MEET THE PRESS

11/25/92

November 23, 1991

MUST DO CALENDAR INCLUDES THE FOLLOWING:

Banking Bill Conference Report

RTC Reauthorization

U.I. Compromise Bill Conference Report

Highway Conference Report

C.F.E. Treaty

Medicaid Moratorium / NGA Compromise

Supplemental Conference Report

Crime Bill

BANKING REFORM TALKING POINTS
NOVEMBER 23, 1991

- LAST THURSDAY, BY VOICE VOTE, THE SENATE PASSED ITS COMPREHENSIVE BANKING REFORM LEGISLATION.

- THE LEGISLATION RECAPITALIZES THE NEARLY INSOLVENT BANK INSURANCE FUND, PROVIDES FOR REGULATORY AND EARLY INTERVENTION REFORMS TO ENSURE WE'RE NOT HERE SEVERAL YEARS FROM NOW DOING THE SAME THING, AND SETS FORTH A "COMPROMISE" ON INTERSTATE BANKING AND INSURANCE ACTIVITIES.

- IT'S NOW UP TO THE HOUSE AND SENATE TO GO TO CONFERENCE AND IRON OUT THEIR DIFFERENCES.

- GIVEN THAT THE HOUSE FAILED ON TWO OCCASIONS TO PASS A BILL AND ENDED UP APPROVING A NARROW PACKAGE ON THE THIRD TRY, I THINK THAT THE CONFEREES WILL BE PRETTY HARD PRESSED TO AGREE ON ANYTHING OTHER THAN A PRETTY NARROW PACKAGE.

- THE HOUSE HAS MADE IT PRETTY CLEAR THAT IT DOESN'T WANT COMPREHENSIVE REFORM AND THAT THE VOTES AREN'T THERE. THAT MAY BE THE CASE IN THE SENATE, TOO.

- CONGRESS' INABILITY TO REACH ANY CONSENSUS ON THESE ISSUES HAS BEEN A BLOW TO THE ADMINISTRATION WHICH HAS CONSISTENTLY ARGUED THAT INTERSTATE BANKING IS ESSENTIAL TO HELPING THE BANKING INDUSTRY GET BACK ON ITS FEET.

- THERE IS AN AWFUL LOT TO DO BETWEEN NOW AND TUESDAY. THE WORST THING THAT CONGRESS COULD DO IS TO LET ITS OWN GRIDLOCK THROW UNCERTAINTY ON OUR FINANCIAL SYSTEM AND THE BANKING INDUSTRY. A PACKAGE MUST BE AGREED UPON, AND THE FUND MUST BE RECAPITALIZED.

CREDIT CARD TALKING POINTS

- PART OF THE SENATE BANKING REFORM PACKAGE IS THE BANKCARD INTEREST RATE CAP AMENDMENT.

- FOR ME, WHILE I AM AWARE THAT BANKS NEED TO MAKE A PROFIT -- PARTICULARLY IN THESE ROUGH TIMES FOR THE INDUSTRY -- IT ALSO SEEMS THAT THE SYSTEM HAS A SHORT-CIRCUIT IN IT WHEN THE AVERAGE BANKCARD INTEREST RATE -- PRESENTLY 18.9% -- IS ALMOST FOUR TIMES THE DISCOUNT RATE, WHICH IS AT ITS LOWEST LEVEL SINCE JANUARY 1973.

- THE REAL TRICK ON THIS ISSUE IS HOW TO ADDRESS THE SHORT-CIRCUIT WITHOUT OTHERWISE HARMING THE FINANCIAL SERVICES INDUSTRY AND THE MANY VALUABLE SERVICES IT PROVIDES TO AMERICAN CONSUMERS.

- SPEAKER FOLEY HAS MADE IT CLEAR THAT THIS PROVISION WILL NOT BECOME LAW. I SUSPECT IT WON'T SURVIVE ANY CONFERENCE.

RTC TALKING POINTS

- WE ARE TOLD THAT THE RTC NEEDS ABOUT $80 BILLION TO FINISH ITS JOB OF CLEANING UP THE SAVINGS AND LOAN DEBACLE. WE ARE ALSO TOLD THAT CONGRESSIONAL INACTION IN PROVIDING MONEY TO THE RTC IS NOW COSTING AMERICAN TAXPAYERS SOMEWHERE BETWEEN $3 AND $4.5 MILLION PER DAY. THAT ADDS UP TO BETWEEN $300 AND $400 MILLION IF ACTION IS DELAYED UNTIL FEBRUARY.

- THIS PROBLEM HAPPENED A YEAR AGO WHEN THE RTC NEEDED FUNDING AND CONGRESS DELAYED THE HARD VOTE UNTIL MARCH 1991 -- ADDING ANOTHER $300 MILLION TO THE COST OF THE BAILOUT.

- IT'S HARD TO BELIEVE ALL THE BIG SPEECHES OF CONCERN OVER THE COST OF THE BAILOUT WHEN CONGRESSIONAL INACTION ADDS TO THOSE COSTS.

- ONE ISSUE THAT HAS SURFACED IS WHETHER TO PROVIDE PARTIAL FUNDING AND COME BACK AND VOTE MORE MONEY NEXT YEAR OR THE FULL $80 BILLION. OF COURSE, EVEN WITH THAT, THERE ARE NO GUARANTEES WE WON'T HAVE TO COME BACK.

- SOME HOUSE REPUBLICANS ARE DEMANDING A VOTE ON AN ECONOMIC GROWTH PACKAGE BEFORE THEY WILL SUPPORT ANY RTC FUNDING.

**Senator, this is the statement that went into the Record after the vote.

STATEMENT OF SENATOR BOB DOLE
BANKING REFORM LEGISLATION
NOVEMBER 21, 1991

MR. PRESIDENT, I RISE TO MAKE A FEW BRIEF REMARKS ON THE LEGISLATION WHICH THIS BODY HAS JUST PASSED, THE COMPREHENSIVE DEPOSIT INSURANCE REFORM AND TAXPAYER PROTECTION ACT OF 1991.

FIRST AND FOREMOST, THE LEGISLATION IS CRITICALLY IMPORTANT TO RESTORING THE DEPOSIT INSURANCE SYSTEM THAT HAS FALLEN INTO SERIOUS JEOPARDY IN RECENT YEARS. THE POINT OF THIS LEGISLATION IS NOT TO POINT FINGERS BUT TO REFORM THE SYSTEM BEFORE WE FIND OURSELVES FACING ANOTHER DEBACLE LIKE THE SAVINGS AND LOAN CRISIS FOR WHICH AMERICAN TAXPAYERS ARE NOW FOOTING THE STAGGERING BILL.

I DO NOT PRETEND TO MAINTAIN THAT THIS LEGISLATION IS PERFECT WITH RESPECT TO ALL MY CONCERNS OR THAT ALL THE INTEREST GROUPS ARE GOING TO GO HOME HAPPY. IN FACT, I SUSPECT THAT EVERY GROUP FOLLOWING THIS LEGISLATION WILL LIKELY FIND SOMETHING TO COMPLAIN ABOUT.

IN THIS CONNECTION, I WANT TO COMMEND THE VALIANT EFFORTS OF THE DISTINGUISHED CHAIRMAN, SENATOR RIEGLE, AND THE RANKING MEMBER, SENATOR GARN, WHO HAVE NOT HAD AN EASY JOB IN SEEKING TO STRIKE A FAIR BALANCE AMONG THE MANY COMPETING INTERESTS INHERENT TO THIS FAR-REACHING AND HIGHLY COMPLICATED LEGISLATION. I ALSO WISH TO COMMEND THEM FOR THEIR LEADERSHIP IN MOVING THIS LEGISLATION THROUGH TO PASSAGE.

THE WORK ON THIS LEGISLATION IS, OF COURSE, NOT OVER YET AND THERE ARE CERTAIN IMPORTANT ISSUES THAT WILL NEED TO BE CAREFULLY ADDRESSED DURING THE CONFERENCE BETWEEN THE HOUSE AND SENATE BILLS.

ONE PROVISION THAT HAS CERTAINLY RAISED A LOT OF EYEBROWS IS THE AMENDMENT PASSED BY THE SENATE WHICH IMPOSED A CAP ON CREDIT CARD RATES. I AM NOT GOING TO STAND HERE AND SAY THAT THIS PROVISION SHOULD BECOME LAW AS IT IS. INDEED, AS I HAVE PREVIOUSLY SAID ON THIS ISSUE, THERE ARE SOMETIMES MATTERS THAT CONGRESS MEDDLES WITH THAT RECOGNIZE A PROBLEM BUT WHICH PERHAPS COULD BE HANDLED A LITTLE DIFFERENTLY.

WHILE I AM WELL AWARE THAT BANKS NEED TO MAKE A PROFIT -- PARTICULARLY IN THESE ROUGH TIMES FOR THE INDUSTRY -- IT ALSO SEEMS THAT THE SYSTEM HAS A SHORT-CIRCUIT IN IT WHEN THE AVERAGE BANKCARD INTEREST RATE -- PRESENTLY 18.9% -- IS ALMOST FOUR TIMES THE DISCOUNT RATE WHICH IS AT ITS LOWEST LEVEL SINCE JANUARY 1973.

THE ISSUE FOR THE CONFEREES WILL BE HOW TO ADDRESS THIS SHORTCIRCUIT WITHOUT OTHERWISE HARMING THE FINANCIAL SERVICES INDUSTRY AND THE MANY VALUABLE SERVICES IT PROVIDES TO AMERICAN CONSUMERS. IN SO DOING, THEY WILL BE MAKING IT A LITTLE BIT EASIER FOR THE CONSUMER TO FIND A FAIR DEAL, WHILE INCREASING CONFIDENCE AND ASSISTING THIS NATION'S ECONOMIC RECOVERY.

MR. PRESIDENT, I HOPE THAT WHEN ALL IS SAID AND DONE ON BANKING REFORM LEGISLATION, THAT THIS LEGISLATION WILL BE RECOGNIZED AS HAVING PROVIDED THE URGENTLY NEEDED FINANCIAL RESOURCES TO THE DEPOSIT INSURANCE SYSTEM WITH CERTAIN MUCH-NEEDED REFORMS TO REVITALIZE THE BANKING INDUSTRY AND ENSURE ITS SURVIVAL AND PROSPERITY INTO THE NEXT CENTURY.

11/23/91

CIVIL RIGHTS -- LEGISLATIVE HISTORY

- THE ONLY LEGISLATIVE HISTORY THAT REALLY MATTERS IS THE TWO PARAGRAPHS THAT CONSTITUTE THE EXCLUSIVE INTERPRETIVE MEMORANDUM ON THE WARDS COVE ISSUES -- ISSUES LIKE THE MEANING OF THE TERM "BUSINESS NECESSITY".

- THE LANGUAGE OF THESE TWO PARAGRAPHS WAS THE SUBJECT OF INTENSE NEGOTIATIONS. THEY WERE A KEY PART OF THE COMPROMISE AGREEMENT.

- IN FACT, THE SENATE TOOK THE UNPRECEDENTED STEP OF REFERENCING THE TWO PARAGRAPHS IN THE STATUTE ITSELF. THESE TWO PARAGRAPHS ARE THE ONLY LEGISLATIVE HISTORY THAT THE COURTS SHOULD PAY ATTENTION TO.

