M E M O R A N D U M

TO: Terry
FROM: Marc
DATE: August 10, 1988
SUBJECT: **Congressional Exemption from Civil Rights Laws**

Background

Congress is currently exempt from a number of laws governing employer behavior, including the Civil Rights Act of 1964, and the Occupational Safety and Health Act of 1970. This situation has recently been subject to press inquiry as it has been discovered that workers in the House folding room have been subject to unsafe working conditions, and are not eligible for overtime pay. Furthermore, the four to one ratio of women to men in low-paying Capitol Hill jobs has come to the attention of several Representatives, most notably Lynn Martin and Patricia Shroeder. Two bills, intending to rectify this problem are currently pending in Senate Committees, while the House Subcommittee on Administrative Personnel and Police held hearings on this issue August 10, 1988.

S. 2299

Sen. Leahy's Fair Employment in Congress Act repeals the Congressional exemption from the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, the Age Discrmination in Employment Act of 1972, and the Occupational Safety and Health Act of 1970. S. 2299 also includes Congress in the Civil Service Reform Act of 1978, giving Congressional employees the same rights as other federal employees. These include the right to organize, bargain with management, complain about unfair labor practices, and seek fair settlement of grievences. This bill also includes Congress in the Fair Labor Standards Act of 1938 and the Equal Pay Act, making Congress subject to the equal pay provisions of these laws. S. 2299 has seven cosponsors, yet is still pending in the Committee on Govermental Affairs, with no chance of reaching the floor this year. As Sen. Leahy has introduced similar legislation for the past ten years, it likely that he will do so again in the 101st Congress.

The major problem with this broad-ranging bill it may violate the separation of powers doctrine. A number of legislators, most notably Rep. Wright, consider that the courts, in course of making rulings on employment discrimination, would have unprecedented power in controlling the federal legislature. Furthermore, politically-motivated judges could harass legislators by staging very public investigations of civil rights abuses. Rep. Wright considers that legislators do not discriminate in employment, as their actions are constantly scruntinized by the press and public.

S. 2428

Sen. Boschwitz's Congressional and Judicial Equal Opportunity Act of 1988 adds a section to the employment discrimination provision in Title VII of the Civil Rights Act of '64. It states that

federal legislative and judicial personnel actions, relating to employees in non-competitve positions, are subject to this law. Competitive positions are those is which a standardized civil service exam is administered, and these workers are already included in the employment discrimination clauses. Under S. 2428, legislators would still be permitted to take an applicant's political affiliation and residency into account. This bill does not affect OSHA or any other civil rights laws.

While this bill is limited in scope, it attempts to solve the problem of separation of powers by establishing an Employment Review Board, whose sole purpose is to investigate discrimination in legislative personnel actions. This Board is comprised of retired Supreme and Federal Court judges who are appointed for investigating and deciding employment discrimination cases.by the Chief Justice as well as the majority and minority leaders of both houses of Congress. The bill establishes a complicated process by which discrimination claims may be investigated. The main purpose of this process appears to be to insulate individual legislators from any negative effects of an investigation. For example, in cases relating to discrimination in the Senate, the Secretary of the Senate is named as the defendant, and any fines levied are paid out of a central fund.

This bill is pending in the Labor and Human Resources Committee, and has four cosponsors.

The Lankford letter deals with this issue.

CRS

Congressional Research Service
The Library of Congress

TO THE HON: Robert Dole

ATTN: Maureen West

The attached information is forwarded in response to your inquiry.

Sincerely,

Joseph E. Ross
Director

RE: Information on the ADA and the Civil Rights Act re congress.

Mary V. Wright
77541

Editorial

The Civil-Rights-For-Everyone-But-Hill-Employees Act of 1990

The Civil Rights Act of 1990, now moving through committee on the House side, is certain to generate more sanctimonious posturing than any piece of legislation we'll see all year. It's not our intention here to discuss its overall merits. We'd like to make a more simple point: If America needs a new civil rights law, then Congress needs one too. There is no reasonable excuse in the world why Congress cannot give its own employees the same protections that it wants private employers to give theirs under this bill. And yet, last month, the House Education and Labor Committee, that bastion of progressive ideals, rejected an amendment to do just that. The vote on May 3 was overwhelming: 21 against, 9 in favor, and 2 present. It was a shameful episode in hypocrisy.

Much of the debate was technical and skirted the simple issue of barring racial discrimination in the Congressional workplace. For example, that old shibboleth about separation of powers came up repeatedly. Certainly, there's a problem in allowing the executive branch to administer a law that applies to the legislative branch. But Congress easily handled this matter in the recent Americans With Disabilities Act and last year's Minimum Wage Act.

Rep. Charles Hayes (D-Ill) objected to the amendment because he said the purpose of the new Civil Rights Act should be to rectify by legislation certain decisions of the Supreme Court. He suggested that Reps. Steve Bartlett (R-Texas), who introduced the amendment, and Craig Washington (D-Texas), a proponent of Congressional employee rights, "get together and structure a piece of legislation that deals specifically with federal employees here on the Hill and get away from the stigma of being, in some instances, called the last plantation." Nice suggestion, but will that ever happen? Don't count on it.

And why wait? As Rep. Harris Fawell (R-Ill) said during the debate: "If we think what we're doing is good, there is no defense in not embracing the employees of Congress. We should not be sheltered. And then we learn, too, as we've learned recently in the legislation where we did put ourselves subject — we understand then what the people of America" have to do to comply with the laws. "You just can't escape the logic, that if it's good for the rest of America, it should be something that we would embrace."

Congress, with a little prodding, has been moving toward ending its anachronistic, hypocritical ways. The vote in the Education and Labor Committee was a setback — and a particularly sad event considering that this is Rep. Gus Hawkins's (D-Calif) final year as chairman. (Hawkins, like every other Democrat on the panel except Washington, voted against the amendment.)The Judiciary Committee is now considering the legislation, and there's a chance to introduce a similar amendment. If it passes Congress without including Congressional employees, President Bush will have an excellent reason to veto the Civil Rights Act of 1990.

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CRS Issue Brief

Major Planning Issue

Civil Rights

Updated May 22, 1990

by
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Congressional Research Service • The Library of Congress

Civil Rights

SUMMARY

Recent developments in Congress and the courts may profoundly influence the course of Federal civil rights law for years to come. Legislative actions by the 101st Congress and its predecessor promise markedly expanded civil rights coverage for certain groups and more effective enforcement procedures. The Civil Rights Restoration Act reversed the Supreme Court decision in the *Grove City College* case and restored "institution-wide" coverage of various Federal laws prohibiting discrimination in federally assisted programs. Years of bipartisan congressional effort culminated in passage of the Fair Housing Amendments Act, which not only expanded the scope of the landmark 1968 Civil Rights Act to include "handicap" and "family status" discrimination but also provided for strengthened enforcement of fair housing cases through a system of administrative law judges and enhanced civil and criminal penalties. Another major initiative passed by the Senate and presently up for House debate is the Americans With Disabilities Act (S. 933, H.R. 2273), which would extend Federal civil rights protection to the handicapped in access to employment, public accommodations and transportation, and telecommunications services.

