Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Keith Boykin to George Stephanopoulos re: Overview of Gay Issues (7 pages)	10/30/1993	P5, P6/b(6)
002. report	Presidential Transition Document (12 pages)	11/4/1992	Personal Misfile
003. report	ADA Training Manual - Legal (13 pages)	n.d.	b(2)

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9591

FOLDER TITLE:
[Civil Rights Working Group]

ds54

RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

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

b(1) National security classified information [(b)(1) of the FOIA]
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Memorandum

TO: Marvin Krislov

FROM: Neera Tanden

RE: **Employment Non-Discrimination Act of 1994 (ENDA)**

ENDA prohibits discrimination in employment on the basis of sexual orientation. It extends fair employment practices to lesbians, gay men and bisexuals. Under ENDA, employers may not subject an individual to different standards or treatment based on that individual's sexual orientation (real or perceived) or discriminate against an individuals based on the sexual orientation of those with whom the individual associates. The "disparate impact" claim available under the employment section of Title VII is not available under ENDA. The bill does not apply to the military, religious organizations or businesses which employ fewer than 15 workers.

Issues:

1. The bill defines sexual orientation as real or perceived lesbian, gay, bisexual or heterosexual orientation. The definition includes orientation stated by individuals or manifested in their personal relations.

The definition of orientation manifested in an individual's personal relations may need some clarification.

2. Although ENDA does not apply to the relationship between the U.S. government and the armed forces, the idea which underlies the bill and is stated in it - that sexual orientation has no relationship to ability to contribute to society - supports the arguments made by lesbians, gays and bisexuals that oppose the ban.

In addition, the military and related areas, along with small businesses and religious organizations would be the only groups allowed to discriminate on the basis of sexual orientation under this bill.

Background:

The Executive Office of the President has stated that it "does not condone nor tolerate discrimination based on ... sexual orientation."

The President in a letter dated February 14, 1994 to the Gay and Lesbian Victory Fund, stated:

> "Those who would legalize discrimination on the basis of sexual orientation or any other grounds are gravely mistaken about the values that make our nation strong. The essential right to equality must not be denied by a ballot initiative or otherwise."

PHOTOCOPY
PRESERVATION

LCCR

Leadership Conference on Civil Rights

1629 "K" St., NW, Suite 1010
Washington, D.C. 20006
202/466-3311

EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) OF 1994
(Job Discrimination Bill)

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Disability Rights Education and Defense Fund
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(*Deceased)

- The Employment Non-Discrimination Act of 1994 (ENDA) prohibits discrimination in employment on the basis of sexual orientation. ENDA extends fair employment practices -- not special rights -- to lesbians, gay men, bisexuals and heterosexuals.

- Federal law currently protects employees from discrimination on the basis of race, religion, gender, national origin, age, and disability. ENDA remedies a gap in federal non-discrimination protection.

- ENDA prohibits employers, employment agencies, and labor unions from using an individual's sexual orientation as the basis for employment decisions, such as hiring, firing, promotion, or compensation.

- Under ENDA, employers may not subject an individual to different standards or treatment based on that individual's sexual orientation (real or perceived) or discriminate against an individual based on the sexual orientation of those with whom the individual associates.

- The "disparate impact" claim available under the employment section of the Civil Rights Act of 1964 (Title VII) is not available under ENDA. An employer is not required to justify a neutral practice that may have a statistically disparate impact based on sexual orientation.

- ENDA exempts small businesses with fewer that fifteen employees, as does Title VII.

- ENDA exempts religious organizations, including educational institutions substantially controlled or supported by religious organizations.

- ENDA prohibits preferential treatment, including quotas, based on sexual orientation.

- ENDA does not require an employer to provide benefits for the same-sex partner of an employee.

- ENDA does not apply to the relationship between the U.S. government and the armed forces and thus does not affect current law on lesbians and gay men in the military.

- ENDA incorporates the remedies of Title VII (injunctive relief and damages to the extent allowed by Title VII).

- ENDA applies to Congress with the same remedies as provided by the Civil Rights Act of 1991.

- ENDA is not retroactive.

"Equality In a Free, Plural, Democratic Society"

THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1994

SECTION-BY-SECTION SUMMARY

An Act to prohibit employment discrimination
on the basis of sexual orientation

Section 1. Short Title.

The short title of the bill is the "Employment Non-Discrimination Act of 1994" (ENDA). ENDA is designed to provide protection for lesbians, gay men, bisexuals, and heterosexuals against discrimination in the workplace.

Section 2. Findings and Purposes. [Senate Only]

The findings set out the basic premise of the bill that sexual orientation has no relationship to ability to contribute to society and that employment discrimination based on sexual orientation violates fundamental values of equality and fairness.

The purpose of the bill is to provide a comprehensive federal prohibition of employment discrimination on the basis of sexual orientation and to provide meaningful remedies against such discrimination.

Section 3. Discrimination Prohibited.

ENDA prohibits employers (including government employers), employment agencies, and labor organizations from subjecting employees to different standards or treatment, or otherwise discriminating in employment or employment opportunities, on the basis of sexual orientation. Employment and employment opportunities include hiring, firing, compensation, and other terms or conditions of employment. Like a similar provision in the Americans with Disabilities Act (ADA), section 3 prohibits discrimination based on the sexual orientation of someone with whom an employee associates.

Section 4. Benefits.

ENDA does not require employers to provide benefits to their employees' same-sex partners. However, employers remain free to provide these benefits if they wish to do so.

Section 5. No Disparate Impact.

ENDA does not require employers to justify neutral practices that may result in a disparate impact against people of a particular sexual orientation. As a result, the "disparate impact" claim, available under Title VII of the 1964 Civil Rights Act (Title VII), is not available to gay men, lesbians, bisexuals, or heterosexuals under this bill.

Section 6. Quotas and Preferential Treatment Prohibited.

ENDA prohibits employers from adopting quotas or giving preferential treatment to an individual on the basis of sexual orientation.

Section 7. Religious Exemption.

Section 7 exempts religious organizations, including educational institutions substantially owned, managed, controlled, or supported by religious organizations and educational institutions whose curriculum is directed to the teaching of religious doctrine. The bill covers only a religious organization's for-profit activities subject to taxation under the Internal Revenue Code.

Section 8. Non-Application to Members of the Armed Forces; Veterans' Preferences.

ENDA does not apply to the relationship between the U.S. government and members of the Armed Forces. Thus, the bill does not affect current law on gay men, lesbians, and bisexuals in the military. In a provision taken from Title VII, Section 8 further provides the bill does not repeal or modify any other law that gives special preferences to veterans.

Section 9. Enforcement.

Section 9 authorizes the Equal Employment Opportunity Commission (EEOC), the Attorney General, and the federal courts to exercise the same power to enforce ENDA as those branches of the Federal Government have to enforce Title VII. Individuals have the same right to bring a private action that individuals have under Title VII. Congress is covered by the same enforcement mechanisms established by the Civil Rights Act of 1991.

Section 10. State and Federal Immunity.

Section 10 provides that the States and the Federal Government are subject to the same actions and remedies as are other employers for violation of the law.

Section 11. Attorneys' Fees.

The bill provides for attorneys' fees and litigation expenses.