- THE SECTION-BY-SECTION ANALYSIS INSERTED INTO THE CONGRESSIONAL RECORD BY MYSELF AND 13 OTHER REPUBLICAN SENATORS -- ON BEHALF OF THE ADMINISTRATION -- WAS DESIGNED TO COUNTER-BALANCE THE VERY LIBERAL LEGISLATIVE HISTORY PROPOSED BY SENATOR KENNEDY.

- I DON'T UNDERSTAND ALL THE RECENT EXCITEMENT OVER THE LEGISLATIVE HISTORY. DURING THE CLOSED DOOR NEGOTIATIONS LEADING UP TO THE COMPROMISE, EVERYONE AGREED THAT THERE WOULD BE DIFFERENT VERSIONS OF LEGISLATIVE HISTORY. IN FACT, WE ALL LAUGHED ABOUT IT.

- THERE IS NOTHING IN THE LEGISLATIVE HISTORY THAT I INSERTED INTO THE RECORD THAT FLATLY CONTRADICTS THE STATUTE. CAN YOU GIVE ME A SPECIFIC EXAMPLE?

- THE LEGISLATIVE HISTORY SUGGESTS THAT WE DID NOT OVERRULE ALL OF WARDS COVE. WELL, THAT'S TRUE. WE OVERRULED PORTIONS OF WARDS COVE -- SUCH AS SHIFTING THE BURDEN OF PROOF TO EMPLOYERS ON THE ISSUE OF BUSINESS NECESSITY.

- JUSTICE SCALIA IS PROBABLY RIGHT -- THE COURTS SHOULD FOCUS ON THE ACTUAL LANGUAGE OF STATUTES, NOT ON THE CONFUSING JUNGLE OF LEGISLATIVE HISTORY. AS JUSTICE SCALIA POINTED OUT, WE ARE A NATION OF LAWS, NOT A NATION OF COMMITTEE REPORTS AND LEGISLATIVE HISTORY.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

CIVIL RIGHTS ACT OF 1991

The Senate continued with the consideration of the bill.

Mr. KENNEDY. Mr. President, for the benefit of the Members, there is a final technical amendment which we expect will be cleared momentarily. We will then begin final statements on the legislation, for a period not to exceed 30 minutes, and then move to disposition of the legislation.

Mr. HATCH. Mr. President, I believe the minority leader——

Mr. DOLE. Mr. President, I would be happy to use 5 minutes of my leader time while we are waiting for clearance on that potential amendment.

The PRESIDING OFFICER. The Chair recognizes the Republican leader.

CIVIL RIGHTS COMPROMISE

Mr. DOLE. Mr. President, for nearly 2 years, President Bush has consistently expressed his willingness to accept a fair and responsible civil rights compromise.

Today, with this historic civil rights agreement, President Bush has delivered on his promise.

From day one, President Bush has been leading the charge for responsible civil rights legislation, not the grab-bag approach advocated by the beltway interest groups and the lawyers' lobby.

When the Patterson and Lorance cases were first decided in 1989, the President immediately proposed remedial legislation.

Last year the President took his civil rights commitment one step further by proposing legislation overturning four of the 1989 Supreme Court decisions and shifting the burden of proof to the employer in disparate impact cases.

This year, the President's efforts culminated with the introduction of the only pending civil rights bill that establishes a monetary remedy specifically for sexual harassment—up to $150,000.

By any standard, the President's civil rights initiative is fair, responsible, comprehensive.

It deserved to be passed last year, and it still deserves to be passed today.

THE COMPROMISE AGREEMENT

Now, there are some in the liberal media who are predictably claiming that the administration somehow gave up too much in the negotiations preceding the final compromise.

This claim is categorically false.

Throughout the negotiations, the administration had two main objectives: First, to ensure that the compromise was drafted in a way that would not force employers to resort to quotas; and second, to ensure that all damage remedies were reasonably capped.

On both counts, the administration has succeeded.

THE COMPROMISE—WARDS COVE

The compromise resolves all of the so-called Wards Cove issues, including the meaning of the term "business necessity."

For nearly 2 years, business necessity has been at the eye of the civil rights storm.

After endless hours of debate, we have finally come up with an acceptable business necessity definition.

Unlike H.R. 1 and the original version of S. 1745, the compromise does not change the "business necessity" standard as it has been defined by the Supreme Court in Griggs versus Duke Power and in subsequent Supreme Court cases.

This standard is intended to be broad and flexible enough to ensure that employers can adopt employment practices that serve a legitimate business goal.

If the business necessity standard is too tough to satisfy—like the standard in H.R. 1 and in the original version of S. 1745—rational employers would have been forced to adopt quotas in order to avoid time-consuming and expensive litigation and, I might add, endless litigation.

Fortunately, the compromise agreement defines the term "business necessity" in a way that reflects the flexible principle outlined by the Supreme Court in Griggs, in New York Transit Authority versus Beazer, and in other Supreme Court cases.

THE COMPROMISE—DAMAGES

The compromise also makes compensatory and punitive damages available for the first time in cases involving intentional discrimination, including sexual harassment.

These damages are capped, setting an important precedent for tort reform.

The caps range from a low-tier of $50,000 for businesses with 16 to 100 employees, to a high-tier of $300,000 for businesses with more than 500 employees.

Ninety-eight percent of all businesses fall within the low tier, which is much lower than the $150,000 cap contained in the President's bill.

With these caps, the incentive for frivolous lawsuits should be significantly reduced.

ONLY WAY OUT OF QUAGMIRE

Mr. President, this compromise is not perfect. It will not satisfy everyone.

But it is the best we can do under the circumstances.

The compromise may not be all things to all people, but it is the only way out of the civil rights quagmire—without producing quotas.

I want to thank my distinguished colleague from Utah, Senator HATCH, for his steadfast commitment—over the past 2 years—to fashioning a bill that will promote equal opportunity, not equal results.

I also want to congratulate my distinguished colleague from Missouri, Senator DANFORTH, who has worked tirelessly to get us where we are today.

Senator DANFORTH's leadership has been the engine driving the compromise effort.

Today, the engine has finally arrived in the station.

Mr. President, I ask unanimous consent that a section-by-section analysis representing the views of the administration, myself, and Senators BURNS, COCHRAN, GARN, GORTON, GRASSLEY, HATCH, MACK, MCCAIN, MCCONNELL, MURKOWSKI, SIMPSON, SEYMOUR, and THURMOND, be reprinted in the RECORD immediately after my remarks.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

SECTION 1. SHORT TITLE

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

SECTION 2. FINDINGS

The Congress finds that this legislation is necessary to provide additional protections and remedies against unlawful discrimination in the workplace. The Congress also finds that by placing the burden on plaintiffs to prove lack of business necessity for employment practices that have a disparate impact, rather than by placing the burden on defendants to prove the business necessity of such employment practices, the Supreme Court's decision in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights laws.

SECTION 3. PURPOSES

The purposes of this Act are to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace, to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs* v. *Duke Power Co.* and in the other Supreme Court decisions prior to *Wards Cove Packing Co.* v. *Atonio*, 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, and 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.

SECTION 4. PHOHIBITION AGAINST RACIAL DISCRIMINATION IN THE MAKING AND PERFORMANCE OF CONTRACTS

Under 42 U.S.C. 1981, persons of all races have the same right "to make and enforce contracts." In *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363 (1989), the Supreme Court held: "The most obvious feature of the provision is the restriction of its scope to forbidding discrimination in the 'mak[ing] and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, [sec.] 1981 provides no relief."

As written, therefore, section 1981 provides insufficient protection against racial discrimination in the context of contracts. In particular, it provides no relief for discrimination in the performance of contracts (as contrasted with the making and enforcement of contracts). Section 1981, as amended by this Act, will provide a remedy for individuals who are subjected to discriminatory performance of their employment con-

tracts (through racial harassment, for example) or are dismissed or denied promotions because of race. In addition, the discriminatory infringement of contractual rights that do not involve employment will be made actionable under section 1981. This will, for example, create a remedy for a black child who is admitted to a private school as required pursuant to section 1981, but is then subjected to discriminatory treatment in the performance of the contract once he or she is attending the school.

In addition to overruling the *Patterson* decision, this Section of the Act codifies the holding of *Runyon* v. *McCrary*, 427 U.S. 160 (1976), under which section 1981 prohibits private, as well as governmental, discrimination.

SECTION 5. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION

Section 5 makes available compensatory and punitive damages in cases involving intentional discrimination brought under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. It sets an important precedent in tort reform by setting caps on those damages, including pecuniary losses that have not yet occurred as of the time the charge is filed, as well as all emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, whenever they occur. Punitive damages are also capped, and are to be awarded only in extraordinarily egregious cases. The damages contemplated in this section are to be available in cases challenging unlawful affirmative action plans, quotas, and other preferences.

SECTION 6. ATTORNEY'S FEES

Section 6 amends 42 U.S.C. 1988 to authorize the award of attorney fees to prevailing parties in cases brought under the new statute (created by Section 5) authorizing damages awards.

SECTION 7. DEFINITIONS

Section 3 adds definitions as those already in Title VII.

SECTION 8. BURDEN OF PROOF IN DISPARATE IMPACT CASES

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court ruled that Title VII of the Civil Rights Act of 1964 prohibits hiring and promotion practices that unintentionally but disproportionately exclude persons of a particular race, color, religion, sex, or national origin unless these practices are justified by "business necessity." Law suits challenging such practices are called "disparate impact" cases, in contrast to "disparate treatment" cases brought to challenge intentional discrimination.

In a series of cases decided in subsequent years, the Supreme Court refined and clarified the doctrine of disparate impact. In 1988, the Court greatly expanded the scope of the doctrine's coverage by applying it to subjective hiring and promotion practices (the Court had previously applied it only in cases involving objective criteria such as diploma requirements and height-and-weight requirements). Justice O'Connor took this occasion to explain with great care both the reasons for the expansion and the need to be clear about the evidentiary standards that would operate to prevent the expansion of disparate impact doctrine from leading to quotas. In the course of her discussion, she pointed out:

"(T)he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. . . . (E)xtending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met." *Watson* v. *Fort Worth Bank & Trust Co.*, 108 S. Ct. 2777, 2787-2788 (1988) (plurality opinion).

The following year, in *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115, 2126 (1989), the Court considered whether the plaintiff or the defendant had the burden of proof on the issue of business necessity. This question had not been unambiguously resolved by the Supreme Court. The courts of appeals were divided on the issue. Compare, e.g., *Burwell* v. *Eastern Air Lines*, 633 F.2d 361, 369-372 (4th Cir.) (en banc), cert. denied, 450 U.S. 965 (1980), with *Coker* v. *Boeing Co.*, 662 F.2d 975, 991 (3d Cir. 1981) (en banc). Resolving an ambiguity in the prior law, the Court placed the burden on the plaintiff. See also *Board of Trustees* v. *Sweeney*, 439 U.S. 24 (1978) (per curiam) (resolving similar ambiguity in disparate treatment cases by placing the burden of proof on plaintiffs).