As dramatic as these events in Congress are, a host of recent Supreme Court decisions have recontoured the judicial landscape for enforcement of Federal civil and constitutional rights. The concern for personal privacy balanced against the "special needs" of the Government for ensuring transportation safety and the integrity of the law enforcement process were highlighted by two employee drug-testing decisions by the High Court last term. The abortion issue gained renewed public and congressional attention as the result of the *Webster* ruling and is again before the Court this term in two other cases. Finally, the Court concluded last term with a spate of rulings on affirmative action and minority-business set-asides, burden-of-proof issues in Federal equal employment opportunity (EEO) litigation, and the scope and application of the Reconstruction-era civil rights statutes that could dramatically alter the future course of Federal civil rights enforcement. The Civil Rights Act of 1990 (S. 2104 and H.R. 4000) addressing several of these rulings has been reported to both houses for debate perhaps by June 1990.

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ISSUE DEFINITION

Recent developments in Congress and the courts may profoundly influence the course of Federal civil rights law for years to come. Legislative actions by the 101st Congress and its predecessor promise markedly expanded civil rights coverage for certain groups and more effective enforcement procedures. The Civil Rights Restoration Act reversed the Supreme Court decision in the *Grove City College* case and restored "institution-wide" coverage of various Federal laws prohibiting discrimination in federally assisted programs. Years of bipartisan congressional effort culminated in passage of the Fair Housing Amendments Act. As dramatic as these events in Congress are, a host of recent Supreme Court decisions have recontoured the judicial landscape for enforcement of Federal civil and constitutional rights.

BACKGROUND AND ANALYSIS

Fair Housing

In response to evidence of continuing discrimination, the 100th Congress passed legislation to make enforcement of fair housing rights more effective. The Federal Fair Housing Act, Title VIII of the 1968 Civil Rights Act, forbids discrimination in the sale, rental, or financing of housing on account of race, color, religion, sex, or national origin. The Department of Housing and Urban Development (HUD) was authorized to seek resolution of discrimination complaints by individuals only through investigation and conciliation.

Legislation in the 100th Congress (S. 558, H.R. 1158) was designed to strengthen fair housing enforcement by adding to the arsenal of available civil rights remedies. As introduced, these bills authorized HUD to prosecute complaints on behalf of individuals before administrative law judges (ALJs) empowered to enjoin discrimination and award damages. S. 867 authorized the Department of Justice (DOJ) to file civil actions in Federal district court on behalf of individual complainants. The ALJ process met with the legal objection that an administrative damage remedy would deprive the alleged discriminator of the right to a jury trial guaranteed by the Seventh Amendment of the Constitution in cases at common law.

Congress passed a version of H.R. 1158, the Fair Housing Amendments of 1988, combining both the administrative and judicial enforcement approaches. The bill, enacted on Sept. 13, 1988 (P.L. 100-430), provides for resolution of fair housing cases by an ALJ with HUD representing the complainant in the administrative hearing, unless either party elects to have the case tried before a jury; then the DOJ would prosecute the action in Federal district court. The law also adds "handicap" and "familial status" (the condition of having one or more children or of pregnancy) as classes protected from unfair housing practices.

On the judicial front, the U.S. Supreme Court recently considered the appropriate means for a Federal court to elicit local governmental compliance with its orders aimed at remedying unconstitutional discrimination in public housing. In

Spallone v. *United States*, no. 88-854, it ruled that the lower court had abused its discretion by imposing contempt sanctions on individual members of the Yonkers, New York, city council for refusing to vote in favor of legislation implementing a consent decree to disperse public housing construction beyond black neighborhoods. The district court, wrote the Chief Justice, should have proceeded first with such contempt citations against the city alone, and then considered contempt citations against individual council members only if sanctions against the city failed to produce compliance within a reasonable period of time.

Civil Rights of the Disabled

A major civil rights initiative of the 101st Congress, the Americans With Disabilities Act (S. 933, H.R. 2273) would provide broad-based discrimination protection for the disabled in public and private employment, public services, public accommodations, transportation, and telecommunications. Patterned on other Federal civil rights enactments, the bill would supplement existing protections afforded by the 1973 Rehabilitation Act which require that "reasonable accommodation" be made to otherwise qualified disabled persons by Federal contractors and financial aid recipients, Federal departments and agencies, and the U.S. Postal Service. Indeed, many concepts embodied in the Americans With Disabilities Act derive from law developed under Section 504 of the 1973 Act except that only entities receiving Federal funds are generally covered by that earlier statute. The Americans With Disabilities Act, by contrast, would be largely coextensive with other civil rights statutes that bar racial and ethnic discrimination by private entities, in respect to employment and the services they provide their patrons. Like present civil rights laws protecting the disabled, however, the principle of "reasonable accommodation" plays a central role in defining the legal obligation of employers, business concerns, transportation and telecommunications operators, and others covered by the Act. This serves to balance the rights of the disabled against the burden of compliance imposed upon covered entities in a manner without direct parallel in the racial or ethnic discrimination context.

The Americans With Disabilities Act originated with a proposal by the National Council on Disabilities, an independent Federal agency whose statutory functions include providing recommendations to the Congress regarding persons with disabilities. Identical House and Senate bills were introduced May 9, 1989; the Senate passed S. 933 with substantial amendments Sept. 7, 1989 In the House, H.R. 2273 was jointly referred to four committees: the Judiciary, Public Works and Transportation, Energy and Commerce, and Education and Labor. After two days of markup, the House Judiciary Committee on May 3, 1990 joined these other three panels in approving the measure (33-3) with only technical amendments. During the first day of floor debate (May 18, 1990), the House agreed (199-187) to an amendment that would permit food-service industry employers covered by the bill to transfer workers infected with the AIDS virus out of jobs that involve food handling.

AIDS discrimination issues have surfaced in several legislative contexts. The 100th Congress considered, but did not approve, bills that contained broad prohibitions specifically against HIV/AIDS discrimination. But the Fair Housing Amendments Act of 1988 (P.L. 100-430) amended Title VIII of the Civil Rights Act

of 1968 to extend its prohibition against housing discrimination to handicapped individuals, including persons with HIV infection and AIDS. The Civil Rights Restoration Act of 1987 (P.L. 100-259) extended the employment coverage of Sections 503 and 504 of the Rehabilitation Act of 1973 to persons with contagious diseases, such as HIV infection or AIDS, if they are otherwise qualified and pose no direct threat to the health or safety of coworkers. (Sections 503 and 504 prohibit discrimination against the handicapped by Federal executive agencies, businesses with Federal contracts, and any federally assisted program or activity.) Finally, the Americans With Disabilities Act would, as noted, prohibit discrimination on the basis of handicap in certain private-sector employment, in public services such as agencies of State and local governments and public transportation, and in privately owned places of public accommodation. Although AIDS is not specifically mentioned in the bills, the legislation's sponsors have made clear that such coverage is intended. Congressional supporters of AIDS nondiscrimination protections are withholding the introduction of AIDS-specific legislation until the outcome of Congress' consideration of the Americans With Disabilities Act is known.