Section 12. Retaliation and Coercion Prohibited.

Section 12 prohibits retaliation against individuals because they oppose an act or practice prohibited by the bill, or participate in an investigation or other proceeding under the bill. This section also prohibits coercion, intimidation, threats, or interference against individuals exercising or enjoying rights protected by the bill. This provision is modelled after similar provisions in Title VII and the Fair Housing Act of 1968.

Section 13. Posting Notices.

As in Title VII, the bill requires that employers post notices describing the requirements of the law.

Section 14. Regulations.

Section 14 authorizes the EEOC to issue regulations to enforce ENDA. Regulations are not mandated under the bill.

Section 15. Relationship to Other Laws.

This section preserves provisions in other federal, state, or local laws that currently provide protection from discrimination.

Section 16. Severability.

The bill includes a general severability clause. Thus, if any provision of ENDA is declared unconstitutional, this section preserves the rest of the bill.

Section 17. Effective Date.

ENDA takes effect sixty days after its enactment. It does not apply retroactively.

Section 18. Definitions.

Most of the definitions in ENDA come directly from existing civil rights laws, primarily Title VII. The bill adds a definition: it defines "sexual orientation" as real or perceived lesbian, gay, bisexual, or heterosexual orientation. The definition includes orientation stated by individuals or manifested in their personal relations.

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EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) OF 1994
(Job Discrimination Bill)

QUESTIONS AND ANSWERS

1) What does ENDA do?

ENDA prohibits an employer from using an individual's sexual orientation as the basis for adverse or different treatment in employment or employment opportunities.

2) Who is protected?

ENDA protects heterosexuals, homosexuals (gay men and lesbians), and bisexuals from discrimination in the workplace based on their sexual orientation.

3) Why is ENDA necessary?

ENDA is necessary because gay men, lesbians, and bisexuals face serious discrimination in employment, ranging from being fired from a job, being denied a promotion, or experiencing harassment on the job.

4) What employers are covered by ENDA?

ENDA covers the same entities that the employment section of the Civil Rights Act of 1964 ("Title VII") covers. Federal, state and local governments, labor unions, and employment agencies are all covered under this bill, as they are under Title VII.

5) Is the military covered under ENDA?

No. ENDA does not apply to the relationship between the United States government and members of the Armed Forces. Thus, this bill does not affect current law on gay men, lesbians, and bisexuals in the military.

6) Does ENDA have a small business exemption?

Yes. ENDA does not cover employers with fewer than 15 employees.

(over)

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EMBARGOED FOR RELEASE UNTIL A.M., THURSDAY, JUNE 23, 1994

Statement of Ralph G. Neas,
Executive Director of The
Leadership Conference On Civil Rights,
On Behalf of the
Employment Non-Discrimination Act
June 23, 1994

Today, I am pleased and proud to announce that the Leadership Conference on Civil Rights (LCCR) , the legislative arm of the civil rights movement, strongly supports the Employment Non-Discrimination Act (ENDA). This historic legislation would prohibit discrimination on the basis of an individual's sexual orientation in hiring, firing, promotions, compensation, and other employment decisions.

It is a special honor to be here today with congressional leaders and with Coretta Scott King, Justin Dart, former chairman of the President's Committee on Employment of People with Disabilities under President George Bush, and many other representatives of minority, women, disability, labor and religious groups.

The Leadership Conference welcomes the bipartisan support for this measure in both the House of Representatives and the Senate. Currently, there are more than two dozen Senate and more than 80 House original cosponsors. We especially applaud the leadership of the bipartisan sponsors of the Employment Non-Discrimination Act, including Senators Ted Kennedy (D-MA), John Chafee (R-RI), Patty Murray (D-WA), James Jeffords (R-VT), Joseph Lieberman (D-CT), and Diane Feinstein (D-CA); and Representatives Barney Frank (D-MA), Gerry Studds (D-MA), Connie Morella (R-MD), Christopher Shays (R-CT), Don Edwards (D-CA), Pat Schroeder (D-CO), Henry Waxman (D-CA), and Michael Huffington (R-CA).

The Leadership Conference on Civil Rights is the nation's oldest, largest, and most broadly based coalition. Founded in 1950, LCCR has 185 national organizations representing minorities, women, persons with disabilities, older Americans, labor, gays and lesbians, and major religious groups. LCCR has coordinated the national campaigns leading to the enactment of every major civil rights law since 1957. Recent LCCR legislative priorities enacted into law include the Americans with Disabilities Act, the Civil Rights Act of 1991, the

Civil Rights Restoration Act, the Fair Housing Act Amendments of 1988, the Japanese American Redress Act , and the 1982 Voting Rights Act Extension.

Earlier this month, the National Board of the Leadership Conference, which meets annually, designated the Employment Non-Discrimination Act a top legislative priority for the 103rd Congress. This is the first time that the Leadership Conference has endorsed a specific legislative measure which prohibits discrimination against gays and lesbians. This decision underscores the growing bipartisan consensus in this country that prohibiting discrimination against gays and lesbians is a fundamental civil rights issue.

The Leadership Conference believes strongly that every worker should have the right to be judged solely on his or her ability to do the job. People who work hard and perform well should not be kept from leading productive and responsible lives -- paying their taxes, covering their mortgages and contributing to the economic life of the nation.

Regrettably, job discrimination against lesbian and gay people is widespread, and there is no federal anti-discrimination law that covers them. The Employment Non-Discrimination Act takes a modest step toward securing equal treatment for millions of Americans who continue to experience discrimination in the workplace.

In addition to the anti-discrimination sections of the Employment Non-Discrimination Act, there are other important provisions in the legislation that would:.

- exempt religious organizations, including religious educational institutions;
- exempt small businesses with fewer than 15 employees;
- prohibit quotas and preferential treatment based on sexual orientation; and
- not require employers to provide benefits to the same-sex partner of an employee.

The Employment Non-Discrimination Act would not apply to uniformed members of the armed forces. It would apply to Congress, and it has the same remedies provided by the Civil Rights Act of 1991 and the Americans with Disabilities Act.

The time is right for a federal law protecting gay and lesbian Americans from employment discrimination. Indeed, national polls show that 76 percent of all Americans believe that people should not be fired or discriminated against for being gay.

The Leadership Conference on Civil Rights is committed to working at the national, state, and local levels on behalf of the Employment Non-Discrimination Act. We call on the House of Representatives and the Senate to follow the lead of a growing number of businesses that already ban job discrimination against gays and lesbians and to pass this vital legislation as soon as possible.

A number of organizations in the Leadership Conference have not taken a position at this time and do not join in this statement.

If you would like a copy of the Employment Non-Discrimination Act or need additional information or materials, please call us at 202-466-3311.

Marvin —
FYI —
this is subject
Keith gave me.

THE WHITE HOUSE

WASHINGTON

EQUAL EMPLOYMENT OPPORTUNITY STATEMENT
EXECUTIVE OFFICE OF THE PRESIDENT

The President is committed to ensuring equal employment opportunity for all Executive Office of the President (EOP) employees. Equally as important, the President is committed to a government that is free of discrimination and which reflects the diversity of this nation.