Under this Act, a complaining party makes out a prima facie case of disparate impact when he or she identifies a particular selection practice and demonstrates that the practice has caused a disparate impact on the basis of race, color, religion, sex, or national origin. The burden of proof then shifts to the respondent to demonstrate that the practice is justified by business necessity. It is then open to the complaining party to rebut that defense by demonstrating the availability of an alternative selection practice, comparable in cost and equally effective in measuring job performance or achieving the respondent's legitimate employment goals, that will reduce the disparate impact, and that the respondent refuses to adopt such alternative.

The burden-of-proof issue that *Wards Cove* resolved in favor of defendants is resolved by this Act in favor of plaintiffs. *Wards Cove* is thereby overruled. As the narrow title of the Section and its plain language show, however, on all other issues this Act leaves existing law undisturbed.

The requirement of particularity

The bill leaves unchanged the longstanding requirement that a plaintiff identify the particular practice which he or she is challenging in a disparate impact case.

The history of prior legislation introduced on this subject accords with this interpretation. This important issue, often referred to as the "cumulation" issue, has also been referred to be a number of other names: "group of practices"; multiple practices"; "particularity"; "aggregation"; and "causation."

Both S. 2104 and H.R. 4000 (from the 101st Congress), the original bills addressing this issue, would have permitted a plaintiff to sue simply by demonstrating that "a group of employment practices [defined in both bills as "a combination of employment practices that produce one or more employment decisions"] results in disparate impact." For good measure, these bills also specified that "if a complaining party demonstrates that a group of employment practices results in disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact."

This language was modified in several subsequent versions to attempt to address the objection that it would permit suit on simple proof that an employer's bottom line numbers were wrong, and hence lead employers concerned about litigation to engage in quota hiring. In all subsequent versions that passed, however, three central features were retained.

First, all the bills that passed specifically allowed plaintiffs to bring disparate impact suits in some circumstances without isolating a simple employment practice that led to the disparate impact. See H.R. 4000, as passed by less than two-thirds of the House of Representatives in 1990, which permitted suit under some circumstances on the basis of a "group of practices"; S. 2014 as vetoed by President Bush in 1990 (same); H.R. 1 as passed by less than two-thirds of the House of Representatives (same).

Second, all these bills contained a provision generally requiring the plaintiff to identify which specific practice or practices resulted in the disparate impact, but with a gigantic exception relieving the plaintiff of that obligation if he or she could not meet it, after diligent effort, from records or other information of the respondent reasonably available through discovery or otherwise. See H.R. 4000, as passed by less than two-thirds of the House of Representatives in 1990 ("(i) except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact; . . . (iii) if the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact—(I) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact; and (II) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact;"); S. 2104 as vetoed by President Bush in 1990 ("(i) except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact; . . . (iii) the complaining party shall be required to demonstrate which specific practice or practices are responsible for the disparate impact in all cases unless the court finds after discovery (I) that the respondent has destroyed, concealed or refused to produce existing records that are necessary to make this showing, or (II) that the respondent failed to keep such records; and except where the court makes such a finding, the respondent shall be required to demonstrate business necessity only as to those specific practices demonstrated by the complaining party to have been responsible in whole or in significant part for the disparate impact;") H.R. 1 as passed by less than two-thirds of the House of Representatives ("(B) If a complaining party demonstrates that a disparate impact results from a group of employment practices, such party shall be required after discovery to demonstrate which specific practice or practices within the group results in disparate impact unless the court finds that the complaining party after diligent effort cannot identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact.").

"(3) This subsection is meant to codify the meaning of 'business necessity' as used in *Griggs* v. *Duke Power Co.* (401 U.S. 424 (1971)) and to overrule the treatment of business necessity as a defense in *Wards Cove Packing Co., Inc.* v. *Atonio* (109 S.Ct. 2115 (1989))." Rejected.

House Amendment to S. 2104 (passed by House 8/3/90):

"(o)(1) The term 'required by business necessity' means—

"(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or

"(B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

"(2) In deciding whether the standards in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

"(3) This subsection is meant to codify the meaning of 'business necessity' as used in *Griggs* v. *Duke Power Co.* (401 U.S. 424 (1971)) and to overrule the treatment of business necessity as a defense in *Wards Cove Packing Co., Inc.* v. *Atonio* (109 S.Ct. 2115(1939))." Rejected.

Conference Report on S. 2104 (vetoed by the President):

"(o)(1) The term 'required by business necessity' means—

"(A) in the case of employment practices involving selection such as tests, recruitment, evaluations, or requirements of education, experience, knowledge, skill, ability or physical characteristics, or practices primarily related to a measure of job performance, the practice or group of practices must bear a significant relationship to successful performance of the job; or

"(B) in the case of other employment decisions, not involving employment selection practices as covered by subparagraph (A) (such as, but not limited to, a plant closing or bankruptcy), or that involve rules relating to methadone, alcohol or tobacco use, the practice or group of practices must bear a significant relationship to a manifest business objective of the employer.

"(2) In deciding whether the standards described in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may receive such evidence as statistical reports, validation studies, expert testimony, performance evaluations, written records or notes related to the practice or decision, testimony of individuals with knowledge of the practice or decision involved, other evidence relevant to the employment decision, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

"(3) This subsection is meant to codify the meaning of 'business necessity' as used in *Griggs* v. *Duke Power Co.* (401 U.S. 424 (1971)) and to overrule the treatment of business necessity as a defense in *Wards Cove Packing Co.* v. *Atonio* (109 S.Ct. 2115(1989))." Rejected.

H.R. 1 as introduced (Brooks):

"(o)(1) The term 'required by business necessity' means—

"(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or

"(B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

"(2) In deciding whether the standards in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

"(3) This subsection is meant to codify the meaning of 'business necessity' as used in *Griggs* v. *Duke Power Co.* (401 U.S. 424 (1971)) and to overrule the treatment of business necessity as a defense in *Wards Cove Packing Co., Inc.* v. *Atonio* (109 S.Ct. 2115(1989))." Rejected.

H.R. 1 as amended and passed by the House (Brooks-Fish):

"(o)(1) The term 'required by business necessity' means the practice or group of practices must bear a significant and manifest relationship to the requirements for effective job performance.

"(2) Paragraph (1) is meant to codify the meaning of, and the type and sufficiency of evidence required to prove, 'business necessity" as used in *Griggs* v. *Duke Power Co.* (401 U.S. 424 (1971)) and to overrule the treatment of business necessity as a defense in *Wards Cove Packing Co., Inc.* v. *Atonio* (490 U.S. 642 (1989))."

"(p) The term 'requirements for effective job performance' may include, in addition to effective performance of the actual work activities, factors which bear on such performance, such as attendance, punctuality, and not engaging in misconduct or insubordination." Rejected.

S. 1208 (Danforth):

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

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

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

"(p) The term 'requirements for effective job performance' includes—

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

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

S. 1408 (Danforth):

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

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

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

"(o) The term 'employment in question' means—

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

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

S. 1745 as introduced (Danforth):

"(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." Rejected.

All of these prior versions were rejected.

In the place of these definitions of business necessity, the compromise bill says that the challenged practice must be *"job-related for the position in question and consistent with business necessity."* Since neither term is defined in the bill, the "Purposes" section is controlling.

In its original "Purposes" clause, S. 1745 said in pertinent part that the "purposes of this Act are . . . 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.* . . ." By contrast, the compromise bill's "Purposes' clause says that "[t]he purposes of this Act are—. . . to codify the concepts of 'business necessity' and 'job-related' enunciated by the Supreme Court in *Griggs* v. *Duke Power Co.*, and in the other Supreme Court decisions prior to *Wards Cove Packing Co.* v. *Atonio.*" Thus, the bill is no longer designed to overrule the meaning of business necessity in *Wards Cove.* (Attorney General Thornburgh's October 22, 1990 Memorandum to the President had objected, at 5-6, to a provision of S. 1204 that would have overruled Wards Cove's "treatment of business necessity as a defense.") Instead, the bill seeks to codify the meaning of "business necessity" in *Griggs* and other pre-*Wards Cove* cases—a meaning which is fully consistent with the use of the concept in *Wards Cove.*

The relevant Supreme Court decisional law which is to be codified can be summarized as follows. *Griggs* said: ". . . any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432. There is no two-tier definition, no subdefinition of the term "employment in question." The Court also said in *Griggs*: "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins." *Id.* at 436.

Finally, all of these bills used some word other than "cause" in describing the relationship between the challenged practice(s) and the disparate impact. See H.R. 4000 as passed by less than two-thirds of the House of Representatives in 1990 (a complaining party may prevail by "demonstrat[ing] that a group of employment practices *results in* a disparate impact" although if he or she "can identify, from records or information reasonably available (through discovery or otherwise) which specific practice of practices *contributed* to the disparate impact" he or she must do so); S. 2104 as vetoed by President Bush in 1990 (a complaining party may prevail by "demonstrat[ing] that a group of employment practices *results in* a disparate impact", except that the complaining party "shall be required to demonstrate which specific practice or practices *are responsible* for the disparate impact" unless he or she cannot do so from the respondent's records); H.R. 1 as passed by less than two-thirds of the House in 1991 (same as H.R. 4000).

The Attorney General memorandum that accompanied President Bush's veto message of S. 2104 in 1990 specifically referenced these three features of the bill as the first argument in explaining why it had to be vetoed because it would lead to quotas. Nevertheless, the House of Representatives retained all three features in this year's H.R. 1, which contributed to continued stalemate as the Administration continued to threaten veto on the ground that the legislation would lead to quotas and the House was unable to muster a two-thirds majority in favor of the bill.

S. 1745 as introduced this year by Senator Danforth began to move away from this approach, although they were not addressed in a satisfactory manner in that bill. It required a complaining party to demonstrate that "a particular employment practice or particular employment practices (or decisionmaking process . . .) *cause[d]* a disparate impact." It also required a complaining party to demonstrate "that *each particular* employment practice causes, *in whole or in significant part*, the disparate impact" unless "the complaining party [could] demonstrate . . . that the elements of a respondent's decisionmaking process are not capable of separation for analysis" in which case "the decisionmaking process may be analyzed as one employment practice."

As finally agreed to, S. 1745 retains none of the three problematic features. It *always* requires the complaining party to demonstrate "that the respondent uses *a particular* employment practice that *causes* disparate impact." Language permitting challenge to multiple practices, or to a practice that only causes "a significant part" of the disparate impact has been eliminated. Likewise, there is no language exonerating the complaining party of the obligation to demonstrate that a particular employment practice caused the disparity if he or she cannot do so from records or other information reasonably available from the respondent.

This codification of the *Wards Cove* "particularity" requirement is consistent with every Supreme Court decision on disparate impact. In *no* Supreme Court disparate impact case has a plaintiff ever been permitted to go forward without identifying a particular practice that caused a disparate impact. All the Supreme Court cases focused on the impact of particular hiring practices, and plaintiffs have always targeted these specific practices. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (high school diploma and written test); *Albemarle Paper Co.* v. *Moody*, 442 U.S. 405 (1975) (employment tests and seniority systems); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979) (exclusion of methadone users); *Connecticut* v. *Teal*, 457 U.S. 440 (1982) (scored written test); *Watson* v. *Fort Worth Bank & Trust Co., 108 S. Ct. 2777 (1988) (subjective supervisory judgments).*

Justice O'Connor's plurality opinion in the *Watson* case, for example, is a full and accurate restatement of the law regarding particularity. Justice O'Connor stated (108 S. Ct. at 2788):

"The plaintiff must begin by identifying the specific employment practice that is challenged. Although this has been relatively easy to do in challenges to standardized tests, it may sometimes be more difficult when subjective selection criteria are at issue. Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."