The executive branch has adopted a general policy prohibiting discrimination against employees with HIV/AIDS who do not pose a safety risk to themselves or others and are able to perform the duties of their jobs. This policy was reinforced in October 1988 in a legal opinion of the Department of Justice stating that Section 504 of the Rehabilitation Act prohibits discrimination by Federal executive agencies and federally assisted programs or activities against persons infected with HIV, persons with AIDS, and persons thought to have AIDS. The State Department, Peace Corps, Job Corps, and DOD do, however, test certain employees or applicants for exposure to HIV, with various consequences for those who test positive.

Affirmative Action and Minority Business Enterprises (MBEs)

For many years, the Federal courts have labored to define the legal limits of public and private affirmative action to promote minority and female opportunities, particularly in employment and public contracting. In the employment sphere, for example, the Court has approved the temporary remedial use of race or sex selection criteria by employers, whether voluntary or by court order, where necessary to redress the effects of past discrimination and when sufficiently hedged with safeguards to prevent "reverse discrimination" against minorities. However, considerable doubt as to the continued efficacy of affirmative action efforts was raised last term by the Supreme Court decision in *Martin* v. *Wilks*, 109 S.Ct. 2180 (1989). That case seems to allow for broad "reverse discrimination" challenges by white males adversely affected by affirmative action orders and consent decrees.

Further fueling the public debate on affirmative action, and minority preferences in government contracting, was the 1989 ruling in *City of Richmond* v. *J.A. Croson Co.*, 109 S.Ct. 706 (1989). The Court there struck down as an equal protection violation a municipal ordinance which reserved 30% of city-financed construction contracts for minority-owned businesses. For the first time, a six-member majority in *Croson* agreed that the Constitution requires that all governmental classifications by race, whether invidiously discriminatory or motivated by a "benign" remedial purpose, be subjected to "strict judicial scrutiny." Measured against this standard, the

Richmond set-aside program was flawed both by absence from the legislative record of "specific" and "identified" instances of past discrimination in city contracting, and by the city's failure to "narrowly tailor" the remedy to any "compelling" objective other than "outright racial balancing."

It has long been a policy of the Federal Government, and of many States and localities, to assist small businesses owned by minorities and women. Indeed, some 32 States and 164 localities had, prior to *Croson*, adopted nearly 200 minority business enterprise (MBE) set-aside programs, which may now be in legal jeopardy. Similarly, Congress has enacted a number of MBE set-asides in recent years. For example, P.L. 101-189, the Department of Defense Authorization Act for FY1990, extended for 3 years DOD's S. 1207 program, which mandates a goal of 5% for procurement contracts to MBEs, historically black colleges and universities (HBCUs) and other minority institutions. P.L. 101-167, making appropriations for foreign operations, export financing and related programs, extended through FY1990 the "Gray amendment" requiring that 10% of development assistance funds and funds for African famine relief be made available for small disadvantaged businesses (SDBs), HBCUs, and other minority institutions.

In addition to the continuation of existing programs, the 101st Congress has created two new legislatively mandated set-asides. P.L. 101-101, making appropriations for energy and water development for FY1990, provides that the Secretary of Energy shall, to the fullest possible extent, ensure that at least 10% of Federal funding for the development, construction, and authorization of the Superconducting Super Collider be made available to SDBs and minority educational institutions. P.L. 101-144, the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act for FY1990, includes a requirement that at least 8% of the total value of contracts awarded by NASA in support of authorized programs, including the space station, be allocated to small businesses, SDBs, and minority educational institutions.

Congressional power to enact these affirmative action measures was not directly affected by *Croson*. The majority opinion makes plain that Congress has broad powers the States lack to adopt race-conscious remedies and reaffirmed its prior ruling in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), which upheld a 10% set-aside of Federal public works funds for MBEs based on past societal discrimination. Nonetheless, the issue is once more before the Court this term as it reviews the differing conclusions of two separate panels of the D.C. Circuit Court of Appeals concerning the application of *Croson* to FCC policies designed to promote minority ownership of broadcast facilities. Thus, in *Metro Broadcasting Inc.* v. *FCC*, no. 89-453, the appellate panel voided FCC's minority distress sale program, providing a preference for sales of broadcast facilities to minority firms, because it was not "narrowly tailored" to remedy past discrimination or to promote program diversity. The Court has also granted certiorari in *Astroline Communications Co.* v. *Shurberg Communications*, no. 89-700, which upheld an FCC policy preference for minority ownership in comparative licensing proceedings based in part on prior indications of congressional approval of the plan. Oral arguments in the FCC cases were heard Mar. 28, 1990, and rulings are expected prior to conclusion of the Court's current term in June.

S. 1235 seeks to overcome the limits on affirmative action imposed by *Croson* by utilizing Congress' Fourteenth Amendment enforcement power to authorize the "States" and their "political subdivisions" to "enact reasonable provisions setting aside a percentage of funds for spending on contracts to be awarded to firms that have ownership, control, or employment practices which further the goal of remedying" past discrimination.

Equal Employment Opportunity

Besides its affirmative action rulings last term, the Court decided several other cases with potentially far-reaching implications for future civil rights enforcement. First, it issued two edicts concerning allocation between the parties of the burden for proving discrimination in so-called "mixed motive" and "disparate impact" cases under Title VII of the 1964 Civil Rights Act. In the former context, *Price Waterhouse* v. *Hopkins*, 109 S.Ct. 1775 (1989), permits a Title VII action for alleged unlawful employment practices based on both discriminatory and legitimate, nondiscriminatory employer motivation. But, in a blow to Title VII plaintiffs, *Wards Cove Packing, Inc.* v. *Atonio*, 109 S.Ct. 2115 (1989), adopted a specific causation rule and relaxed business justification standard that effectively shifted from the employer to the employee the ultimate burden of proof in Title VII adverse impact litigation. In another closely watched case, *Patterson* v. *McLean Credit Union*, 109 S.Ct. 2362 (1989), the Court refused to overturn established precedent but held that S. 1981 of the 1866 Civil Rights Act applied to EEO only in the "initial formation" and "enforcement" of an employment contract and did not reach racial harassment on the job. Another S. 1981 case, *Jett* v. *Dallas Independent School District*, 109 S.Ct. 2702 (1989), held that a municipality could not be made liable for the discriminatory acts of its supervisory employees under a *respondeat superior* theory. *Public Employment Retirement System of Ohio* v. *Betts*, 109 S.Ct. 2854 (1989), repudiated prevailing administrative and judicial policy by narrowly interpreting the 1967 Age Discrimination in Employment Act to prohibit age bias in employee benefit plans (retirement, pension, insurance, etc.) only if used as a "subterfuge" for discrimination in nonfringe benefits and imposed on employees the burden of proving specific intent. Closing out its civil rights agenda last term, the Court: restricted the availability of attorney's fees awards against intervenors in civil rights actions, *Independent Federation of Flight Attendants* v. *Zipes*, 109 S.Ct. 2732 (1989); placed further limits on the "continuing violation" theory of Title VII recovery as applied to seniority systems, *Lorance* v. *AT&T Technologies, Inc.*, 109 S.Ct. 2261 (1989); and held that neither States nor State officials acting in their official capacities could be sued under S. 1983 of the 1871 Civil Rights Act (*Will* v. *Michigan Department of Police*, 109 S.Ct. 2304 (1989)).