This statement reaffirms the policy of the EOP prohibiting unlawful discrimination and sexual harassment. The EOP does not condone nor tolerate discrimination based on race, color, national origin, sex (including sexual harassment), religion, age (over 40), disability or sexual orientation, in any of its personnel policies, practices, and operations.

All EOP agency heads and employees have a responsibility to uphold this policy. Each employee must be personally accountable for his or her performance in ensuring and promoting equal opportunity principles and in recognizing diversity as a source of strength for the EOP. Moreover, managers and employees alike must work together to ensure a workplace free of discrimination and sexual harassment.

In general terms, unlawful discrimination involves improperly making employment decisions or carrying out actions based on the factors listed above. Discrimination on the basis of sex includes sexual harassment. Sexual harassment, as defined by the Equal Employment Opportunity Commission and for the purposes of the EOP, is: unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: (1) submission is made explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

While every EOP employee may raise claims of discrimination and/or sexual harassment, employees' rights, responsibilities, appeals, and remedies may vary. If you believe that you have been discriminated against or sexually harassed, you may pursue an equal employment opportunity claim. You should be aware that the timeframes for raising claims vary for EOP employees from 45 to 180 calendar days from the alleged discriminatory event.

If you have any questions about the process and timeframes for raising a claim or would like more information, please contact Sharon Solomon, Equal Employment Opportunity Manager, Office of Administration, Executive Office of the President, at (202) 395-3996/TDD: 395-1160.

THE WHITE HOUSE

WASHINGTON

February 14, 1994

Mr. William Waybourn
Executive Director
Gay and Lesbian Victory Fund
Seventh Floor
1012 14th Street, N.W.
Washington, D.C. 20005

Dear Mr. Waybourn:

Thank you and your colleagues for your letter of February 9, 1994. Like you, I am committed to the fight for equality for all Americans.

All people in our society must enjoy the opportunity to be judged on their merits. Sadly, as you point out, this simple principle of justice has come under assault in several states this year.

Those who would legalize discrimination on the basis of sexual orientation or any other grounds are gravely mistaken about the values that make our nation strong. The essential right to equality must not be denied by a ballot initiative or otherwise.

I commend the broad-based coalition of leaders from the religious communities, labor unions, environmental groups, gay and lesbian organizations, women's groups, senior citizens, communities of color, Republicans and Democrats, and many other groups who have united to oppose these ballot initiatives. You have demonstrated through your actions and your diverse membership that this is not an issue of "special rights" for any one group. This is a battle to protect the human rights of every individual.

Sincerely,

Bill Clinton

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DRAFT

CLINTON ADMINISTRATION ACCOMPLISHMENTS
GAY AND LESBIAN ISSUES
(Draft #1, Monday, June 6, 1994)

- Appointed more than 30 openly gay and lesbian people to the Administration, including at the White House

- Appointed Roberta Achtenberg as Assistant Secretary of Housing & Urban Development for Fair Housing, the first open lesbian to be confirmed by the Senate

- Appointed Bruce Lehman as Assistant Secretary of Commerce for Patents and Trademarks, the first openly gay man appointed to this position and the first openly gay man to be unanimously confirmed to his position by the Senate

- Nearly every major cabinet department and agency has banned discrimination based on sexual orientation

- President Clinton was the first U.S. President to meet with leaders of the gay and lesbian community, which he did in April 1993 in connection with the Gay and Lesbian March on Washington

- President Clinton issued a strong statement condemning the anti-gay ballot initiatives circulating in several states

- President Clinton's Surgeon General Joycelyn Elders continues to be a forceful advocate for the rights of gay and lesbian Americans

- Secretary of Health & Human Services Donna Shalala will convene a national conference to examine the causes and solutions to gay youth suicide later this month

- Members of the Administration have met with members of the lesbian and gay community, for the first time opening up the doors of the government to all people

- President Clinton's health care reform bill will guarantee quality, private health insurance that can never be taken away and with choice of doctor to all Americans

- President Clinton appointed Jane Alexander, a strong defender of freedom of the arts, to head the National Endowment for the Arts

- The majority of all federal bench appointees in the President's first year were women and minorities, meaning straight white men were the minority of appointments for the first time in history

DRAFT

- The President signed an executive order overturning the Bush-era gag rule that prevented health care providers that receive federal funds from even mentioning the word abortion to their patients

- One of the first bills the President signed into law reauthorized the National Institutes of Health and created a permanent Office of Women's Health Research and reorganized the office of AIDS Research

AIDS ISSUES:

- The Justice Department has vigorously enforced the Americans with Disabilities Act, prosecuting those who discriminate based on HIV or AIDS status

- President Clinton held an unprecedented meeting with religious leaders to discuss how government and faith communities can support one another in stopping the spread of AIDS and insuring compassionate care for those who are ill

- President Clinton issued a presidential directive requiring that every federal employee (including all White House staff) receive comprehensive workplace education

- The Department of Health & Human Services named a new task force last fall to work aggressivelty to identify and resolve barriers to the development of new AIDS drugs

- The Administration introduced a new AIDS prevention initiative that candidly emphasizes abstinence and encourages correct and consistent use of latex condoms

- Attorney General Janet Reno granted a travel waiver to allow people living with HIV and AIDS to participate in Gay Games activities in New York this month

- President Clinton commemorated World AIDS Day in December 1993 by participating in a number of different activities designed to highlight the profile of the issue and invited an openly gay, HIV-positive African American community activist to introduce him

- President Clinton appointed the first National AIDS Policy Coordinator to orchestrate Administration AIDS activities

CLINTON QUOTES ON GAYS IN THE MILITARY BY SUBJECT

Principles:

- "we need everybody in America that's got a contribution to make that's willing to obey the law and work hard and play by the rules." -- 11/12/92

- "I'm not going to change my position" -- 11/13/92

- "I intend to keep my commitment." -- 1/25/93

- "the principle...behind this for me is that Americans who are willing to conform to the requirements of conduct... should be able to serve in the military..." -- 1/28/93

- "This compromise is not everything I would have hoped for or everything that I have stood for, but it is plainly a substantial step in the right direction." -- 1/29/93

- "I still think I'm right...I'm going to maintain the commitment that I have." -- 1/29/93

- "I still embrace the principle...I don't expect to change my position..." -- 1/29/93

- "I think people should not be asked to lie if they're going to be allowed to serve, because the question is not whether they should be there or not. They are there. So the narrow question of this debate is should you be able to stay and admit it." -- 2/10/93

- "I have a presumption against discrimination based on status alone, but I will listen to any report filed." -- 3/24/93

- "this country's policies should be heavily biased in favor of non-discrimination...there ought to be an overwhelming and compelling reason for it...I just have always had an almost libertarian view that we should try to protect the rights of American individual citizens to live up to their fullest of their capacities, and I'm going to stick right with that." -- 4/23/93

- "if somebody is willing to die for their country, should they have the right to do it? I think the answer is yes, if somebody is willing...the only way our country can make it is if we can find somehow strength out of our diversity, even with people with whom we profoundly disagree." 4/25/93

- "I've had so many people...come up to me and say that they have served with homosexuals who served bravely in Vietnam and other places, who were good people, who did not violate any rules. It is them that I am trying to protect." 5/27/93