Justice O'Connor then went on to explain that "[o]nce the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Id.* at 2788-89.

Significantly, Justice Blackmun, who was joined by Justice Brennan and Marshall in a concurring opinion in Watson, did not dissent from Justice O'Connor's formulation of the particularity requirement. Although Justice O'Connor's opinion on the particularity issue was quite detailed and explicit, Justice Blackmun's opinion hardly addressed that issue at all. He merely noted in a footnote at the end of his opinion (108 S. Ct. at 2797, n. 10) that "the requirement that a plaintiff in a disparate-impact case specify the employment practice responsible for the statistical disparity" cannot "be turned around to shield from liability an employer whose selection process is so poorly defined that no specific criterion can be identified with any certainty, let alone be connected to the disparate effect." Thus, Justices Blackmun, Brennan and Marshall expressly recognized "the requirement that a plaintiff in a disparate-impact case specify the employment practice responsible for the statistical disparity." These Justices would only have dispensed with that requirement if the employer's selection process was "so poorly defined" that identification of a specific selection criterion with any certainty was impossible.

The particularity requirement is only fair. For a plaintiff to be allowed simply to point to a racial imbalance, and then require the employer to justify every element of his selection practice, would be grossly unfair, and would turn Title VII into a powerful engine for racial quotas.[1]

This particularity requirement is not unduly burdensome. Where a decisionmaking process includes particular, functionally-integrated elements which are components of the same test, those elements may be analyzed as one employment practice. For instance, a 100-question intelligence test may be challenged and defended as a whole; it is not necessary for the plaintiff to show which particular questions have a disparate impact. This is the principle for which the Dothard case is cited in the agreed-upon legislative history. There, the combination of height and weight was used as a single test to measure strength.

Finally, the phrase "not capable of separation for analysis" means precisely that. It does not apply when the process of separation is merely difficult or may entail some expense—for example, where a multiple regression analysis might be necessary in order to separate the elements. It also does not apply in situations where records were not kept or have been destroyed. In such circumstances, the elements obviously are separable.

Senator Kennedy's *post hoc* suggestion at p. 15,233 of volume 137 of the October 25, 1991 daily edition of the Congressional Record that situations of this type are meant to be covered by this language is accordingly inconsistent with the language he purports to be construing. The example offered by Senator Kennedy also clearly is not included in the "exclusive legislative history" on the *Wards Cove* issues first incorporated into an interpretive memorandum agreed to that day by Senators Danforth, Kennedy and Dole before Senator Kennedy made his floor speech, and now made the exclusive legislative history by statutory provision. See sec. 8(b) of this bill.

In sum, the particularity provision of the compromise bill does exactly what the President has insisted all along that it do. It leaves the *Wards Cove* case law (which is the same as *Griggs* and all other Supreme Court cases) in place, and requires that plaintiffs identify the particular practice they are challenging.

The defendant's evidentiary standard: Job relatedness and business necessity

The bill embodies longstanding concepts of job-relatedness and business necessity and rejects proposed innovations. In short, it represents an affirmation of existing law, including *Wards Cove*.

For almost two years and through numerous legislative attempts and proposals, Congress sought to define business necessity; this bill rejects and displaces the following legislative proposals:

S. 2104 as introduced (Kennedy):

"(o) The term 'required by business necessity' means essential to effective job performance," Rejected.

S. 2104 as passed by the Senate on 7/18/90:

"(o)(1) The term 'required by business necessity' means—

"(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or

"(B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

"(2) In deciding whether the standards in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

[1] It should also be noted that in 1982 the Supreme Court held in Connecticut versus Teal that an employer cannot justify a particular practice that has a disparate impact simply by pointing to a racially balanced bottom line. So it would make no sense at all if a plaintiff could point to a racially unbalanced bottom line without identifying a particular practice.

As explained in the Attorney General's letter of June 21, 1991 to Senator Danforth, and again in the Attorney General's October 22, 1990 Memorandum to the President, this is the consistent standard applied by the Supreme Court. As the Attorney General stated to Senator Danforth, "an unbroken line of Supreme Court cases confirms" that the operative standard was " 'manifest relationship to the employment in question.' " The Court has used this phrase in *Albermarle Paper Co.* v. *Moody*, 422 U.S. at 425 (1975); *Dothard* v. *Rawlinson*, 433 U.S. at 329 (1977); *New York Transit Authority* v. *Beazer*, 440 U.S. at 587 n.31 (1979); *Connecticut* v. *Teal*, 457 U.S. at 446 (1982) (a Justice Brennan opinion); and *Watson* v. *Ft. Worth Bank and Trust*, 108 S.Ct. at 1790 (O'Connor plurality opinion for four Justices). Even Justice Stevens' dissent in *Wards Cove*, joined by Justices Brennan, Marshall, and Blackmun, cites the "manifest relationship" language at least three times as the applicable disparate impact standard. 109 S.Ct. at 2129, 2130 n.14.

Particularly significant among prior cases is the Supreme Court's 1979 decision in *New York City Transit Authority* v. *Breazer* 440 U.S. 568 (1979). This decision was well known to all sides in the negotiations and debates over the present bill. The *Beazer* case involved a challenge to the New York Transit Authority's blanket no-drug rule, as it applied to methadone users seeking non-safety sensitive jobs. A lower court had found a Title VII disparate impact violation. The Supreme Court, however, reversed: "At best, the [plaintiffs'] statistical showing is weak; even if it is capable of establishing a prima facie case of discrimination, it is assuredly rebutted by [the employer's] demonstration that its narcotics rule (and the rule's application to methadone users) is 'job related. . . .' " The Court noted that the parties agreed "that [the employer's] legitimate employment goals of safety and efficiency require the exclusion of all users of illegal narcotics. . . . Finally, the District court noted that those goals are significantly served by—even if they do not require—[the employer's] rule as it applies to all methadone users, including those who are seeking employment in on-safety-sensitive positions. The record thus demonstrates that [the employer's] rule bears a 'manifest relationship to the employment in question.' " *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432. *Id.* at 587, n. 31.

The Supreme Court's formulation in *Wards Cove* of the appropriate evidentiary standard defendants must meet is not only based upon that in *Beazer*, but is nearly identical with it. By removing the language in the purposes clause stating the bill overruled *Wards Cove* with respect "to the meaning of business necessity," by substituting the language in the compromise purposes section referring to Supreme Court decisions prior to *Wards Cove*, and by removing the definitions of business necessity or job-related and any definition of "employment in question," the present bill has codified the "business necessity" test employed in *Beazer* and reiterated in *Wards Cove*.

The language in the bill is thus plainly not intended to make that test more onerous for employers to satisfy than it had been under current law.

Furthermore, "job related for the position in question" is to be read broadly, to include any legitimate business purpose, even those that may not be strictly required for the actual day-to-day activities of an entry level job. Rather, this is a flexible concept that encompasses more than actual performance of actual work activities or behavior important to the job. See *Washington* v. *Davis*, 426 U.S. 229, 249-251 (1976). Thus, those purposes may include requirements for promotability to other jobs. There has never been any suggestion in the language or holdings of pre-Wards Cove cases that such purposes are not legitimately considered. Even Justice Stevens' *dissent* in *Wards Cove* stated the definition of business necessity quite broadly—it is required only that the challenged practice "serves a valid business purpose." 490 U.S. at 665.

Alternative practices with less adverse effect

The bill provides that a complaining party may establish that an employment practice has an unlawful disparate impact if he demonstrates the existence of an "alternative employment practice and the respondent refuses to adopt such alternative employment practice," where that demonstration is "in accordance with the law as it existed on June 4, 1989," i.e., the day before *Wards Cove* was decided.

The standards outlined in *Albemarle Paper Co.*, and *Watson* should apply.

The Supreme Court indicated in *Albemarle* that plaintiffs can prevail if they "persuade the factfinder that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s]; by so demonstrating, [plaintiffs] would prove the defendants were using their tests merely as a 'pretext' for discrimination." Any alternative practices which plaintiffs propose must be equally effective in achieving the employer's legitimate business goals. As was pointed out in *Watson:* "Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate goals." 108 S. Ct., at 2790. In making these judgments, the judiciary should bear carefully in mind the fact that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 578 (1978).

Therefore, unless the proposed practice is comparable in cost and equally effective in measuring job performance or achieving the respondent's legitimate employment goals, the plaintiff should not prevail.

SECTION 9. DISCRIMINATORY USE OF TEST SCORES

Section 9 means exactly what it says: race-norming or any other discriminatory adjustment of scores or cutoff points of any employment related test is illegal. This means, for instance, that discriminatory use of the Generalized Aptitude Test Battery (GATB) by the Department of Labor's and state employment agencies' is illegal. It also means that race-norming may not be ordered by a court as part of the remedy in *any* case, nor may it be approved by a court as a part of a consent decree, when done because of the disparate impact of those test scores. Seen *Bridgeport Guardians, Inc.* v. *City of Bridgeport*, 933 F.2d 1140 (2d Cir. 1991).

It is important to note, too, that this section in no way be interpreted to discourage employers from using tests. Frequently tests are good predictors and helpful tools for employers to use. Indeed, Title VII contains a provision specifically designed to protect the use of tests. See 42 U.S.C. 2000e-2(h). Rather, the section intends only to ban the discriminatory adjustment of test scores or cutoffs.

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

Section 10 of the bill addresses the holding in *Price Waterhouse* v. *Hopkins*, S. Ct. 1775 (1989), in which the Court ruled in favor of the woman who alleged that she had been denied partnership by her accounting firm on account of her sex. The Court there faced a case in which the plaintiff alleged that her gender had supplied part of the motivation of her rejection for partnership. The Court held that once she had established by direct evidence that sex played a substantial part in the decision, the employer could still defeat liability by showing that it would have reached the same decision had sex not been considered.

Section 10 allows the employer to be held liable if discrimination was a motivating factor in causing the harm suffered by the complainant. Thus, such discrimination need not have been the sole cause of the final decision.

The provision also makes clear that if an employer establishes that it would have taken the same employment action absent consideration of race, sex, color, religion, or national origin, the complainant is not entitled to reinstatement, backpay, or damages.

It should also be stressed that this provision is equally applicable to cases involving challenges to unlawful affirmative action plans, quotas, and other preferences.

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

In *Hansberry* v. *Lee*, 311 U.S. 32, 40-41 (1940) (citations omitted), the Supreme Court held:

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in which he is not designated as a party or to which he has not been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statutes of the United States . . . prescribe, . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require."

In *Hansberry*, Carl Hansberry and his family, who were black, were seeking to challenge a racial covenant prohibiting the sale of land to blacks. One of the owners who wanted the covenant enforced argued that the Hansberrys could not litigate the validity of the convenant because that question has previously been adjudicated, and the convenant sustained, in an earlier lawsuit, although the Hansberrys were not parties in that lawsuit. The Illinois court had ruled that the Hansberrys' challenge was barred, but the Supreme court found that this ruling violated due process and allowed the challenge.