Congress quickly responded to this volley of judicial decisions with legislative proposals to restore the law to its former status. A pair of companion measures designed to overcome the *Betts* ruling, S. 1511 and H.R. 3200, were the subject of early introduction and a series of House and Senate hearings in late September 1989. Completing its markup Apr. 4, 1990, the House Education and Labor committee voted 21-12 along party lines to approve H.R. 3200 affirming that the ADEA prohibits discrimination in fringe benefits and restricting the ability of employers to obtain employee waivers of rights protected by that law. The Committee defeated a

series of amendments offered by the minority to clarify the status of early retirement plans under H.R. 3200, to remove a provision making the legislation retroactive to ADEA cases pending when *Betts* was decided and to ease the standard for acceptable age-based distinctions in employee benefit plans. An amendment to allow employers to offset severance pay by pensions received by retirement-age employees was also voted down.

On Feb. 20, 1990, the House Committees on Education and Labor and on the Judiciary began joint hearings on H.R. 4000, the Civil Rights Act of 1990, a bill to overturn the Court's rulings in *Wards Cove*, *Price Waterhouse*, *Patterson*, *Martin v. Wilkes*, and *Lorance*. Following Senate hearings, the Committee on Labor and Human Resources on Apr. 4, 1990, voted (11-5) to report S. 2104, an identical Senate proposal, with an amendment that would protect employer's drug-free workplace policies from Title VII disparate impact challenges. These bills, in addition, address issues ranging from the recovery of attorney's fees from intervenors, and expert witness fees, to interest on judgments against the U.S. Government. Another aspect of the proposal would expand the remedies under Title VII to include compensatory and punitive damages for victims of intentional employment discrimination and to allow for jury trials under that law. On May 8, 1990, the House Education and Labor Committee approved H.R. 4000 with a key amendment designed to ease employers' burden of proving business necessity for workplace practices having an adverse impact on minorities. The bill as introduced required the employer prove that the challenged practice was "essential to effective job performance." The business community and the Administration protested that because this standard would be impossible to meet, employers would be compelled to adopt hiring quotas to avoid costly discrimination lawsuits. The committee amendment substitutes a standard requiring the employer to prove that the practice or group of practices "bears a substantial and demonstrable relationship to effective job performance." The Hawkins amendment also would require employers to satisfy this business necessity defense with "objective evidence."

As the Civil Rights Act of 1990 heads for floor consideration in both Houses, possibly as early as June, the Administration has indicated its disagreement with three significant aspects of the bill. The first relates to the "quota" controversy that prompted the Hawkins committee amendment and which may be subject of a similar amendment when the measure reaches the Senate floor. Second, there has been Administration objection to a provision that would broaden Title VII remedies to allow victims of intentional discrimination to collect compensatory and punitive damages, an amendment that could affect enforcement of the Americans with Disabilities Act as well. Finally, the Administration has objected to bill provisions that would limit "reverse discrimination" lawsuits that challenging the validity of judicially approved affirmative action plans. The Administration has supported a more limited approach that would broaden the scope of the 1866 Civil Rights Act and more liberally permit Title VII challenges to discriminatory seniority systems, but leave other legal issues untouched. (See S. 2166, H.R. 4081.)

On Mar. 27, 1990, the Supreme Court agreed to review the fetal protection ruling of the Seventh Circuit in *UAW v. Johnson Controls*, a case involving Title VII disparate impact issues similar to those raised by *Wards Cove*. In a sharply divided 7 to 4 ruling, the appellate court there found that the company's fetal protection policy of excluding all fertile female workers from high-lead-exposure jobs in its

battery plant was permissible as a business necessity or bona fide occupation qualification under Title VII. Relying on *Wards Cove*, the Seventh Circuit reasoned that once the employer asserts that its policy is justified by the business necessity of protecting fetal health, the burden shifts to the plaintiffs to prove that it is not warranted. Two other Federal Courts of Appeals have reached the contrary conclusion that the burden remains instead with the employer to show that there is a substantial risk of harm to fetuses of female employees and that no less restrict alternatives are available. The High Court may revisit the issue again this term.

Another EEO issue that continues to command congressional attention relates to pay equity. Despite the existence of Federal and State laws enshrining the doctrine of equal pay for equal work, a male-female wage gap persists in the national economy so that women earn about 70 cents for every $1.00 earned by male workers. Several approaches have been advanced to combat sex-based wage inequities ranging from increased efforts to place women in traditionally male dominated job categories to adoption of neutral job evaluation or so-called "comparable worth" pay systems. Thus, the Nontraditional Employment for Women Act (H.R. 975, S. 3050) would amend the Job Training Partnership Act to encourage the establishment of programs to train, place, and retain women in nontraditional fields, or those occupations in which women comprise less that one-fourth of employed individuals. The comparable worth approach, while largely unsuccessful in the courts, has been employed by a number of state legislatures as a means of achieving pay equity in the public workplace.

A proposal to study pay equity in Federal employment has also been introduced in Congress. H.Con.Res. 95 (also part of the Economic Equity Act of 1989, H.R. 3085/S. 1480) would create a bipartisan Commission on Employment Discrimination in the Legislative Branch to conduct a study of the pay and personnel practices of the Library of Congress for conformity with the requirements of Title VII of the 1964 Civil Rights Act and to make recommendations regarding the entire legislative branch.

A final approach to pay equity calls on Federal agencies to rigorously enforce existing laws that prohibit sex-based wage discrimination and to disseminate pay equity information to interested parties. The Pay Equity Technical Assistance Act (H.R. 41/S. 16 and the Economic Equity Act of 1989) would require the Department of Labor (DOL) to collect and disseminate information on pay equity efforts in the public and private sectors as well as to provide technical assistance to employers concerned about their wage-setting practices. Another bill, H.R. 134, would strengthen the EEOC's Title VII authority to compel heads of Federal agencies appearing before it to explain the failure to submit affirmative action plans; after hearings, the Commission could order the submission of plans and enforce agency compliance.