Timing of lifting the ban:

- "immediate repeal of the ban" -- [position paper] 1992
- "I want to have 6 months to give them a chance to work on." -- 1/28/93
- "The change cannot and should not be accomplished overnight..." -- 1/29/93

Acceptable grounds for separation:

- "proof that they'd done [something] wrong" -- 9/9/92
- "behavior that was objectionable: -- 9/9/92
- "simple status alone should not be enough for excluding somebody" -- 9/9/92
- "destructive behavior" -- 9/11/92
- "The issue ought to be conduct." -- 11/12/92
- "People should be disqualified from serving in the military based on something they do, not based on who they are." 1/28/93
- "any sort of improper conduct should result in severance." -- 1/28/93
- "individuals who are prepared to accept all necessary restrictions on their behavior...should be able to serve their country honorably and well." -- 1/29/93
- "This single thing that is dividing people on this debate...is whether a person, in the absence of any other disqualifying conduct, can simply say that he or she is homosexual and stay in the service." -1/29/93
- "the issue is should you be able to say what you are and not be kicked out. This is not about conduct. This is about status. I believe there ought to be the strictest code of behavioral conduct applicable here. I also believe there ought to be an even stricter code applicable to sexual harassment, whether homosexual or heterosexual." -- 2/10/93
- "any kind of improper sexual conduct should be grounds for dismissal or other appropriate discipline." -- 3/24/93
- "My view is people should be judged on their conduct... That's my view; it's a behavior test." -- 5/27/93

Method of implementation:

- "considered for reentry on a case by case basis" -- 9/9/92
- "I want to consult with military leaders" -- 9/11/92
- "do it in a way that is most appropriate for the management of the whole national security and military interest of the country." -- 9/12/92
- "I want to consult with a lot of people about what our options are, including people who may disagree with me about the ultimate merits" -- 9/12/92
- "I do not propose any changes in the code of military conduct. None. Zero. I do not believe that anything should be done in terms of behavior that would undermine unit cohesion or morale. Nothing...Should we change the code of conduct? They say no, and I say no, not at all, not on the base, not any way, no changes in the code of conduct." -- 5/10/93
- "I have not called for any change in the Uniform Code of Conduct." -- 5/27/93

Compromise proposals:

- "if you can discriminate against people in terms of whether they get in to the service or not, based on not what they are but what they say they are, then I would think you could make appropriate distinctions on duty assignments once they're in. The courts have historically given quite wide berth to the military to make judgments of that kind in terms of duty assignments." -- 3/23/93
- Asked whether he would accept restrictions on duty assignments, the president said, "That depends on what the report says...But I wouldn't rule that out, depending on what the grounds and arguments are." -- 3/23/93
- "if they made a recommendation to me, would I review it and consider it? Of course I would. I mean I asked them to study this. I can't refuse then to get the results of the study and act like my mind's made up." - 3/24/93
- Regarding the "don't ask; don't tell" proposals, the President said: "Well, we might end up that way as long as it doesn't lead to a whole range of deliberate outings. I mean, we don't want to make it worse. I think we're very close to a compromise along those lines." -- 5/27/93

Joint Chiefs:

- "I'm going to meet with them...I want their input on how we should do it...I think they're entitled to really be listened to on a lot of the practical issues." -- 1/25/93

- "the Joint Chiefs should have 6 months to deal with the practical issues involved."

- "the Joint Chiefs agree...that we should not anymore ask people about their sexual orientation when they enlist." -- 1/28/93

- The interim policy was reached "after a long conversation, and a very good one, with the Joint Chiefs of staff and discussions with several Members of Congress." -- 1/29/93

- "I agree with the Joint Chiefs that the highest standards of conduct must be required." -- 1/29/93

- "that fact that we actually have the Joint Chiefs of Staff agreeing that it's time to take this question off the enlistment form, that there ought to be serious examination of how this would be done, even though they haven't agreed that it should be done...I think, this is very, very significant." -- 1/29/93

- "This is a very difficult time for them [the Joint Chiefs of Staff]...I think they're divided among themselves on this issue." -- 3/24/93

- "The difference between my position and that of many people in the military...is over a very narrow category of people actually." -- 5/10/93

Congressional role in decision:

- "we're working on the resolution in the Senate." -- 1/28/93

- "we were here...last night with Senator Nunn" -- 1/29/93

- "Today...I have reached an agreement, at least with Senator Nunn and Senator Mitchell..." -- 1/29/93

- The change "require[s] extensive consultation with...experts in the Congress..." -- 1/29/93

- "The compromise announced today by the Senators and by me shows that we can work together to end the gridlock that has plagued our city for too long." -- 1/29/93

- "I applaud the work...by Senator Nunn, Senator Mitchell, and other..." -- 1/29/93

- "I would remind you that any President's Executive order can be overturned by an act of Congress...I always knew that there was a chance that Congress would disagree with my position."

- Senator Nunn's "schedule to have hearings has nothing to do with the fact that I asked the Secretary of Defense to present to me..." -- 3/23/93

Time spent on the issue:

- "Most people with whom I talk, except you folks [the press], never discuss that." -- 1/28/93

- "Of course, I didn't bring it up; people in the Senate did. I just tried -- I have not, frankly, spent very much time on it compared to the time I'm spending on the economy..." -- 1/29/93

- "I actually spent very little time on the issue myself...I was frankly appalled that we spent so much time the first week talking about that instead of how to get the economy moving again. It wasn't my idea..." -- 2/10/93

Lifestyle issues:

- "a lot of ministers of the gospel believe that homosexuality is morally wrong and, therefore, that ground alone is enough to justify the ban." -- 2/10/93

- "not that Americans agree with the lifestyle but that they accept the fact that there are citizens in the United States who are homosexual, who work hard, who don't break laws, who pay their taxes, don't bother other people, who ought to have a chance to serve." -- 2/20/93

- "there are a lot of people whose religious beliefs dictate that the homosexual lifestyle is wrong. I don't ask them to give up their religious beliefs but simply to accept other people as people and give them a chance to be citizens as long as they're not doing anything wrong." -- 2/20/93

- "This is not about embracing anybody's lifestyle." -- 4/25/93

- "Others say if you...acknowledge it, it amounts to legitimizing a lifestyle or putting it on par with -- I don't see it as that...It is not about asking the American people to approve a lifestyle, to embrace it, to elevate it, anything else...I keep saying, 'That's not what I think we're about.'" -- 5/10/93

- "That does not imply that the rest of the society agrees with the lifestyle...they should be judged based on their behavior, not their lifestyle." -- 5/27/93

- "Most Americans believe that the gay lifestyle should not be promoted by the military or anybody else in this country... I understand what you're saying -- so that our country does not appear to be endorsing a gay lifestyle...the government appearing to endorse a lifestyle...it's a legitimate concern." -- 5/27/93

CLINTON ON GAYS/LESBIANS IN THE MILITARY DURING THE CAMPAIGN

CLINTON'S POLICY ON GAYS/LESBIANS NOT BASED ON POLITICS:

- In an interview with the New York Times Magazine, Clinton said he became a supporter of gay rights partly because of knowing people with AIDS and having friends who are homosexual:

  "See, this is more about saying than doing, this whole thing. It's not so much whether you're gay or not, but whether you can own up to being gay and still have your job or serve your country." [Washington Times, 10/13/92]

CLINTON CITED PENTAGON STUDY SUPPORTING GAYS IN THE MILITARY:

- "Yes. I support repeal of the ban on gays and lesbians serving in the United States armed forces, in accord with the Pentagon study, which stated that allowing gays and lesbians to serve would have no detrimental impact on our military strength." [St. Petersburg Times, 9/30/92]

- "[W]hen the Pentagon issued its report saying that there was no basis for the ban on homosexual men and women in the military, I said that I would act to repeal the ban. The Secretary of Defense said it ought to be repealed, but he wouldn't do it. But they stopped kicking people out while the Gulf War was going on, and then started again after the Gulf War was over. I don't think it's right. I think everybody ought to have the right to work and should be required to work. I think people should have the right to serve their country. And if denied the right to serve their country, it should be on the basis of behavior, not status." [Federal News Service, 11/20/92]

CLINTON TOLD MILITARY HE OPPOSED BAN:

- In an interview with the Army Times, Navy Times and Air Force Times, Mr. Clinton did not shy away from his position to remove the ban on gays in the military:

  "Right now (homosexuals) are not required to disclose that (status) when they join the service. There's no form to check off whether you're gay or not. So the issue is whether you should be able to stay if you acknowledge you are gay. I don't believe that alone should be justification for kicking you out." [PR Newswire, 9/27/92]

CLINTON CAMPAIGNED WITH GAY/LESBIAN COMMUNITY:

- "I have a vision and you are part of it," said Clinton at a Hollywood fund-raiser of over 600 gay supporters. "You represent a community of our nation's gifted people whom we have been willing to squander. We can't afford to waste the capacities, the contributions, the hearts, the souls, the minds of the gay and lesbian Americans." [Boston Globe, 5/31/92]

CLINTON SAID BAN WASTED TALENTS OF AMERICANS:

- "I believe we have to have a tolerant, but not a permissive society...to use the talents of all Americans. There ought to be a presumption that people are able to serve their country ... in the military or any other way. We cannot afford to waste the talents of any Americans." [UPI, 6/9/92]

CLINTON SAID BAN COST TAXPAYERS $500 MILLION:

- In a live television town meeting in Florida, Clinton pointed to the amount of money squandered on the enforcement of the current ban:

  "My own view on that is that simple status alone should not be enough for excluding somebody from the military. We spent $500 million in tax money in the last 10 years to get about 16,300 homosexual men and women out of the military, in the absence of any proof that they'd done anything wrong--that there was any behavior that was objectionable. So my position would be that behavior alone should not be enough and that people should be considered for reentry on a case by case basis." [The Reuter Transcript Report, 9/9/92]

H.R. 2128

A bill to prohibit discrimination and preferential treatment on the basis of race, color, national origin, or sex with respect to Federal employment, contracts, and programs, and for other purposes.

SHORT TITLE(S) AS INTRODUCED: Equual Opportunity Act of 1995

OFFICIAL TITLE AS INTRODUCED: A bill to prohibit discrimination and preferential treatment on the basis of race, color, national origin, or sex with respect to Federal employment, contracts, and programs, and for other purposes.

SPONSOR: Rep. Canady

RELATED BILL(S): S. 1085, Sen. Dole

STATUS: ***NONE***

PURPOSE

Equal Opportunity Act of 1995 - Prohibits discrimination or preferences in Federal employment and contracting on the basis of race, color, national origin, or sex, or entering into a consent decree requiring, authorizing, or permitting any such discrimination or preference. Prohibits construing this Act to prohibit or limit: (1) employment recruiting or encouraging contract bid-ding or requiring or encouraging Federal contractors to so recruit or encourage, if the recruit-ing or encouraging does not involve a numerical objective or otherwise granting a preference; (2) any act designed to benefit historically Black colleges or universities; (3) any action under a Federal law or treaty relating to the Indian tribes; or (4) classifications based on sex if sex is a bona fide occupational qualification reasonably necessary to the normal operation of the Government, contractor, or subcontractor, the classification is designed to protect privacy, a U.S. national security interest is involved, or the classification is applied regarding an armed forces member on active duty in a theatre of combat operations. Allows as remedies only injunctive or equitable relief (including back pay), attorney's fees, and costs.

ANALYSIS

The purpose of this Act is to ensure that all Americans are treated equally by the Federal government in Federal employment, Federal contracting and subcontracting, and Federally-conducted programs. This Act furthers the cause of equal opportunity and non-discrimination by embracing the view that rights inhere in individuals, not in groups. This Act endorses those Federal `affirmative action' programs that are designed to recruit broadly and widen the opportunities for competition, without guaranteeing the results of the competition or resorting to preferences on the basis of race, color, national origin, or sex. However, the Act would prohibit those Federal `affirmative action' programs that seek to divide Americans through the use of quotas, set-asides, timetables, goals, and other preferences.

Section 1. Short Title. Section 1 provides that the Act may be cited as the `Equal Opportunity Act of 1995.'

Section 2. Prohibition against Discrimination and Preferential Treatment. Section 2 prohibits the Federal government or any officer, employee, or agency of the Federal government from intentionally discriminating against, or granting a preference to, any individual or group, in whole or in part, on the basis of race, color, national origin, or sex. This prohibition applies to Federal employment, contracting, subcontracting, and the administration of Federally- conducted programs. The use of race, color, national origin, or sex `in part, 'i.e., as one factor) in a hiring or promotion decision, a contract or subcontract award, or a decision to admit a person to a Federal program, is forbidden by Section 2. When race, ethnicity, or sex is used as a so-called `plus' factor in determining the outcome of a decision, that is a preference.

Section 2 also explicitly prohibits the Federal government or any officer, employee, or agency of the Federal government from requiring or encouraging any Federal contractor or subcontractor intentionally to discriminate against, or grant a preference to, any individual or group, in whole or in part, on the basis of race, color, national origin, or sex.

As originally conceived, Executive order 11246 equated `affirmative action' with the principle of non-discrimination. Pursuant to Executive Order 11246, each Federal contractor is required to agree that it `will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin' and that the contractor `will take affirmative action to ensure that applicants are employed . . . without regard to their race, color, religion, sex, or national origin.' Unfortunately, bureaucratic implementation of the Executive Order over a period of years has converted it from a program aimed at eliminating discrimination to one which relies on it in the form of preferences. Section 2 aims not to overturn Executive Order 11246, but to restore its original meaning and purpose.

Section 2 also forbids the Federal government from entering into a consent decree that requires, authorizes, or permits any preferences otherwise forbidden by this Act.
Section 2(1)(c) applies to programs wholly administered by the Federal government. Nothing in Section 2, nor anything in this Act, affects programs or activities merely receiving Federal financial assistance. For example, Title IX of the Education Amendments of 1972, prohibiting discrimination in Federally-assisted education programs, is unaffected by this Act. In addition, this Act does not affect the Voting Rights Act or its enforcement.

Section 2 does not forbid preferences on any basis other than race, color, national origin, or sex. Thus, a preference in contracting based on economic criteria, the size of the company seeking the contracting business, veteran's status, or some other neutral social criteria is not forbidden by this Act, so long as every American has an equal opportunity to meet the criteria without regard to race, color, national origin, or sex.