In *Martin* v. *Wilks*, 109 S. Ct. 2180 (1989), the Court confronted a similar argument. That case involved a claim by Robert Wilks and other white fire fighters that the City of Birmingham had discriminated against them by refusing to promote them because of their race. The City argued that their challenge was barred because the City's promotion process had been sanctioned in a consent decree entered in an earlier case between the City and a class of black plaintiffs, of which Wilks and the white fire fighters were aware, but in which they were not parties. The Court rejected this argument. Instead, it concluded that the Federal

Rules of Civil Procedures required that persons seeking to bind outsiders to the results of litigation have a duty to join them as parties, see Fed. R. Civ. P. 19, unless the court certified a class of defendants adequately represented by a named defendant, see Fed. R. Civ. P. 23. The Court specifically rejected the defendants' argument that a different rule should obtain in civil rights litigation.

Under specified conditions, Section 11 of the bill would preclude certain challenges to employment practices specifically required by court orders or judgments entered in Title VII cases. This Section would bar such challenges by any person who was an employee, former employee, or applicant for employment during the notice period and who, prior to the entry of the judgment or order, received notice of the judgment in sufficient detail to apprise that person that the judgment or order would likely affect that person's interests and legal rights; of the relief in the proposed judgment; that a reasonable opportunity was available to that person to challenge the judgment or order by future date certain; and that the person would likely be barred from challenging the proposed judgment after that date. The intent of this section is to protect valid decrees from subsequent attack by individuals who were fully apprised of their interest in litigation and given an opportunity to participate, but who declined that opportunity.

In particular, the phrase "actual notice . . . apprisfing] such person that such judgment or order might adversely affect the interests and legal rights of such person," means of course that the notice itself must make clear that potential adverse effect. And this, in turn, means also that the discriminatory practice at issue must be clearly a part of the judgment or order. Otherwise, it cannot credibly be asserted that the potential plaintiff was given adequate notice. Thus, where it is only by later judicial gloss or by the earlier parties' implementation of the judgment or order that the allegedly discriminatory practice becomes clear, Section 11 would not bar a subsequent challenge. Moreover, the adverse effect on the person barred must be a likely or probable one, not a mere possibility. Otherwise, people would be encouraged to rush into court to defend against any remote risk to their rights, thus unnecessarily complicating litigation. Finally, the notice must include notice of the fact that the person must assert his or her rights or lose them. Otherwise, it will be insufficient to apprise the individual "that such judgment or order might adversely affect" his or her interests.

"Adequate representation" requires that the person enjoy a privity of interest with the later party. This is because in Section 11 both "(n)(1)(B)(i)" and "(n)(1)(B)(ii)" must be construed with "(n)(2)(D)" so that people's due process rights are not jeopardized. And the Supreme Court has stated clearly: "It 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 never had an opportunity to be heard." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 n.7 (1979).

SECTION 12. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT

Section 12 extends the protections of Title VII and the ADA extraterritorially. It adopts the same language as the ADEA to achieve this end.

In addition, the section makes clear that employers are not required to take actions otherwise prohibited by law in a foreign place of business.

SECTION 13. EDUCATION AND OUTREACH

Section 13 provides for certain educational and outreach activities by the EEOC. These activities are to be carried out in a completely nonpreferential manner.

SECTION 14. EXPANSION OF RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS

Section 14 overrules the holding in *Lorance* v. *AT&T Technologies, Inc.*, 109 S. Ct. 2261 (1989), in which female employees challenged a seniority system pursuant to Title VII, claiming that it was adopted with an intent to discriminate against women. Although the system was facially nondiscriminatory and treated all similarly situated employees alike, it produced demotions for the plaintiffs, who claimed that the employer had adopted the seniority system with the intention of altering their contractual rights. The Supreme Court held that the claim was barred by Title VII's requirement that a charge must be filed within 180 days (or 300 days if the matter can be referred to a state agency) after the alleged discrimination occurred.

The Court held that the time for plaintiffs to file their complaint began to run when the employer adopted the allegedly discriminatory seniority system, since it was the adoption of the system with a discriminatory purpose that allegedly violated their rights. According to the Court, that was the point at which plaintiffs suffered the diminution in employment status about which they complained.

The rule adopted by the Court is contrary to the position that had been taken by the Department of Justice and the EEOC. It shields existing seniority systems from legitimate discrimination claims. The discriminatory reasons for adoption of a seniority system may become apparent only when the system is finally applied to affect the employment status of the employees that it covers. At that time, the controversy between an employer and an employee can be focused more sharply.

In addition, a rule that limits challenges to the period immediately following adoption of a seniority system will promote unnecessary, as well as unfocused, litigation. Employees will be forced either to challenge the system before they have suffered harm or to remain forever silent. Given such a choice, employees who are unlikely ever to suffer harm from the seniority system may nonetheless feel that they must file a charge as a precautionary measure—an especially difficult choice since they may be understandably reluctant to initiate a lawsuit against an employer if they do not have to.

Finally, the *Lorance* rule will prevent employees who are hired more than 180 (or 300) days after adoption of a seniority system from ever challenging the adverse consequences of that system, regardless of how severe they may be. Such a rule fails to protect sufficiently the important interest in eliminating employment discrimination that is embodied in Title VII.

Likewise, a rule that an employee may sue only within 180 (or 300) days after becoming subject to a seniority system would be unfair to both employers and employees. The rule fails to protect seniority systems from delayed challenge, since so long as employees are being hired someone will be able to sue. And, while this rule would give every employee a theoretical opportunity to challenge a discriminatory seniority system, it would do so, in most instances, before the challenge was sufficiently focused and before it was clear that a challenge was necessary. Finally, most employees would be reluctant to begin their jobs by suing the employers.

Section 14 is not intended to disturb the settled law that disparate impact challenges may not be brought against seniority systems. See *TWA* v. *Hardison*, 432 U.S. 63, 82 (1977); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 65, 69 (1982; *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 (1982).

SECTION 15. AUTHORIZING AWARD OF EXPERT FEES

Section 15 authorizes the recovery of a reasonable expert witness fee by prevailing parties. See *West Virginia University Hospitals, Inc.* v. *Casey*, No. 89-994 (U.S. Sup. Ct. Mar. 19, 1991); cf. *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.* 482 U.S. 437 (1987). The provision is intended to allow recovery for work done in preparation of trial as well as after trial has begun.

In exercising its discretion, the court should ensure that fees are kept within reasonable bounds. Fees should never exceed the amount actually paid to the expert, or the going rate for such work, whichever is lower.

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

Section 16 extends the period for filing a complaint against the Federal government pursuant to Title VII from 30 days to 90 days. It also authorizes the payment of interest to compensate for delay in the payment of a judgment according to the same rules that govern such payments in actions against private parties.

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

This section generally conforms procedures for filing charges under the ADEA with those used for other portions of Title VII. In particular, it provides that the EEOC shall notify individuals who have filed charges of the dismissal or completion of the Commission's proceedings with respect to those charges, and allows those individuals to file suit from 60 days after filing the charge until the expiration of 90 days after completion of those proceedings. This avoids the problems created by current law, which imposes a statute of limitations on the filing of suit regardless of whether the EEOC has completed its action on an individual's charge.

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

Section 18 specifies that 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. Thus, this legislation makes no change in this area to Title VII of the Civil Rights Act of 1964, which states:

"It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a).

This legislation does not purport to resolve the question of the legality under Title VII of affirmative action programs

that grant preferential treatment to some on the basis of race, color, religion, sex or national origin, and thus "tend to deprive" other "individual[s] of employment opportunities . . . on the basis of race, color, religion, sex, or national origin." In particular, this legislation should in no way be seen as expressing approval or disapproval of *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), or *Johnson* v. *Transportation Agency* 480 U.S. 616 (1987), or any other judicial decision affecting court-ordered remedies, affirmative action, or conciliation agreements.

SECTION 20. ALTERNATIVE MEANS OF DISPUTE RESOLUTION

This provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods.

In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

SECTION 21. SEVERABILITY

Section 21 states that if a provision of this Act is found invalid, that finding will not affect the remainder of the Act.

SECTION 22. EFFECTIVE DATE

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

Mr. HATCH. Mr. President, I asked Senator GRASSLEY about this amendment, and he just wants to look at it. I think it will be in fine shape and it will be all right. So I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BYRD. Mr. President, I have been tied up in other matters during the debate on this bill, but I want to express my support for the Civil Rights Act of 1991. I know it has been a difficult process to bring it to this point, and I congratulate all on both sides of the aisle who have worked hard and long to move the bill to this stage.

This bill, for the first time, makes it clear that victims, of intentional discrimination on the basis of sex, religion, or disability are entitled to compensatory and punitive damages, as are victims of intentional job discrimination on the basis of race, under current law.

I do, however, have serious constitutional reservations about one part of this bill—those provisions that extend coverage of certain antidiscrimination acts to employment by the Senate. While I believe it is important for victims of discrimination to have a procedure under which they may seek redress, I believe—as I indicated by voting for the Rudman amendment—that judicial appellate review as the final step of the process is not constitutional. I strongly believe in the doctrine of the separation of powers, and I believe that such judicial review is an unconstitutional intrusion into the internal affairs of the Senate. But if coverage of these antidiscrimination laws is to be extended to the Senate, I also believe it should be extended to the judicial branch.

They employ people. Why should it not be extended to the judicial branch? Is there anyone who believes that sexual harassment has never occurred, never occurs, or never will occur in the judicial branch?

I also wish to make clear that if a rollcall vote had been taken on the Grassley-Mitchell amendment, I would have voted in favor of the amendment.

I yield the floor, and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BUMPERS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BUMPERS. Mr. President, what is the parliamentary situation?

The PRESIDING OFFICER. The Senate is considering S. 1745, and at this moment the Danforth amendment is pending.

Mr. BUMPERS. Mr. President, I want to make a few comments about this legislation, which has had such a tortuous beginning and ending, and to say that when I reflect on what has happened in civil rights in this country over the past 3 decades it has been just short of monumental.

We talk about all these bloodless revolutions that have taken place in Eastern Europe, and we are all immensely gratified by them. But I have a tendency to believe that the revolution that has occurred in this country which—was also bloodless, was even greater. But over the past 30 years it has lost some of its steam and its momentum, and while there has been no legal turning back of the clock, there has been a growing indifference in the area of civil rights.

There is an old expression that lovers can stand hatred and contempt better than they can stand indifference.

And so it is altogether proper that the Senate is considering this bill. I am very pleased that the President has agreed to it, and I am hopeful that the House will soon also sign off on it. It is a pretty dramatic and complex bill and is something of an experiment. This bill does indeed carry us further in the civil rights arena than most people would have dared believe we would go a year or two ago.

When the President continued to oppose this legislation, saying that it was a quota bill, I think he was referring to the provision in the bill that allows people to show that there is a disparate impact; in other words, that a business has a smaller proportion of minority employees than are represented in the applicant pool and that therefore businesses would hire by quotas so they could not be fairly charged with discrimination.