Finally, initiatives have been taken or proposed in Congress to afford Federal EEO protections to its own employees commensurate with other public and private workers. As it had in the 100th Congress, the House last year passed a measure, H.Res. 15, which prohibits discrimination in employment by the House of Representatives based on race, color, national origin, religion, sex (including marital or parental status), handicap, or age, and establishes a special Office of Fair Employment Practices to handle complaints and to provide counseling and mediation

services. S.Con.Res. 11 would replicate these procedures in the Senate. S. 272, the Fair Employment in Congress Act, would apply Federal EEO and equal pay law to the legislative branch, and H.R. 3276, the Congressional and Judicial Equal Employment Opportunity Act of 1989, would cover legislative and judicial branch employees under Title VII. Another proposal, S. 1165, would extend the antidiscrimination and labor rights protection afforded by a variety of Federal laws to Senate and House employees presently exempted therefrom and create a bicameral Office of Congressional Employee Relations.

Education

Since the 1954 landmark ruling in *Brown* v. *Board of Education*, education has been an important focus of the Nation's civil rights policies. Just as the importance of education has not diminished since *Brown*, the dilemma of how to ensure equal educational opportunity has not been resolved. Over the past 36 years, legal and policy issues involved in ending discrimination and inequality in education have proven to be unusually intractable. Currently, one issue being debated is at what point local school districts carrying out court-ordered desegregation plans become unitary so they can be freed from court supervision. Another is whether the Office for Civil Rights in the Department of Education is adequately enforcing civil rights laws. A third issue is exactly what educational practices are to be considered discriminatory. In addition, there is ongoing debate over what role other Federal educational policies and programs might play in increasing educational opportunity.

The courts are being asked to determine **when** school districts have fulfilled their constitutional mandate to desegregate schools, that is, achieved "unitary status." In 1988, the Department of Justice announced it would seek dismissal of suits involving over 200 school districts if they had complied with court orders. The courts are also struggling to define **what** "unitary status" actually means for the future administration of school districts. Contradictory opinions about the authority of "unitary" school systems to refashion parts of their desegregation plans have been rendered by Federal Courts of Appeals in cases involving several school districts, including those in Oklahoma City, Oklahoma, and Norfolk, Virginia. The Supreme Court joined the fray when it agreed on Mar. 27, 1990, to review the Tenth Circuit decision in *Oklahoma City Board of Education v. Dowell*. The appeals court there ruled that a judicial finding that the school system had achieved "unitary," status did not relieve school authorities of the duty to comply with the original desegregation decree. In 1986, the Justices had refused to review a contrary Fourth Circuit decision that since the Norfolk system had been ruled unitary, it was freed of judicial control and, in the absence additional evidence of intentional discrimination, could end student busing and return to neighborhood school assignments.

A significant issue related to the financing of school desegregation remedies was decided by the Supreme Court Apr. 18, 1990. (*Missouri* v. *Jenkins*, no. 88-1150.) In a 5 to 4 decision, the Court there found that a Federal judge had "abused" his discretion by directly imposing a local property tax increase to finance implementation of a magnet school plan to desegregate the Kansas City public schools. While objecting to "direct" judicial taxation, however, Justice White wrote that "[a] court order directing a local government body to levy its own taxes is plainly a judicial act

within the power of a Federal court," and that the Federal judiciary may also block enforcement of state law limitations on local tax increases that interfere with the funding of constitutionally-based desegregation plans. The difference was more than formal, he argued, since "[a]uthorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems."
This drew a dissent from Justice Kennedy who, joined by three of his brethren, derided the distinction as a "convenient formalism" and criticized the decision as "an expansion of power in the Federal judiciary beyond all precedent."

Disagreement over the adequacy of Federal enforcement of civil rights laws in education has continued during this period. Congress has repeatedly scrutinized the operation of the Department of Education's Office for Civil Rights (OCR). Most recently, the House Education and Labor Committee held hearings on OCR's enforcement of the law, drawing particular attention to the failure to name a permanent Assistant Secretary for Civil Rights in the Department of Education. Decisions in ongoing litigation (*Adams* v. *Cavazos*) have found OCR to have failed to enforce the law and require the agency to follow specific timeframes in acting upon complaints involving discrimination and conducting reviews of educational institutions' compliance with civil rights statutes.

In enacting civil rights laws, Congress generally has provided limited guidance about what constitutes "discrimination" in education. Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act prohibit discrimination on grounds of race, sex, handicapping conditions, and age, respectively, in federally funded programs (Title IX is limited to federally funded **education** programs), but it is not always clear what policies and practices are barred. Where congressional intent is unclear, the actual reach of the laws is determined by administrative actions and court decisions. In recent years there have been ongoing controversies about whether schools may exclude students with AIDS, about schools' responsibilities for improving access for physically handicapped students, and about the continuation of racially imbalanced colleges in southern States. Questions have also been raised about discriminatory practices in testing, the assignment of teachers, and the tracking of students.

The scope of the Federal effort to promote equal educational opportunity now encompasses a broad array of programs addressing the educational and other needs of children, youth, and young adults. The largest -- Head Start, compensatory education for elementary and secondary school students, and student aid -- are multi-billion dollar programs. Significantly, participation in these programs depends on individuals' low-income or educational status, not their race, ethnicity, or sex. Whether this Federal involvement should be targeted directly to minorities continues to be debated.

The concern for equal educational opportunity influences the development of new Federal education policies. President Bush is advocating improvement in educational quality by increasing the amount of **choice** parents and students have over the schools the students attend. One key feature of the debate over this effort centers on the possibility that choice will increase the segregation of low-income and

minority children in particular schools. Magnet schools, which may use such approaches as different curricula or innovative instructional strategies to attract students of different races, have been used extensively for over a decade to further school desegregation. Proposals to redirect some of the magnet school activity to school improvement as part of choice programs trigger debate about the consequences for equal educational opportunity.

Hate Crimes

Crimes motivated by religious, racial, or ethnic hatred or prejudice, such as vandalism of synagogues, cross burnings on lawns, and letter bombs, are thought by some to be on the increase in the United States. Yet no national statistics are collected on the phenomenon of so-called "hate crimes." Consequently, in every Congress since the 99th, bills were considered and passed by the House that would require the Justice Department to collect data on such crimes. In the current Congress, H.R. 1048, the Hate Crime Statistics Act, passed the House last year (368-47). On Feb. 8, 1990, the Senate incorporated the text of its version of the bill, S. 419 as amended, in H.R. 1048 as an amendment, and passed the measure (92-4). Then, on Apr. 4, 1990, the House suspended the rules and agreed to the Senate amendment (402-18).

As passed, the Act requires the Attorney General to collect data over a 5-year period on crimes that manifest prejudice based on race, religion, sexual orientation or ethnicity, and specifies the crimes of murder, nonnegligent manslaughter, forcible rape, aggravated assault, simple assault, intimidation, arson, and destruction, damage or vandalism of property. Data gathered under the Act shall be used only for research or statistical purposes and that the data not contain any information that may reveal the identity of an individual victim of a crime.