COMMITTEE(S) OF REFERRAL:

House Judiciary
House Economic and Educational Opportunities
House Government Reform and Oversight

SUBCOMMITTEE(S):

Hsc Civil Service
Hsc Employer-Employee Relations
Hsc Constitution

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

LRM NO: 3442

FILE NO: 1834

1/30/96

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): _____

TO: Legislative Liaison Officer - See Distribution below:

FROM: James JUKES (for) Assistant Director for Legislative Reference

OMB CONTACT: Ingrid SCHROEDER 395-3883
Legislative Assistant's line (for simple responses): 395-3454
C=US, A=TELEMAIL, P=GOV+EOP, O=OMB, OU1=LRD, S=SCHROEDER, G=INGRID, I=M
schroeder_i@a1.eop.gov

SUBJECT: JUSTICE Proposed Draft Bill: Civil Rights in Public Accomodations Act of 1995

DEADLINE: Noon Tuesday, February ~~13~~ 6,1996

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

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

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RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

LRM NO: **3442**

FILE NO: **1834**

If your response to this request for views is simple (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.
If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.
You may also respond by:
(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
(2) sending us a memo or letter
Please include the LRM number shown above, and the subject shown below.

TO: Ingrid SCHROEDER 395-3883
Office of Management and Budget
Fax Number: 395-3109
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

SUBJECT: JUSTICE Proposed Draft Bill: Civil Rights in Public Accomodations Act of 1995

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

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of ____ pages, attached to this response sheet

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

draft

The Honorable Newt Gingrich
Speaker
U. S. House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I am transmitting for the consideration of Congress the enclosed legislative proposal to amend Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a et seq.

The proposal would expand the law to add "any...entity that sells, rents or provides goods or services" and "any public transportation service provided by a private entity that is primarily engaged in the business of transporting people" to the list of "public accommodations" that are prohibited from discriminating based on race, color, religion and national origin. In addition, the amendment would expand the covered classes to include "sex" and would allow courts to award compensatory damages and impose civil penalties in Title II lawsuits brought by the Attorney General.

This would conform the covered classes of Title II to those covered by Title VII of the 1964 Act, which prohibits discrimination in employment. The damages and civil penalty language is modeled after provisions in the Fair Housing Amendments Act of 1988.

Existing Title II prohibits racial or religious discrimination in "any place of public accommodation" and permits the Attorney General to enforce the law. But the definition of "public accommodation" under Title II is a limited one. An establishment is a "place of public accommodation" within the meaning of Title II if its operations affect commerce and it falls within one of the categories of establishments which serve the public. Generally, these are motels, hotels, restaurants, theaters, sports arenas, stadiums, or other places of entertainment or exhibition. See 42 U.S.C. §2000a(b).

The coverage of Title II is more circumscribed than the Americans with Disabilities Act (ADA), 42 U.S.C. §12181 et seq., which Congress enacted in 1990. The ADA expands the definition of "public accommodation" for purposes of prohibiting discrimination against persons with disabilities (see 42 U.S.C. §12181(7)) to include as public accommodations establishments that engage in the provision of goods, services, education, recreation, and social services. The ADA specifically lists examples of types of establishments considered to be a public accommodation -- a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; and a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment. 42 U.S.C. 12187(7)(E) and (F).

In addition, the ADA also contains a specific prohibition of discrimination in specified public transportation services provided by private entities (such as taxicabs):

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce. 42 U.S.C. 12184(a).

Because of the disparity between Title II and the ADA, at least one court has rejected the argument that Title II coverage should be more broadly interpreted because of the expanded definition of "public accommodation" under the ADA and suggested that the "proper forum" for a change in the law is Congress. Welsh v. Boy Scouts of America, 993 F.2d 1267, 1270-71 (7th Cir. 1993).

Since 1991 the Department has filed and successfully resolved just seven matters involving discrimination by places of public accommodation under Title II. The reason for this dearth of enforcement activity is two-fold. First, as discussed above, Title II is extremely limited in its coverage. Although courts have construed these provisions as broadly as possible, there is no precedent to extend the prohibition to the vast section of the business community made up of establishments which sell goods and services. In fact, Title II, as proposed by President Kennedy and reported by the Senate Judiciary Committee, originally covered retail and service establishments but was later amended not to include them. The law as enacted fails to reach supermarkets, clothing stores, barber shops, insurance agencies, laundromats and other common places of business.

Second, in addition to the coverage limitation, Title II has a limitation on remedies that dissuades individuals from bringing

complaints to the Department's attention. When the Attorney General moves to enforce Title II, she can obtain only injunctive relief. Damages, no matter how egregious the case, cannot be awarded, and civil penalties cannot be imposed. Certain state laws do provide for monetary relief and, primarily for this reason, it is under such laws that most public accommodation cases are litigated.

Unfortunately, discrimination by places of public accommodation persists as our recent action involving the Denny's restaurant chain makes disturbingly clear. That case also highlights the effect of the limitation on remedies in Title II -- the large monetary settlement could not have been reached without the private litigants who had an independent right to damages under 42 U.S.C. 1981 and under state civil rights laws.

Reports to the Department of Justice, and in the press, have revealed similar broad patterns of discriminatory action in retail and service establishments. People continue to be routinely harassed, followed, hurried, charged different prices, and outright denied access to goods and services on the basis of race, color, sex and national origin. A few recent examples serve to illustrate the common problems:

- A Springfield, Illinois, taxicab company posted a policy instructing drivers not to "pick up any black males unless you feel it is safe." The notice went on to state that "[t]here had been too many robberies lately" and that they had all been by black males.

- A teenager in Prince Georges County, Maryland, was challenged by a store security guard to prove he had bought the shirt he was wearing. He was forced to strip off his shirt, leave the store in his undershirt and return with a receipt proving he had purchased the shirt, even though the store cashier remembered having sold him a shirt the day before.

- Women are consistently charged more for the same goods and services, such as haircuts, dry cleaning, alterations, car sales and car repair. In response to such discrimination, California recently enacted a law to prohibit discrimination based on gender in the provision of services. Similar bills have been introduced in other states.

- A black corrections officer from Woodbridge, Virginia reported that he and at least two other black individuals, one of whom is twelve years old, were denied services at a local barber shop. Several of the barbers who work in the shop gave written statements in a related human rights investigation stating that they were instructed by the owner of the shop not to cut "niggers' hair."

- A shopper at a large department store in Bowie, Maryland, was alarmed when a clerk stamped her check and circled the letter B for black. The code also contained the letters W, A and H for white, Asian and Hispanic. Similar incidents were reported throughout Maryland and in Boston as well. Investigations by reporters revealed that the racial coding on checks was used primarily for minority buyers and rarely implemented for whites.

Each of these reports indicates the possible presence of a pattern or practice of discrimination that the Department was unable to address under the current statutory scheme for public accommodations. Such discrimination is demeaning, insulting, humiliating and embarrassing, not just to the victims of such action, but to our nation.