I prefer to believe that if there is anything about this bill that would make it lead to quotas, it is the fear, the inordinate fear of the business community in this country of the damage provisions, both compensatory and punitive which have been added to civil rights for the first time. It was often said during the rather acrimonious debate last year, and much less acrimonious debate this year, that this bill simply reversed five Supreme Court decisions. Mr. President, it does much more than that. It provides compensatory and punitive damages in cases of intentional discrimination under title VII of the Civil Rights Act. This is an immensely complex bill. Do not let anybody kid you. This is a complex bill.

Now, I am frank to tell you that last summer, when Senator DANFORTH and some people on this side of the aisle were negotiating, there were four Democrats appointed by the majority leader who played a role in these negotiations and I was one of them. But the role I played, mostly in negotiating what we hoped would be a compromise that President Bush would sign off on, was primarily in trying to negotiate damage provisions. As I said then and repeat now, the quota aspect of this bill, if there is one, is the inordinate fear of the business community of compensatory and punitive damages. I always believed that was the reason they might hire by quota, so that they could not ever be fairly accused of intentionally discriminating and face punitive damages.

It has been said to the press and perhaps on the floor that the Senator from Massachusetts and the majority leader, Senator MITCHELL, will introduce a bill to take all the caps or limits off the damage provisions once the President has signed this bill. It goes without saying that I think that is a mistake.

Now I know that there are perhaps a majority of people on this side of the aisle that will support unlimited damages. I want to point out that this bill is even more liberal with respect to damages than the one I negotiated back in July. We had agreed on $50,000 combined compensatory and punitive damages for employers with

C. Boyden Gray

Civil Rights: We Won, They Capitulated

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

To understand what happened, the public needs to know the story of an extraordinary amendment that was adopted without debate or a vote. But first we must set the stage.

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

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

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

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

Suddenly, on Thursday, Oct. 24, Sen. Edward Kennedy stunned administration negotiators by agreeing to a *Wards Cove* proposal developed by Sen. Robert Dole and transmitted through Sen. John Danforth. This option was virtually identical in substance to the president's bill and to other formulations that Kennedy and the private lobbyists for his bill had rejected time and again.

> *"The president won a clean victory for equal opportunity, and that victory will survive the current round of fictions."*

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

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

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

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

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

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

Heroic efforts to enforce the agreement would not have been required unless there had been something very significant were at stake. And there was. Buried in this dispute, as in earlier arcane debates over legal terminology, was the difference between preserving the essence of current law and creating a new quota monster. It also meant the difference between a system that will encourage kids to stay in school and a novel system of legal threats against those who reward hard work and achievement. On these fundamental issues the president won a clean victory for equal opportunity, and that victory will survive the current round of fictions about some supposed political surrender.

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The writer is counsel to the president.

Bob Dole

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

FOR IMMEDIATE RELEASE
OCTOBER 30, 1991

CONTACT: WALT RIKER
(202) 224-5358

CIVIL RIGHTS COMPROMISE

REMARKS OF SENATOR BOB DOLE PRIOR TO
FINAL PASSAGE OF COMPROMISE CIVIL RIGHTS BILL

FOR NEARLY TWO YEARS, PRESIDENT BUSH HAS CONSISTENTLY EXPRESSED HIS WILLINGNESS TO ACCEPT A FAIR AND RESPONSIBLE CIVIL RIGHTS COMPROMISE.

TODAY, WITH THIS HISTORIC CIVIL RIGHTS AGREEMENT, PRESIDENT BUSH HAS DELIVERED ON HIS PROMISE.

FROM "DAY ONE," PRESIDENT BUSH HAS BEEN LEADING THE CHARGE FOR RESPONSIBLE CIVIL RIGHTS LEGISLATION, NOT THE "GRAB-BAG" APPROACH ADVOCATED BY THE BELTWAY INTEREST GROUPS AND THE LAWYERS' LOBBY.

WHEN THE PATTERSON AND LORANCE CASES WERE FIRST DECIDED IN 1989, THE PRESIDENT IMMEDIATELY PROPOSED REMEDIAL LEGISLATION.

LAST YEAR, THE PRESIDENT TOOK HIS CIVIL RIGHTS COMMITMENT ONE STEP FURTHER BY PROPOSING LEGISLATION OVERTURNING 4 OF THE 1989 SUPREME COURT DECISIONS AND SHIFTING THE BURDEN OF PROOF TO THE EMPLOYER IN DISPARATE IMPACT CASES.

THIS YEAR, THE PRESIDENT'S EFFORTS CULMINATED WITH THE INTRODUCTION OF THE ONLY PENDING CIVIL RIGHTS BILL THAT ESTABLISHES A MONETARY REMEDY SPECIFICALLY FOR SEXUAL HARASSMENT -- UP TO $150,000.

BY ANY STANDARD, THE PRESIDENT'S CIVIL RIGHTS INITIATIVE IS FAIR, RESPONSIBLE, COMPREHENSIVE.

IT DESERVED TO BE PASSED LAST YEAR, AND IT STILL DESERVES TO BE PASSED TODAY.

ADMINISTRATION'S OBJECTIVES MET

NOW, THERE ARE SOME IN THE LIBERAL MEDIA WHO ARE PREDICTABLY CLAIMING THAT THE ADMINISTRATION SOMEHOW GAVE UP TOO MUCH IN THE NEGOTIATIONS PRECEDING THE FINAL COMPROMISE.

THIS CLAIM IS CATEGORICALLY FALSE.

THROUGHOUT THE NEGOTIATIONS, THE ADMINISTRATION HAD TWO MAIN OBJECTIVES: ONE, TO ENSURE THAT THE COMPROMISE WAS DRAFTED IN A WAY THAT WOULD NOT FORCE EMPLOYERS TO RESORT TO QUOTAS, AND TWO, TO ENSURE THAT ALL DAMAGE REMEDIES WERE REASONABLY CAPPED.

ON BOTH COUNTS, THE ADMINISTRATION HAS SUCCEEDED.

THE COMPROMISE -- WARDS COVE

THE COMPROMISE RESOLVES ALL OF THE SO-CALLED WARDS COVE ISSUES, INCLUDING THE MEANING OF THE TERM "BUSINESS NECESSITY."

FOR NEARLY TWO YEARS, BUSINESS NECESSITY HAS BEEN AT THE EYE OF THE CIVIL RIGHTS STORM.

AFTER ENDLESS HOURS OF DEBATE, WE HAVE FINALLY COME UP WITH AN ACCEPTABLE BUSINESS NECESSITY DEFINITION.

(more)

UNLIKE H.R. 1 AND THE ORIGINAL VERSION OF S. 1745, THE COMPROMISE DOES NOT CHANGE THE "BUSINESS NECESSITY" STANDARD AS IT HAS BEEN DEFINED BY THE SUPREME COURT IN GRIGGS VERSUS DUKE POWER AND IN SUBSEQUENT SUPREME COURT CASES.

THIS STANDARD IS INTENDED TO BE BROAD AND FLEXIBLE ENOUGH TO ENSURE THAT EMPLOYERS CAN ADOPT EMPLOYMENT PRACTICES THAT SERVE A LEGITIMATE BUSINESS GOAL.

IF THE BUSINESS NECESSITY STANDARD IS TOO TOUGH TO SATISFY -- LIKE THE STANDARD IN H.R. 1 AND IN THE ORIGINAL VERSION OF S. 1745 -- RATIONAL EMPLOYERS WOULD HAVE BEEN FORCED TO ADOPT QUOTAS IN ORDER TO AVOID TIME-CONSUMING AND EXPENSIVE LITIGATION.

FORTUNATELY, THE COMPROMISE AGREEMENT DEFINES THE TERM "BUSINESS NECESSITY" IN A WAY THAT REFLECTS THE FLEXIBLE PRINCIPLE OUTLINED BY THE SUPREME COURT IN GRIGGS, IN NEW YORK TRANSIT AUTHORITY VERSUS BEAZER, AND IN OTHER SUPREME COURT CASES.

THE COMPROMISE -- DAMAGES

THE COMPROMISE ALSO MAKES COMPENSATORY AND PUNITIVE DAMAGES AVAILABLE FOR THE FIRST TIME IN CASES INVOLVING INTENTIONAL DISCRIMINATION, INCLUDING SEXUAL HARASSMENT.

THESE DAMAGES ARE CAPPED, SETTING AN IMPORTANT PRECEDENT FOR TORT REFORM.

THE CAPS RANGE FROM A LOW-TIER OF $50,000 FOR BUSINESSES WITH 16 TO 100 EMPLOYEES, TO A HIGH-TIER OF $300,000 FOR BUSINESSES WITH MORE THAN 500 EMPLOYEES.

98% OF ALL BUSINESSES FALL WITHIN THE LOW TIER, WHICH IS MUCH LOWER THAN THE $150,000 CAP CONTAINED IN THE PRESIDENT'S BILL.

WITH THESE CAPS, THE INCENTIVE FOR FRIVOLOUS LAWSUITS SHOULD BE SIGNIFICANTLY REDUCED.

ONLY WAY OUT OF QUAGMIRE

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

BUT IT IS THE BEST WE CAN DO UNDER THE CIRCUMSTANCES.

THE COMPROMISE MAY NOT BE "ALL THINGS TO ALL PEOPLE," BUT IT IS THE ONLY WAY OUT OF THE CIVIL RIGHTS QUAGMIRE -- WITHOUT PRODUCING QUOTAS.

I WANT TO THANK MY DISTINGUISHED COLLEAGUE FROM UTAH, SENATOR HATCH, FOR HIS STEADFAST COMMITMENT -- OVER THE PAST TWO YEARS -- TO FASHIONING A BILL THAT WILL PROMOTE EQUAL OPPORTUNITY, NOT EQUAL RESULTS.

I ALSO WANT TO CONGRATULATE MY DISTINGUISHED COLLEAGUE FROM MISSOURI, SENATOR DANFORTH, WHO HAS WORKED TIRELESSLY TO GET US WHERE WE ARE TODAY.

SENATOR DANFORTH'S LEADERSHIP HAS BEEN THE ENGINE DRIVING THE COMPROMISE EFFORT.

TODAY, THE ENGINE HAS FINALLY ARRIVED IN THE STATION.

###

Crime

November 23, 1991

CRIME BILL

- The delay in going to Conference was a result of Democrats insisting on naming more Senators than they were entitled. Under the ratio of 5 - 3, Democrats would control 63% of the Members while holding only 57% of the Senate. Appointing the full Committee as Conferees would result in a 57%, the exact ratio of the Senate.

- While this may seem unimportant, the difference is that Democrats are worried about getting the Crime Bills into Conference, Republicans are worried about getting a good tough Crime Bill out of Conference. Since the vote is rigged, we will probably end up with nothing but lip service being given to the very real problem of street crime and the protection of law abiding citizens -- just like we ended up with last year.

CRIME, DRUG, AND GUN CONTROL: COMPARISON OF MAJOR OMNIBUS BILLS OF THE 102d CONGRESS

SUMMARY

The report compares significant provisions of crime, drug, and gun control legislation under consideration by the 102d Congress. Bills included in this comparison are: S. 1241 as passed by the Senate (July 11, 1991); H.R. 3371 as passed by the House (October 22, 1991); and an Administration bill (introduced in the House as H.R. 1400 and in the Senate as S. 635).