Several localities and at least nine States have enacted similar laws, and representatives of some of these jurisdictions testified in congressional hearings as to the usefulness of these laws in dealing with the problem of hate crimes.

Supporters of the bills argued that accurate data on hate crimes would help in efforts to understand and solve the problem of hate-motivated violence and would assist law enforcement officials in combatting these offenses. Opponents pointed out the difficulty of determining the motive of criminal acts, leading to questions as to the accuracy of such statistics. Some opponents, furthermore, feared the bills were an indirect means to accord protected class status for homosexuals, or might establish the justification for such status. In response to this latter concern, the Act contains language stating that nothing in the legislation gives a person a right to bring a complaint of discrimination based on homosexuality. It also was amended in the Senate to affirm the importance of family life to American society and to prohibit the use of funds authorized by the bill to "promote or encourage homosexuality."

Abortion

In 1973 the U.S. Supreme Court held that the Constitution protects a woman's decision whether to terminate her pregnancy, *Roe* v. *Wade*, 410 U.S. 113, and that a State may not interfere in a significant way with the exercise of that fundamental right by regulations that prohibit or substantially limit access to the means of effectuating that decision, *Doe* v. *Bolton*, 410 U.S. 179. But rather than settling the issue, the Court's rulings have kindled heated debate and precipitated a variety of governmental actions at the Federal, State, and local levels designed either to nullify the rulings or hinder their effectuation. On July 3, 1989, the Supreme Court upheld the constitutionality of the State of Missouri's abortion regulation statute in *Webster* v. *Reproductive Health Services*, 109 S.Ct. 3040. In this 5-4 decision, while the majority did not overrule *Roe*, it indicated that it was willing to apply a less stringent standard of review to State restrictions concerning a woman's right to an abortion as defined in *Roe*. With respect to the regulation of abortion, *Webster* makes it clear that State legislatures have considerable discretion to pass restrictive legislation in the future with the increased likelihood that such laws could pass constitutional muster. *Webster* amounts to an express invitation to the States to pass more restrictive abortion laws, and these enactments' constitutional validity will be reviewed on a case-by-case basis.

The Court has heard arguments on two new cases involving challenges to restrictive State abortion laws: *Ohio* v. *Akron Center for Reproductive Health*, 88-805 and *Hodgson* v. *Minnesota*, 88-1125, both concerning parental notification requirements. A third case, *Turnock* v. *Ragsdale*, no. 88-790, was settled prior to argument. The settlement agreement requires the State of Illinois to eliminate regulations that abortion rights supporters regarded as medically unnecessary for private abortion clinics. The State keeps the authority to inspect the clinics and enforce the rules it regards essential to protect the health and safety of patients.

In response to the *Webster* decision, the Freedom of Choice Act of 1989 (S. 1912 /H.R. 3700), was introduced in the first session of the 101st Congress. On the purported basis of Congress' authority to enforce the Fourteenth Amendment, this legislation would prohibit the States from acting to restrict the right of a woman to choose to terminate a pregnancy under any circumstances prior to viability and post-viability if the termination is necessary to protect the life or health of the woman. States would be permitted to impose requirements medically necessary to protect the life or health of a woman in respect to abortion. Sponsors of these bills explained that the intent is to codify *Roe* v. *Wade*.

Public Employee Drug Testing

Recent Federal, State, and local programs to test public employees and workers in certain government-regulated industries for illicit drug use have increasingly pitted the privacy rights of the employee against the needs of government for assuring a drug free workplace. Added impetus for these efforts may come from two Supreme Court decisions last term which upheld post-accident drug and alcohol testing of railway employees involved in major train accidents or incidents, *Skinner* v. *Railway*

Labor Executives Ass'n, 109 S.Ct. 1402 (Mar. 29, 1989) and of U.S. Customs Service employees seeking promotion to certain "sensitive" jobs involving firearms, drug interdiction, or access to classified information, *National Treasury Employee's Union* v. *Von Raab*, 109 S.Ct. 1384 (1989). Previously, a key constitutional issue which had divided the Federal appeals courts was whether public employee drug testing is ever permissible absent "reasonable suspicion" of employee drug abuse or impairment. *Skinner* and *Von Raab* make clear that reasonable suspicion is not always required, at least where the government's "compelling" interest in public safety outweighs any "diminished expectation of privacy" of the employees being tested. Since those decisions, the Court has denied review in cases challenging random drug testing of police officers, transit employees, nuclear powerplant workers and, most recently, of two groups of Federal employees -- Justice Department lawyers who hold top-secret security clearances and civilian Army drug counselors. Over the dissent of one Justice, the Court refused April 30 to review a D.C Circuit Court of Appeals decision upholding the U.S. Department of Transportation's right to conduct random drug tests of nearly half of its employees, American Federation of Government Employees v. Skinner, No. 89-1272.

During the 100th and 101st Congresses, the Senate approved legislation requiring random testing of safety-sensitive workers in the railroad, airline, and trucking industries (S. 591), while the House approved measures targeting only rail industry workers for drug and alcohol testing (H.R. 1208). The Senate, however, has refused to accept House language guaranteeing the rehiring, following rehabilitation, of those who test positive for drugs, and a deadlock remains on the issue in the 101st Congress.

Extension of the Civil Rights Commission

The U.S. Commission on Civil Rights was scheduled to expire on Nov. 29, 1989. P.L. 101-180, enacted Nov. 16, 1989, extended the Commission until Sept. 30, 1991, to allow Congress additional time to consider whether the Commission should be continued in its present form, reconstituted, or terminated.

Originally created in 1957 to advise the President and Congress concerning developments affecting the implementation of Federal civil rights laws and policies, the Commission in recent times has come under increasing criticism from civil rights groups who charge that it has abandoned its bipartisan independence in favor of political advocacy. Some congressional critics have also chided the Commission for low productivity and poor management.

Accordingly, the House twice attempted -- in 1986 and 1987 -- to defund the Commission, but the Senate restored its appropriation at a reduced level. Legislation has been introduced in the 101st Congress to allow the present Commission to expire and to establish a new Commission in 1990. Finally, however, a bill to extend the Commission for 22 months, or until Sept. 30, 1991, and allowing the Congress additional time to consider its future, passed the House on Nov. 15, the Senate on Nov. 16, and was signed by the President on Nov. 22, 1989.

LEGISLATION

H.R. 1048 (Conyers)

Hate Crimes Statistics Act. Provides for the acquisition and publication of data about crimes that manifest prejudice based on race, religion, homosexuality or heterosexuality, ethnicity or other characteristic as the Attorney General considers relevant. Introduced Feb. 22, 1989; reported from Committee on the Judiciary (H.Rept. 101-109) June 23. Passed House, amended (368-47), June 27. Passed Senate, amended (92-4), in lieu of S. 419, Feb. 8. House suspended rules and agreed to Senate amendment (402-18) Apr. 4, 1990.