When President Kennedy announced his intention to introduce a broad public accommodations bill to Congress to prohibit discrimination in, among other places, retail and service establishments, he spoke of the unrestricted access it would require as "an elementary right." That right is no less elementary today - one which we should strive to protect with the full force and resources of Federal action. The bill we propose would make such action possible.

We urge the Congress to move swiftly to enact this bill. The Office of Management and Budget has advised that from the standpoint of the Administration's program, there is no objection to the submission of this legislation.

Sincerely,

Andrew Fois
Assistant Attorney General

Enclosure

cc: The Honorable Al Gore

A BILL

To prohibit discrimination on the basis of race, color, religion, sex and national origin in retail and service establishments and provide the Attorney General with effective enforcement tools to protect civil rights in public accommodations.

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

SEC. 1. SHORT TITLE

This Act may be cited as the "Civil Rights in Public Accommodations Act of 1995."

SEC. 2. FINDINGS

The Congress finds that --

(1) Discrimination on the basis of race, color, religion, sex or national origin by entities that sell, rent or provide goods or services to the general public persists.

(2) Discrimination on the basis of race, color, religion, sex or national origin by entities that serve the public, including retail and service establishments, substantially affects interstate commerce.

(3) The Federal government has a central role in protecting individuals from discrimination on the basis of race, color, religion, sex or national origin.

(4) The Federal government lacks the authority to redress discrimination on the basis of race, color, religion, sex or national origin by many retail and service establishments.

(5) Individuals face harassment, poor service, disparate

treatment, and outright exclusion from retail and service establishments because of their race, color, religion, sex or national origin.

(6) The Attorney General lacks authority under Title II of the Civil Rights Act of 1964 to request monetary relief to compensate victims of discrimination or civil penalties to vindicate the public interest, which has hampered the Federal government's ability to redress and deter discrimination by places of public accommodation.

SEC. 3. PROHIBITION OF DISCRIMINATION

(a) Section 201(a) of the Civil Rights Act of 1964 is amended by inserting "sex," after "religion,".

(b) Section 201(b) of the Civil Rights Act of 1964 is amended --

(1) by striking "and" in paragraph (3),

(2) by redesignating paragraph (4), and all subsequent references to paragraph (4), as paragraph (6), and

(3) by adding the following new paragraphs:

"(4) any store, office, shop, market or shopping mall, or other entity that sells, rents or provides goods or services;

"(5) any public transportation service provided by a private entity that is primarily engaged in the business of transporting people; and"

SEC. 4. ENFORCEMENT ACTIONS BY THE ATTORNEY GENERAL

Section 206(a) of the Civil Rights Act of 1964 is amended by

adding the following before the period and after the word 'described' --

", and (4) requesting such other relief, including monetary damages to persons aggrieved, and (5) requesting a civil penalty against the respondent to vindicate the public interest in an amount not to exceed $50,000 for a first violation, and in an amount not to exceed $100,000 for any subsequent violation."

U.S. Equal Employment Opportunity Commission
Office of Communications and Legislative Affairs
1801 L Street, NW, Room 9024
Washington, DC 20507
FAX # (202) 663-4912

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DOCUMENT: Internal Memo on ADEA/Law Enforcement Exemption

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Chairman Casellas plans to discuss this with
Ms. Rasco at Monday meeting.

Please telephone the appropriate office above if you do not receive all documents.

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Talking Points on H.R. 849, the "Age Discrimination in Employment Amendments of 1995," and H.R. 344, to amend the ADEA.

H.R. 849

H.R. 849 would retroactively amend, to December 31, 1993, the Age Discrimination in Employment Act to permit state and local governments to use age as a basis for hiring and retiring law enforcement officers and firefighters.

In addition, Section 3 of H.R. 849 provides for a Study and Guidelines for Performance Tests. See Appendix 1 attached for the language of H.R. 849.

Discussion

This legislation has two basic components. First it makes permanent an exemption to the Age Act for the hiring and retirement of police officers and firefighters. Second, through requiring a study and the issuance of guidelines for performance tests it appears to be moving toward requiring the Chairman of the EEOC to develop a "safe harbor" test that police and fire departments can use which will protect them from legal challenge. While the legislation does not explicitly include such language, taken together the provisions of the bill may be construed -- or intended -- to incorporate this requirement.

More specifically, the legislation does the following:

- it permanently enacts a provision permitting the return to mandatory hiring and retirement ages for law enforcement officers and firefighters that were in effect on March 3, 1983 and otherwise permits a mandatory retirement age of 55.

- it directs the Chairman to conduct a study within 3 years of abilities tests available for public safety jobs and tasks, technical and administrative standards that must or should be met, and an evaluation of the cost effectiveness, safety, and compliance of such tests with Federal civil rights laws and regulations.

- the proposed legislation requires the Chairman, not later than 4 years after enactment of this Act, to develop and issue advisory guidelines, based on the results of the required study, for the administration of physical and mental fitness tests to measure the ability and competency of public safety officials to perform the requirements of their jobs.

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- within 2 years of passage of the Act, the Chairman must propose advisory standards for wellness programs for such law enforcement officers and firefighters.

- five million dollars is authorized to carry out these requirements.

The 1986 ADEA Amendments

This legislation is largely duplicative of 1986 ADEA legislation (the pertinent provisions of which are set forth in the attached Appendix 2). The 1986 ADEA Amendments created a temporary exemption permitting age-based hiring and retirement decisions in public safety occupations through December 31, 1993 (at which date the exemption was automatically revoked).[1] In addition, Congress charged the EEOC and the Department of Labor with conducting a study to determine whether tests are available that could replace the use of age as a predictor of job performance. The central research questions were:

> If one wanted to replace age with performance or capacity tests, would it be possible? Are there job-related tests that are practical, safe and cost effective? If so can the tests be fairly administered without unduly compromising personal safety, public safety, or agency efficiency?[2]

In October 1992, this study[3] -- conducted by researchers from Penn State University at a cost of some $1 million -- was sent by the two agencies to Congress. The Study Group concluded that (1) age is a poor predictor of performance in public safety occupations, (2) practical tests are currently available that are better predictors (with specific tests enumerated), and (3) the temporary exemption should be permitted to expire as scheduled.

Relation Between H.R. 849 and The Prior Study

H.R. 849 rejects the basic conclusion of the earlier study -- that age is a poor predictor of performance -- by making

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[1] H.R. 849 is retroactive to the December 31, 1993 revocation date of the 1986 exemption.

[2] Edwards, R. Mandatory Retirement: Police, Fire Fighters and Tenured Faculty, Public Administration Review, Vol. 53, No. 4, 1993. See Appendix 2 for substance of 1986 Amendments.

[3] Alternatives to Chronological Age in Determining Standards of Suitability for Public Safety Jobs, Volume 1: Technical Report, Center for applied Behavioral Sciences, Pennsylvania State University, (University Park, PA: Intercollegiate Research Programs, 1992), 459 pp.