All three proposals are broad in scope, the Senate bill having 49 titles, the Administration bill eleven, and the House bill twenty-five. They are similar insofar as they each seek, in a number of respects, to expand the Federal role in the nation's crime control efforts. The bills all to some degree increase penalties for the criminal use of firearms; expand the number of Federal crimes punishable by death; provide for changes in habeas corpus procedure intended to expedite review of capital cases; add new offenses subject to Federal jurisdiction; and increase penalties for violent crimes and drug trafficking. However, they each have unique provisions and in some instances propose significantly divergent approaches to the issues addressed. Among the differences are the following:

- **Firearms.** *S. 1241* expands Federal regulation of military-style semiautomatic firearms ("assault weapons"). By floor action, similar provisions in *H.R. 3371* as reported were stricken. Both *S. 1241* and *H.R. 3371* provide for the screening of handgun buyers (H.R. 7, the "Brady Bill", was incorporated by floor amendment into *H.R. 3371)*; but *S. 1241* also contains provisions designed to achieve a national system for instant identification of felons and other high-risk individuals, which could be used at the point-of-purchase by gun dealers, after which the Brady waiting period feature would be eliminated. *S. 1241* also establishes potential Federal jurisdiction over virtually all gun crimes and a Federal death penalty for murder committed with a firearm. Except for a ban on large-capacity magazines, a proposal also generated by the assault weapon issue, the Administration bill has no similar provisions.

- **Habeas Corpus.** *H.R. 3371* expands the retroactive application of new Supreme Court decisions to Federal habeas proceedings initiated by State prisoners; *S. 1241* and the *Administration bill* do not, and they bar Federal habeas relief where State courts have given a constitutional or other claim a full and fair hearing.

- **Exclusionary Rule.** *S. 1241* codifies the good faith exception (reliance on a warrant) developed in Federal case law related to the Fourth Amendment "Exclusionary Rule." Both the *Administration bill* and *H.R. 3371* also include warrantless searches within the exception, and the *Administration bill* further includes guns seized as evidence.

- **Racially Discriminatory Capital Sentencing.** Both the *Administration bill* and *H.R. 3371* require procedures to provide for color-blind capital sentencing without statistical tests. *S. 1241* contains no comparable provisions.

- **Federalization of Crime.** Although all three bills would in varying degrees extend Federal criminal jurisdiction and involvement in crime control measures, only *S. 1241* would make it possible to prosecute in a Federal court the perpetrator of any violent or drug trafficking crime, under State law, if during and in relation to the offense he possessed a deadly or dangerous weapon or device.

- **New Funding Authorizations.** *S. 1241* contains new appropriation authorizations for fiscal year 1992 totalling approximately $2.1 billion, including $400 million for a new Police Corps program, $850 million for the construction and operation of Federal and non-Federal prisons, $550 million for Federal law enforcement agencies, $400 million for a national Felon Identification System (intended for use in identifying proscribed firearm purchasers), $300 million for a new drug emergency areas program, and $150 million for youth violence and rural crime initiatives. A similar total for *H.R. 3371* is in the range of $1.2 billion, including $100 million for each of three new programs (substance abuse treatment programs in State prisons, safe schools, and drug testing of arrestees), $150 million for a community policing program, $200 million for alternatives to prison, $300 million for drug emergency areas, and approximately $100 million for the Drug Enforcement Administration. The *Administration bill* contains no provisions for new or increased funding authorizations.

SIDE-BY-SIDE COMPARISON OF CERTAIN PROVISIONS INCLUDED IN THE SENATE AND HOUSE CRIME BILLS

ISSUE	SENATE BILL BILL S.1241	HOUSE BILL H.R. 3371
Death Penalty	Establishes constitutional procedures to implement death penalty at federal level. Meets procedural requirements as mandated by the Supreme Court. Contains D'Amato provision which makes murder with a gun a federal death penalty offense. (support)	*Contains the President's *tough death penalty. *It has language to *limit appeals which *Sen. Biden blocked in *the Senate. (support) * * * * * *
Habeas Reform	Broad reform which limits Federal court interference with State court cases and eliminates abuses typical of habeas prisoner petitions Toughest habeas reform to ever have passed the Senate	*Reform effort which, in *effect, would *ultimately lead to more *litigation and abuse *than currently exists. *It expands death row *inmates' rights.(oppose) * *
Exclusion-ary Rule Reform	Contains weak exclusionary rule which is worse than current law. (oppose)	*Codifies Leon decision on *good faith searches made *pursaunt to a warrant and *extends the exception to *warrantless searches. *(support). * *
Firearms	Contains both a waiting period provision and a ban on certain semi-auto. firearms.	*Contains no waiting *period or ban on semi- *automatic firearms. *weapons and *bans export of semi- *automatic weapons. * *
Confessions	No provision	*Overturns major Sup. Ct. *decision which aided *prosecutors by expanding *the admissability of *certain confessions. *(oppose) * *
Funding	Requires federal funding for States which is equal to amount given to death row lawyers. (support)	*Identical provision. * *

Other provisions which must be resolved include: (1) police bill of rights; (2) forfeiture provisions; (3) victims' provisions; (4) increased authorizations; (5) gambling issues.

TO: Senator Dole
Sheila

FR: Kerry

RE: Status of Crime Bill Conference

*To date, no first meeting of the conference has been set, and the Democrat committee staff has not called the Republican committee staff to begin any negotiations.

*The Republican Judiciary staff is operating under the assumption that the Democrats are putting together a bill this weekend, and will call a conference on Monday, and ram the bill through.

*They are working with DOJ to prepare a Republican bill, including the best provisions on capital punishment, habeas corpus, exclusionary rule, etc., which could be used in pointing out the differences between the Democrat approach, and a Republican "tough on crime" approach.

*Whit and others have picked up information, however, that Jack Brooks wants to keep the bill in conference until next year, to give the NRA folks more time to line up their troops against the gun provisions.

HOUSE REPUBLICAN LEADER'S TASK FORCE ON JOBS AND ECONOMIC GROWTH
REP. MICKEY EDWARDS, CHAIRMAN

DEFICIT NEUTRAL PACKAGE for
JOBS, SAVINGS, INVESTMENT, and HOMEOWNERSHIP
(As Adopted by the House Republican Conference, November 22, 1991)

- Increase Social Security Earnings Limit.
- HR 2550 LEAP apprenticeship provision.
- Repeal Excise Tax on Boats, Aircraft, etc.
- Middle Income Savings Plan. Interest income exclusion on savings.
- IRA Plus. Allow tax free withdrawal at maturity.
- Expensing Capital Investments for Small Business. Increase from current $10,000.
- Capital Gains Rate Differential. As advanced by the Administration.
- 50% Capital Gains Exclusion on Venture Capital Investments. Taxpayer invests in new ventures and holds for 5 years.
- Prospective Indexing of Capital Gains.
- Partial Repeal of Passive Loss Rules.
- No-Penalty on IRA withdrawal for 1st-time home buyer.
- Treat Loss on Sale of Principal Home as a Capital Loss.

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To Clarkson

According to House Conference Staff, House Republicans have not decided whether to move this as a "stand alone" package. For now they intend to offer it as an amendment to RTC.

TDO 11/22/91

Highway inaction threatens jobs

106,000 at risk if Congress fails to pass transit funding.

The Associated Press

WASHINGTON — About 106,000 jobs throughout the country could be lost by the end of the year if Congress doesn't act quickly to restore the flow of federal highway and transit money to the states, the Bush administration projects.

The potential job losses come as the country is trying to pull itself out of recession and fighting the highest unemployment rates in five years.

California faces the biggest losses, according to the estimates, made available by the Transportation Department. Many states would be affected to some degree.

According to the list, Kansas would lose $10,090,000 and 605 jobs. Missouri would lose $73,000,000 and 4,380 jobs.

And things could worsen.

The American Association of Highway and Transportation Officials projects a loss of 409,000 jobs throughout the economy if highway spending is not quickly restored.

Highways and jobs

States that would feel the greatest impact of the government failure to pass new highway and transit legislation.

	Reduced Program Spending	Jobs at stake
Arkansas	$48 million	2,880
California	$269.7 million	16,182
Colorado	$52 million	3,720
Illinois	$101 million	8,080
Iowa	$70.8 million	4,428
Louisiana	$53.3 million	3,188
Michigan	$112.7 million	6,762
Missouri	$73 million	4,380
Texas	$68.3 million	4,098
Wisconsin	$60 million	3,600

Source: Department of Transportation AP

The association estimates that the ripple effect could reach $27.8 billion in terms of lost productivity, contracts and employment opportunities. It says these effects would take about a year to be fully felt.

Tom Larson, head of the Federal Highway Administration, said his agency estimated worst-case job losses in the 600,000 range if spending authority is not restored soon.

Congress is struggling to pass highway and transit authorization legislation to replace the five-year bill that expired Sept. 30. Without the authority to spend highway money, about $1.7 billion in aid to states cannot be allocated for the final quarter of 1991.

So far agreement has been reached on the overall dimensions of the measure, pegging spending at $151 billion over six years. But differences remain on a host of major and minor provisions.

Trying to increase pressure on Congress to pass a bill, the Transportation Department on Wednesday issued a four-page document illustrating what it called a crisis situation. Delays in passing legislation have created "a drag on economic recovery," the department said.

Without the legislation, the document said, "14,000 lane-miles of pavement would not be rehabilitated, 1,700 lane-miles of capacity would not be added and 1,000 bridges would not be rehabilitated."

November 22, 1991

REPUBLICAN TASK FORCE

TALKING POINTS

- Today's bill is the product of a year's worth of work on the part of the Republican Health Task Force.
- The most critical element of our proposal is the use of incentives and flexibility rather than mandates.
- We believe that given the chance small business, the self-employed and many individuals will avail themselves of health insurance coverage.
- The problems confronting us are multifaceted, calling for multifaceted solutions. We can help some people purchase private insurance while still others will need even broader subsidies and probably full coverage under a public program.
- Ours is not a perfect plan nor the only plan. A number of Republicans, like Senators Durenberger and Domenici have introduced individual bills that merit our attention.
- Our proposal is meant to lay out a series of important principles. Not all of us agree on all aspects of the plan -- nor do we agree on the financing. But be assured, we are committed to paying for whatever we do.
- We have not sought out the endorsement of the Administration. But, we are hopeful that the principles we lay out, and those that are put forward in a number of other bills introduced by Republicans, will give the White House a basis upon which they might build their own proposal.

November 7, 1991

SENATOR DOLE FLOOR STATEMENT
ON REPUBLICAN HEALTH TASK FORCE BILL

Mr. President, Washington is a city full of agendas. But if one dominates the list, it is health care. After years of neglect, it's time has come. Just turn on the evening news, or pick up any newspaper, or attend any town meeting, as I have over the past months, and what you see and hear is Americans concerned about health care and wanting us to do something.

And for good reason. Health care costs have run amok. The number of uninsured has grown. And the middle class are getting more and more concerned about the security and affordability of health care. When I read recent polls indicating that 90% of the American people feel our health care system needs fundamental change, I believe it.

A number of reform proposals to revamp the current system are kicking around Capitol Hill -- my latest count is 24. There's also been a flood of reform proposals that have poured out of business, labor, medical, insurance, and grassroots organizations.

But conventional wisdom among government and industry experts says that meaningful, comprehensive reform is at least 3 to 5 years away.

