETWORK

ID# 27467955

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

__✓__ Remainder of case not scanned.

____ Oversize attachment not scanned.

____ Report not scanned.

____ Enclosure(s) not scanned.

____ 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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Document No. 274679

WHITE HOUSE STAFFING MEMORANDUM

DATE: 09/30/91 91 OCT 1 P4:25 ACTION/CONCURRENCE/COMMENT DUE BY: NOON Tuesday 10/01

SUBJECT: SAP: S. 1745 -- CIVIL RIGHTS ACT OF 1991

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

REMARKS:

Please provide any comments directly to Fred McClure by Noon on Tuesday, 10/01, with a copy to this office. Thanks.

RESPONSE:

NC DD

Vcalled in SB

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

THE WHITE HOUSE

WASHINGTON

91 SEP 30 P7:25

September 30, 1991

MEMORANDUM FOR PHIL BRADY

FROM: FRED McCLURE

SUBJECT: Clearance for Statement of Administration Policy

RE: **Senior Advisor's Veto Threat on S. 1745, Senator Danforth's Civil Rights Bill. This SAP will serve as an Executive Summary for the 24 page letter from acting Attorney General, Bill Barr, currently in circulation.**

We have just received the attached Statement of Administration Policy from OMB. We would appreciate your comments by Noon, Tomorrow, 10/1/91.

Please direct all comments to my office at x2230.

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

September 30, 1991

MEMORANDUM TO FREDERICK D. McCLURE
Assistant to the President for Legislative Affairs

FROM: David Taylor
OMB Legislative Affairs

SUBJECT: West Wing Clearance of a Senior Advisers Veto Threat

S. 1745 -- Civil Rights Act of 1991

The attached draft SAP contains a senior advisers veto threat. The draft was prepared as an executive summary of a 24-page letter from Acting Attorney General Barr to the Senate Leadership. The Barr letter has been held pending clearance of the attached draft SAP so that the two documents can be released simultaneously. If approved, this SAP will be the first senior advisers veto threat issued on the latest Danforth compromise bill (S. 1745).

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Attachment

September 30, 1991
(Senate)

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

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

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

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

(CCA)
General comment: could this be phrased better -

The bill's use of 8 words taken from the Americans with Disabilities Act ("ADA") is a misleading gimmick. These 8 words do not define "business necessity" either in the ADA (which uses "business necessity" as an undefined term) or in S. 1745. Nor does the use of these 8 words materially alter the definition in S. 1745's predecessor bill (S. 1408). The same 8 words could be inserted into the President's bill without changing its meaning, accordingly, the Administration has no objection to the inclusion of these 8 words in the President's bill.

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

S. 1745 would also create a lawyers' bonanza. It provides for jury trials and compensatory damages in all Title VII cases, along with punitive damages in many cases. (As currently written, the bill would

even make damages available in disparate impact cases, which goes beyond H.R. 1 and last year's Kennedy-Hawkins bill.) These damages provisions would transform Title VII from its original design, which emphasizes conciliation and make-whole relief, into an entirely different structure modeled on our Nation's tort system -- which is now widely recognized to be in a state of crisis.

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

The Administration's Proposal

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

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

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

* * * * *

DOJ, EEOC, LWND

Document No. 274679

WHITE HOUSE STAFFING MEMORANDUM

DATE: 09/30/91 91 OCT 1 P5:03 ACTION/CONCURRENCE/COMMENT DUE BY: NOON Tuesday 10/01

SUBJECT: SAP: S. 1745 -- CIVIL RIGHTS ACT OF 1991

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	HORNER	☐	☐
SUNUNU	☐	☑	MCCLURE	☐	☑
SCOWCROFT	☐	☐	PETERSMEYER	☐	☐
DARMAN	☐	☐	PORTER	☑	☐
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DEMAREST	☑	☐		☐	☐
FITZWATER	☐	☑		☐	☐
GRAY	☑	☐		☐	☐
HOLIDAY	☑	☐		☐	☐

REMARKS:

Please provide any comments directly to Fred McClure by Noon on Tuesday, 10/01, with a copy to this office. Thanks.

RESPONSE:

See general comment. Thanks.

Paul Korfonta
10/01/91

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

CS

ID # 274679 CU

HU010

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Phil Brady

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

Subject: SAP : S.1745 - Civil Rights Act of 1991

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CMOA	ORIGINATOR	91/10/01		C	91/10/01 CS
	Referral Note:				
CMAT 10	A	91/10/01		C	91/10/01 CS
	Referral Note:	91/10/01	NL memo to McClure		
		1 1	also: see comments		
	Referral Note:				
		1 1			1 1
	Referral Note:				
		1 1			1 1
	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
- S - Suspended

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

Comments: phoned changes to Lewis Gottlieb as well CS

Keep this worksheet attached to the original incoming letter.
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

THE WHITE HOUSE

WASHINGTON

October 1, 1991

MEMORANDUM FOR FREDERICK D. MCCLURE
ASSISTANT TO THE PRESIDENT FOR LEGISLATIVE AFFAIRS

FROM: NELSON LUND
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Statement of Administration Policy Re: S. 1745 - Civil Rights Act of 1991

At the request of Phillip D. Brady, Counsel's office has reviewed the captioned Statement of Administration Policy. Changes are marked on the attached hard copy.

We appreciate the opportunity to review this matter.

cc: Phillip D. Brady

Attachment

Document No. 274679

COUNSEL'S OFFICE
RECEIVED
OCT 1 1991

WHITE HOUSE STAFFING MEMORANDUM

DATE: 09/30/91 ACTION/CONCURRENCE/COMMENT DUE BY: NOON Tuesday 10/01

SUBJECT: SAP: S. 1745 -- CIVIL RIGHTS ACT OF 1991

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* * * * *

DOJ, EEOC, LWND