H.R. 3200 (Roybal)

Older Workers Benefit Protection Act. Amends the Age Discrimination in Employment Act of 1967 to specify that it prohibits discrimination against older workers in all employee benefits except as otherwise justified by significant cost considerations. Introduced Aug. 4, 1989; referred to House Committee on Education and Labor. Ordered reported with amendment Apr. 4, 1990.

S. 933 (Harkin)

Americans with Disabilities Act of 1989. Prohibits Discrimination against the handicapped in employment, public services, public accommodations and services operated by private entities, and telecommunications relay services. Introduced May 9, 1989; reported from Committee on Labor and Human Resources (S.Rept. 101-116) Aug. 30. Passed Senate, amended 976-8), Sept. 7, 1989.

S. 2104 (Kennedy)

The Civil Rights Act of 1990. Proposes amendments to Title VII of the 1964 Civil Rights Act to override recent narrowing judicial interpretations by the U.S. Supreme Court and for other purposes. Introduced Feb. 7, 1990; referred to Committee on Labor and Human Resources.

FOR ADDITIONAL READING

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----- The Americans With Disabilities Act, S. 933, as passed by the Senate: an overview, by Nancy Lee Jones. [Washington] 1989. 4 p.
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----- Federal programs for minority and women-owned businesses, by Mark Eddy. May 1, 1989. [Washington] 1989. 9 p.
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----- Comparable worth pay equity in the Federal Government, by Linda Levine. [Washington] 1990. (Updated regularly)
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----- Minority business set-asides and the Constitution: a legal analysis of the U.S. Supreme Court ruling in *City of Richmond* v. *J.A. Croson Co.*, by Charles Dale. [Washington] 1989. 14 p.
CRS Report 89-124 A

----- Legal analysis of S. 2104 and H.R. 4000, the Civil Rights Act of 1990, by Charles Dale. [Washington] 1990. 32 p.
CRS Report 90-145 A

----- Fair Housing Act Amendments, by Paul M. Downing. Nov. 4, 1988. [Washington] 1989. 12 p.
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-----The Fair Housing Act: A Legal Overview, by Henry Cohen. [Washington] 1989. 22 pp.
CRS Report 89-683 A

----- Segregation and discrimination in housing: A review of selected studies and legislation, by Paul Downing and Leslie W. Gladstone. [Washington] 1989. 50p.
CRS Report 89-317 GOV

----- Abortion law in the aftermath of *Webster*, by Karen J. Lewis. [Washington] 1989. 17 p.
CRS Report 89-432 A

----- Abortion: judicial control, by Karen J. Lewis. [Washington] 1990. (Updated regularly)
CRS Issue Brief 88006

----- Abortion: legislative control, by Thomas P. Carr. [Washington] 1990. (Updated regularly)
CRS Issue Brief 88007

----- Extension of the Civil Rights Commission, by Leslie W. Gladstone and Paul Downing. [Washington] 1990. (Updated regularly)
CRS Issue Brief 87116

PROBLEMS WITH GRASSLEY'S AMENDMENT:

o This issue is not whether Congress should live by the same standards it applies to others. It should. The issue is whether the proposed enforcement mechanism is constitutional.

o The separation of powers concern that preclude executive interference on internal congressional matters applies equally to the concept of judicial interference.

o The argument that Congress should be treated like the private sector is specious. Congressional staffs are analogous to presidential appointees and judicial clerks, and these employment decisions are now not reviewable in court.

o There is no basis for treating the House and Senate differently, or Members of Congress differently than the President

--The House, under direct orders from the Speaker and the Minority Leader, flatly refused to consider punching a hole in congressional immunity.

--The Justice Department would certainly argue that any this provision, if applied to the President, would be unconstitutional and would recommend a veto on that basis.

--Maybe the House and the President know something.

THE AMENDMENT ADOPTED IN CONFERENCE IS BADLY DRAFTED

o As drafted, it appears to expose the personnel decisions of Senators to litigation, but also the internal processes of the Ethics and Rules Committees. Whatever dispute there is as to the applicability of the speech and debate clause to employment decisions, there is no dispute about its application to Ethics and Rules Committee procedures.

CURRENT CASE LAW

o The Supreme Court has held that the Speech and Debate clause does not apply only to speech and debate on legislative matters, but rather protects all "things generally done in a session of the House by one of its members in relation to the business before it." (Kilbourn v. Thompson, 1881)

--See also U.S. v. Johnson (S.Ct., 1966); Gravel v. U.S. (S.Ct. 1972); and many others.

o With respect to employment, current case law is enunciated in Browning v. Clerk, U.S. House (D.C.Cir., 1986). The Circuit Court held that Members of Congress had absolute immunity under the speech and debate clause in relation to employment decisions if the position had duties related in some way to the legislative process. Thus, a decision to fire a reporter of debates was held to be non-reviewable.

--By contrast, in Walker v. Jones, the same Circuit held in 1984 that the decision to fire a House restaurant employee was reviewable.

DAVIS V. PASSMAN:

o Some have suggested that Davis v. Passman permits suits against Members of Congress.

o In fact, the Supreme Court has never ruled directly on this issue.

--In Davis v. Passman (1984), the Supreme Court by 5-4 reversed an en banc decision of the Fifth Circuit and held that a constitutional claim could lie against a Member if the speech and debate clause did not apply. The majority refused to rule on the speech and debate issue because it had not been decided by the Circuit Court and the case was remanded.

--The minority held that congressional immunity obviously applied and the case should be summarily dismissed.

--Browning post-dates this decision.

FORRESTER V. WHITE:

o Some have argued the Supreme Court in 1988, in Forrester v. White, effectively overturns Browning. The Court held that the appropriate test in an employment case where judicial immunity had been raised was the the nature of the judge's act, not the duties of the employee (as in Browning).

However:

--The Supreme Court noted, "running through our cases, with fair consistency, is a 'functional' approach to immunity questions other than those that have been decided by express constitutional or statutory enactment." In other words, speech and debate clause questions are different.

--The D.C. Circuit in Gross v. Winter just last year refused to overrule Browning. The Circuit noted that there was obvious tension between Forrester and Browning, but "we do not reach the question whether special considerations applicable to members of Congress, such as separation of power concerns, continue to justify the absolute immunity for congressional personnel decisions."

--Therefore, absolute immunity for Members of Congress in employment decisions is still the controlling constitutional priniciple, just like it is for the President.

o Ethics members, who already have an unpleasant task, could be in an untenable position if their decisions were subjected to court review. They would be exposed to the politically damaging charge of engaging in a whitewash if a court were to disagree with their conclusion, which is perfectly possible in a close case.

o Members would be exposed to malicious, groundless lawsuits immediately prior to an election. By contrast, the Ethics Committee has been able to deal with election-motivated complaints while avoiding adverse publicity to the incumbent's campaign.