What's blocking action? There's a lot of finger-pointing going on right now. Democrats point to the White House. Others point to a Democrat-controlled Congress. Doctors point to the lawyers. Insurance companies point to wasteful hospitals and doctors who charge too much. Small business points to the insurance companies. Interest groups point to a lack of consensus. Everyone talks about the how complex the issue is. And meanwhile, the American people watch in frustration as their coverage dwindles, or even disappears in some cases, and costs go higher and higher.

It's time to stop pointing fingers -- there's plenty of blame to go around -- and it's time to really do something. I don't mean it's time to just talk about doing something, I mean, it's time to introduce a bill that will actually pass -- that will have the support of the President and Congress -- from members on both sides -- and that will become law.

Mr. President, today my Republican colleagues and I are introducing a bill that I think has a fighting chance of doing just that.

A year ago, the Republican members of this body formed a Health Care Task Force, ably chaired by the distinguished senator from Rhode Island, Senator Chafee.

For the past year, the Task Force met every week searching for ways to curb the ever-rising health care costs, and to expand access for the millions of Americans now without insurance.

Our discussions have been frank and comprehensive. Did we agree on every point? Of course not. Have we solved the crisis? Not completely. But what we have done is put together a meaningful package that will improve health care for Americans.

We must remember, comprehensive, sweeping reform is going to take some time. Anyone who says it will happen this year, or even next year is either inexperienced and naive, or is simply not stating the truth.

The financial resources to restructure the system are just not there. Simply put, the government is broke. And most of the states are running in the red as well. That's why the Democrats keep talking about taxing business -- because that's what those "pay or play" proposals really are -- a tax on business.

If it's our intention to bankrupt the employers of our nation, particularly small employers, some of which are already operating on the margin -- then it's the right solution. Or if it's our intention to ravage the economy and force people out of work -- then the proposals we've seen come forward by the Democrats are the right solution.

But, that's not our intention. Our goal is to curb runaway health care costs that are consuming more and more of our gross national product. Our goal is a health care system accessible to all Americans. And our goal is to have health care reform that preserves the assets of our system -- assets we often don't hear about -- like unparalleled high quality health care delivered by our health professionals.

The most critical element of the proposal before you is the use of incentives versus mandates. We continue to believe that, given the chance, small business, the self-employed, and many individuals will seek to protect themselves or their employees. Our bill seeks to do just that through the use of tax credits and reforms in small market insurance.

Additionally, our bill recognized the multifaceted nature of the problems confronting us. Some people can be helped through the use of tax credits. Others will benefit through the expansion of the community health clinic program, while still others will avail themselves of coverage under the state publically financed program.

I should also note that there is special attention given to the real needs of rural populations. The bill not only increases the funding for community health clinics, it also increases

funding for the National Health Service Corps., which will translate into more health care providers for rural areas.

Our bill also has many strong provisions to contain skyrocketing costs. We believe that $15 billion could be saved each year by reform of the medical liability laws. We've also made provisions for small market insurance reform and the creation of purchasing groups.

These are just a few of the innovations included in our bill. As a group, the Task Force had to resist the temptation to throw out the entire system and start over, or to propose radical reforms which have no chance of passing. I believe our approach is both reasonable and responsible.

Mr. President, I also would like to note that while the proposal we are introducing today focuses on acute care services, long-term care is still a priority.

In August, Senator Packwood and I introduced a long-term care bill that addresses the needs of many of our older Americans. It provides for both home and community-based long-term care services, as well as nursing home care. And most importantly, it significantly improves access to long-term care for a larger segment of our senior population. Unfortunately, we have yet to see any action on our proposal.

FINANCING

And now, Mr. President, let me turn to the question which must be asked of any legislation in these times of thinning budgets. How are we going to pay for the bill?

Mr. President, you can be certain, that as a group, we are fully committed to seeking a responsible financing mechanism. One area that looks particularly promising to me is the placing of a reasonable limit on the tax deductibility of health benefits provided by employers.

Our current system of unlimited tax-free health benefits not only strips away incentives to contain costs and to consume cautiously, it also results in a loss of revenue to the U. S. Treasury of almost $40 billion per year. This is only one financing mechanism that is a viable option. There are others. I am confident that a financing mechanism will be found. And, I can assure you, it will be done so <u>without</u> adding to our federal deficit.

CONCLUSION

Mr. President, I realize that our bill today does not solve all of our health care system's shortcomings. But I believe it significantly moves us forward in the right direction toward greater access with decisive cost containment measures. What it

does not do is have the government take on volumes of new regulations, huge deficits, or massive tax increases on our business people.

It is quite different than the Canadian system that some seemed to be so fascinated with. It is also quite different from the leading Democratic proposals with all of their mandates.

If you're looking for a health care bill that will actually help the American people, without wreaking havoc on the economy, I think this bill looks pretty good. On the other hand, if you're looking for an excuse to expand the government and weaken our businesses, look elsewhere.

BILL # S1936

THE HEALTH EQUITY AND ACCESS IMPROVEMENT ACT OF 1991

Sponsors:
SENATOR JOHN H. CHAFEE
Senator Robert Dole
Senator John McCain
Senator Arlen Specter
Senator Christopher S. Bond
Senator William S. Cohen
Senator John C. Danforth
Senator Frank H. Murkowski
Senator Slade Gorton
Senator Mitch McConnell
Senator Ted Stevens
Senator Larry Pressler
Senator Alan K. Simpson
Senator Malcolm Wallop
Senator John W. Warner
Senator Connie Mack
(partial list)

SUMMARY:

The Issue:

American health care is admired throughout the world for its sophistication and quality. Yet it is under attack at home. Why?

** In 1990 it is projected that $660 billion -- almost $2 billion per day -- was spent in the US on health care: more per capita than any other industrialized nation.
** Yet between 31 and 37 million people, almost half of them children, may be unable to get needed health care services because they lack health insurance or live in an area without easy access to affordable health care providers.
** While we spend more on health care than any other nation, we lag behind many countries in key measurements such as infant mortality and life expectancy.
** Our businesses are faced with skyrocketing costs for employee coverage. In recent years, one of the primary causes of labor-management disputes has been disagreement over the cost of insurance premiums. Many small employers find it almost impossible to offer health care coverage to employees.

Our system, however, does have many strong points.

** Approximately 85% of all Americans do have some form of health insurance.
** Our system allows patients to have choices about where they receive care.
** There are few lines for health care among those who are covered.

** Our medical technology is among the best in the world.

The Health Equity and Access Improvement Act of 1991:

This package of proposals represents an effort by Senate Republicans to develop a fair and equitable health care strategy designed to address the health care needs of Americans by enhancing the benefits of our system and correcting its deficiencies from both the accessibility and cost perspectives. To achieve this the Task Force has developed a proposal that builds on our present system to both hold down skyrocketing costs and expand access to health care services.

Major points of proposal:

** The proposal recognizes that our system needs to be modified to promote fairness, to respond to the needs of those it does not adequately serve, and to otherwise prevent further erosion. It reforms health insurance practices and federal tax policies to ensure that individuals, small employers and their employees are treated fairly in comparison to large employers and their employees.

** The proposal ensures that innovative and creative alternatives to traditional health insurance plans are given a fair opportunity to evolve in both the private and public sectors.

** It includes reform of medical liability laws that have an impact on how care is provided and on the rising cost of health care.

** It is designed to encourage the development of better and more responsive methods of delivering health

care services (e.g., health centers or other primary care providers vs. emergency rooms).

** The proposal maintains individual choice.

COST CONTAINMENT:

One of the most critical elements of health care reform is to develop methods to slow the trend of skyrocketing medical costs. The proposal addresses this aspect of the issue in a variety of ways:

1. Medical Liability Reform. A conservative estimate sets the cost of medical liability at $15 billion annually. It is estimated that this accounts for roughly 15% of our total expenditures on physician services. The RHCTF proposal would reform our liability system by encouraging development of alternative dispute resolution systems thereby lowering court costs and backlogs as well as increasing access to the liability system for those with small claims; encouraging early settlements whenever possible; preempting state tort law in certain areas; sending punitive damage awards to consumer protection agencies and state disciplinary boards; and strengthening the ability of states to ensure that the quality of care provided by physicians and other health care professionals remains high.
2. Managed Care. Businesses and insurers continue to develop effective methods to contain the growth of their medical costs. One such effort is through managed care arrangements ranging from simple pre-admission screening to full-scale HMOs. The proposal would encourage the development of such arrrangements through tax credits and preemption of state anti-managed care laws for approved managed care plans.

3. Insurance. Currently, a small business purchasing health insurance for its employees faces a series of insurance practices which result in premium costs which are much higher than those large businesses pay. The proposal reforms some of those practices and also encourages the development of small group purchasing organizations giving them the ability ability to negotiate due to greater market share.
4. Prevention: Expands existing public programs which have a focus on primary and preventive care such as Community Health Centers and the Childhood Immunization Program. Also creates a new tax credit for individuals who receive preventive services including cancer screening, immunizations, and well child care.

EXPANSION OF ACCESS TO HEALTH CARE:

1. Tax credits for individuals. Approximately three-quarters of those who are uninsured have family incomes below $30,000 annually. To assist these families in their attempt to find adequate and appropriate health care, the proposal creates a tax credit (which is completely phased out at $32,000 in income for a family, $16,000 for an individual) of $1,200 for a family and $600 for an individual. This credit can be used for the purchase of health insurance as well as health care services.
2. Tax credits for small business. About 40% of those who are uninsured are employed by a small business. The proposal would provide tax credits to small businesses which begin to provide health insurance to employees as well as to those which extend coverage to include dependents. In addition, those employers

which join a purchasing group (as defined in the bill) will receive a tax credit.

3. Tax deductibility. Those who receive employer provided health benefits pay no tax on any employer contribution to the premium. On the other hand, an individual who does not receive employer-based insurance not only will pay more for insurance because he is purchasing it outside of a group, but also will pay for it with after-tax dollars. Thus, we are subsidizing health care for a significant number of upper and middle-income individuals. Workers in businesses that do not provide insurance, usually low-wage workers in the service industry or seasonal workers, do not receive this subsidy. The proposal would create equity in the tax code, and encourage the purchase of health insurance by making the cost deductible for 1) those without employer-provided insurance; and 2) those who are self-employed.

4. Expansion of Public Health Service Programs. The proposal would expand Community Health Centers and the National Health Service Corps -- these two expansions would ensure that health care services would be available to at least an additional 7.5 million people over the next five years. The proposal would also increase funding for the immunization program. In addition, the proposal would create a new program to help develop cost-effective health delivery systems in medically underserved areas -- in both urban and rural areas.

5. Creation of new public program for those not eligible for Medicaid (but below 200% of the federal poverty level). States would be given the option of filling its health insurance gaps through a program for which they may set eligibility, services, and delivery of

care. A federal match would be available and the federal government would ensure that the quality of care is high. States would be able to focus this program on preventive and primary care.

6. Series of improvements in existing programs to increase access to health care services in rural areas.
7. State Flexibility. This would give states the ability to restructure existing health care delivery systems and reimbursement so that they can expand access to health care. The proposal would set up a mechanism under which states could propose to combine current entitlement and public health service health care funding to develop such systems.