100TH CONGRESS
2D SESSION

H. RES. 558

Providing for fair employment practices in the House of Representatives.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 29, 1988

Mr. PANETTA (for himself, Mr. FOLEY, Mr. MICHEL, Mr. COELHO, Mr. ANNUNZIO, Mr. FRENZEL, Mr. HAWKINS, Mrs. SCHROEDER, Mrs. MARTIN of Illinois, Mr. ROBERTS, Mr. BARTLETT, Mr. ECKART, and Mr. DURBIN) submitted the following resolution; which was referred to the Committee on House Administration

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RESOLUTION

Providing for fair employment practices in the House of Representatives.

Resolved,

SECTION 1. SHORT TITLE.

This resolution may be cited as the "Fair Employment Practices Resolution".

SEC. 2. NONDISCRIMINATION IN HOUSE OF REPRESENTATIVES EMPLOYMENT.

(a) IN GENERAL.—Personnel actions affecting employment positions in the House of Representatives shall be made free from discrimination based on race, color, national origin,

religion, sex (including marital or parental status), handicap, or age.

(b) INTERPRETATIONS.—Interpretations under subsection (a) shall reflect the principles of current law, as generally applicable to employment.

(c) CONSTRUCTION.—Subsection (a) does not prohibit the taking into consideration of—

(1) the domicile of an individual with respect to a position under the clerk-hire allowance; or

(2) the political affiliation of an individual with respect to a position under the clerk-hire allowance or a position on the staff of a committee.

SEC. 3. PROCEDURE FOR CONSIDERATION OF ALLEGED VIOLATIONS.

The procedure for consideration of alleged violations of section 2 consists of 3 steps as follows:

(1) Step I, Counseling and Mediation, as set forth in section 5.

(2) Step II, Formal Complaint, Hearing, and Review by the Office of Fair Employment Practices, as set forth in section 6.

(3) Step III, Final Review by Review Panel, as set forth in section 7.

alleged violation through mediation between the individual and the employing authority.

SEC. 6. STEP II: FORMAL COMPLAINT, HEARING, AND REVIEW BY THE OFFICE OF FAIR EMPLOYMENT PRACTICES.

(a) FORMAL COMPLAINT AND REQUEST FOR HEARING.—Not later than 15 days after the end of the counseling period, the individual may file a formal complaint with the Office. Not later than 10 days after filing the formal complaint, the individual may file with the Office a written request for a hearing on the complaint.

(b) HEARING.—The hearing shall be conducted—

(1) not later than 10 days after filing of the written request under subsection (a), except that the Office may authorize a delay of not more than 30 days for investigation;

(2) on the record by an employee of the Office; and

(3) to the greatest extent practicable, in accordance with the principles and procedures set forth in sections 555 and 556 of title 5, United States Code.

(c) DECISION.—Not later than 20 days after the hearing, the Office shall issue a written decision to the parties. The decision shall clearly state the issues raised by the com-

plaint, and shall contain a determination as to whether a violation of section 2 has occurred.

SEC. 7. STEP III: FINAL REVIEW BY REVIEW PANEL.

(a) IN GENERAL.—Not later than 20 days after issuance of the decision under section 6, any party may seek final review of the decision by filing a written request with the Office. The final review shall be conducted by a panel constituted at the beginning of each Congress and composed of—

(1) 2 elected officers of the House of Representatives, appointed by the Speaker;

(2) 2 employees of the House of Representatives appointed by the minority leader of the House of Representatives;

(3) 2 members of the Committee on House Administration (one of whom shall be appointed as chairman of the panel), appointed by the Chairman of that Committee; and

(4) 2 members of the Committee on House Administration, appointed by the ranking minority party member of that Committee.

If any member of the panel withdraws from a particular review, the appointing authority for such member shall appoint another officer, employee, or Member of the House of Representatives, as the case may be, to be a temporary member of the panel for purposes of that review only.

(b) REVIEW AND DECISION.—The review under this section shall consist of a hearing (conducted in the manner described in section 6(b)(3)), if such hearing is considered necessary by the panel, and an examination of the record, together with any statements or other documents the panel deems appropriate. A tie vote by the panel is an affirmation of the decision of the Office. The panel shall complete the review and submit a written decision to the parties and to the Committee on House Administration not later than 30 days after filing of the request under subsection (a).

SEC. 8. RESOLUTION BY AGREEMENT.

If, after a formal complaint is filed under section 6, the parties resolve the issues involved, the parties shall enter into a written agreement, which shall be effective—

(1) in the case of a matter under review by the Office under section 6, if approved by the Office; and

(2) in the case of a matter under review by a panel under section 7, if approved by the panel.

SEC. 9. REMEDIES.

The Office or a review panel, as the case may be, may order the following remedies:

(1) Monetary compensation, to be paid from the contingent fund of the House of Representatives.

(2) In the case of a serious violation, a payment in addition to compensation under paragraph (2), to be

paid from the clerk-hire allowance of a Member of the House, or from personnel funds of a committee of the House or other entity, as appropriate.

(3) Injunctive relief.

(4) Costs and attorney fees.

(5) Employment, reinstatement to employment, or promotion (with or without back pay).

SEC. 10. COSTS OF ATTENDING HEARINGS.

An individual with respect to whom a hearing is held under this resolution shall be reimbursed for actual and reasonable costs of attending the hearing, if the individual resides outside the District of Columbia.

SEC. 11. PROHIBITION OF INTIMIDATION.

Any intimidation of, or reprisal against, any person by an employing authority because of the exercise of a right under this resolution is a violation of section 2.

SEC. 12. CLOSED HEARINGS AND CONFIDENTIALITY.

All hearings under this resolution shall be closed. All information relating to any procedure under this resolution is confidential, except that a decision of the Office under section 6 or a decision of a review panel under section 7 shall be published, if the decision constitutes a final disposition of the matter.

SEC. 13. EXCLUSIVITY OF PROCEDURES AND REMEDIES.

The procedures and remedies under this resolution are exclusive except to the extent that the Rules of the House of Representatives and the rules of the House Committee on Standards of Official Conduct provide for additional procedures and remedies.

SEC. 14. DEFINITIONS.

As used in this resolution—

(1) the term "employment position" means, with respect to the House of Representatives, a position the pay for which is disbursed by the Clerk of the House of Representatives, and any employment position in a legislative service organization or other entity that is paid through funds derived from the clerk-hire allowance;

(2) the term "employing authority" means, the Member of the House of Representatives or elected officer of the House of Representatives with the power to appoint the employee;

(3) the term "Member of the House of Representatives" means a Representative in, or a Delegate or Resident Commissioner to, the Congress; and

(4) the term "elected officer of the House of Representatives" means an elected officer of the House of Representatives (other than the Speaker and the Chaplain).

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