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permanent an exemption similar to the one created in 1986. Indeed, H.R. 849 goes further than the prior legislation by permitting the use of a mandatory retirement age even by state and local governments that had not implemented age limitations for public safety officers in prior years. If signed into law, H.R. 849 would undercut years of EEOC litigation (pre-1987) in which we routinely challenged the use of arbitrary age limitations by police and fire departments. Further, the proposed amendment to permit State and local governments to require the retirement of firefighters and law enforcement officers as early as age 55 is inconsistent with a substantial body of case law which was developed previously under the ADEA that prohibited mandatory retirement of law enforcement officers and firefighters on the basis of an arbitrary age cut-off. See, e.g., EEOC v Kentucky State Police Department, 860 F.2d 665 (6th Cir. 1988), cert. denied, 49 FEP Cases 1640 (1989); EEOC v. Pennsylvania State Police, 829 F.2d 392 (3rd Cir. 1987); EEOC v. Mississippi State Tax Commission, 873 F.2d 97 (5th Cir. 1989) (en banc).

Moreover, while H.R. 849's requirements regarding its study and guidelines are more specific than the requirements in the 1986 legislation, many of the questions were already asked and answered in the previous study. This includes identifying particular tests on the market as well as standards that these tests should meet.

It is important to note, however, that there was a dispute over the meaning of the statutory requirements regarding the prior study. Those favoring restoration of the exemption have charged that EEOC was expected to develop a safe harbor test under the 1986 legislation, and that it failed to satisfy that requirement. The Commission, on the other hand, never read the 1986 law as requiring the development of a safe harbor test. It is quite possible that a similar debate might arise regarding the meaning of this legislation with proponents arguing, even though the language is murky, that the EEOC is required to develop -- or, at least, identify -- a "safe harbor" test.

Technical and Legal Problems With H.R. 849's Study and Guideline Requirements

The mandated new study and advisory guidelines appear to require a precision in formulating approval criteria for public safety officer testing that is legally impractical. The EEOC has never given a blanket endorsement of any specific test (and indeed the EEOC lacks the expertise and resources for formulating or endorsing specific tests), but has instead adopted the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607 (1978), which provides specific standards of validity that tests which result in adverse impact should meet. While the Uniform Guidelines do not directly apply to age discrimination, the Age Act regulations incorporate the Uniform Guidelines Standards.

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29 C.F.R. § 1625.7(d).

Under the Uniform Guidelines, the validity of a test depends on the way in which that test is used in a specific situation. The provision of a blanket endorsement for a test by a federal enforcement agency is thus inconsistent with the principle that a test's validity can only be properly judged in connection with the requirements of particular jobs. In fact, because tests must be validated against particular jobs, development or approval of a given test would necessarily -- and inappropriately -- put the EEOC in the position of making judgments regarding how local police and fire departments structure their jobs and assign responsibilities. In addition, such endorsement would undercut enforcement efforts when that test is used improperly by a particular employer. Further, endorsement may provide an unfair competitive advantage to the publisher of that test.

H.R. 849 also requires the Chairman of the EEOC to propose advisory standards for wellness programs for law enforcement officers and firefighters. This is another example of the legislation requiring the Commission to act in an area totally beyond its normal enforcement responsibility and for which it has no expertise, background or resources.

Finally, it is important to note that the legislation's mandates go to the Chairman of the EEOC, rather than the Commission as a whole. While this may be the result of less than precise drafting, it may also represent an effort to create individual accountability in the Chairman. Clearly, the Chairman has the authority to conduct a study and propose guidelines. However, requiring the Chairman to "issue" guidelines is likely inconsistent with the Commission's statutory role in the development of policy.

H.R. 344

H.R. 344, introduced on January 4, 1995 by Representative Pickett, would make lawful any State or local government hiring or discharge decision with regard to firefighters or law enforcement officers where "such individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983" and is "pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of the [ADEA]."

No study is referred to in H.R. 344 and, as is the case with H.R. 849, the exemption appears to be permanent.

Conclusion

Both legislative proposals are unwarranted and unwise. This proposed legislation ignores the results of the scientific

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study on this subject and proposes a permanent exemption for age discrimination in most public safety jobs.

First, such legislation is incompatible with the fundamental premise of the ADEA that age is an inappropriate proxy for ability. Second, the proposed legislation ignores the result of the scientific study on the subject just completed at Congress' direction and would require the EEOC to revisit, at very substantial public expense, many questions addressed in the earlier study. Third, a national test is incompatible with the long established principle of job-specific test validation. The concept of a safe harbor test brings with it the notion that the federal government should instruct all police and fire departments across the nation on standardized performance criteria for their positions. It is neither possible nor appropriate for the federal government to assume such a role. For these reasons, we recommend that these legislative proposals be opposed.

officers and firefighters to perform the requirements of their jobs.

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APPENDIX 1

H.R. 849 As introduced in the House, February 7, 1995

104th CONGRESS
1st Session

H.R. 849

To amend the Age Discrimination in Employment Act of 1967 to reinstate an exemption for certain bona fide hiring and retirement plans applicable to State and local firefighters and law enforcement officers, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES
February 7, 1995

Mr. Fawell (for himself, Mr. Owens, Mr. Goodling, Mr. Clay, Mr. Ballinger, Mr. Petri, Mrs. Roukema, Mr. Hoekstra, Mr. Sawyer, Mr. Martinez, Mr. Kildee, Mr. Talent, Mrs. Meyers of Kansas, Mr. Knollenberg, Mr. Payne or New Jersey, Mr. Weldon of Florida, Mr. Graham, Mr. Gene Green of Texas, Mr. McDermott, Mr. Engel, Ms. Slaughter, Mr. Andrews, and Ms. Eddie Bernice Johnson of Texas) introduced the following bill; which was referred to the Committee on economic and Educational Opportunities

---

A BILL

To amend the Age Discrimination in Employment Act of 1967 to reinstate an exemption for certain bona fide hiring and retirement plans applicable to State and local firefighters and law enforcement officers, and for other purposes.

==========

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Age Discrimination in Employment Amendments of 1995."

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SEC. 2. REINSTATEMENT OF EXEMPTION.

(a) Repeal of Repealer.--Section 3(b) of the Age Discrimination in Employment Amendments of 1986 (29 U.S.C. 623 note; Public Law 99-592) is repealed.

(b) Exemption.--Section 4(j) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623), as in effect immediately before December 31, 1993--

(1) is hereby reenacted as such, and

(2) as so reenacted is amended by striking "attained age" and all that follows through "1983, and", and inserting the following:

"attained--

"(A) the age of hiring and retirement in effect under applicable state or local law on March 3, 1983; or

"(B) if such age was not in effect under applicable state or local law on March 3, 1983, 55 years of age; and".

SEC. 3. STUDY AND GUIDELINES FOR PERFORMANCE TESTS.

(a) Study.--Not later than 3 years after the date of enactment of this Act, the Chairman of the Equal Employment Opportunity Commission (in this section referred to as "the Chairman") shall conduct, directly or by contract, a study that will include--

(1) a list and description of all tests available for the assessment of abilities important for completion of public safety tasks performed by law enforcement officers and firefighters,

(2) a list of such public safety tasks for which adequate tests do not exist,

(3) a description of the technical characteristics that performance tests must meet to be compatible with applicable Federal civil rights Acts and policies,

(4) a description of the alternative methods available for determining minimally acceptable performance standards on the tests described in paragraph (1),

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(5) a description of the administrative standards that should be met in the administration, scoring, and score interpretation of the tests described in paragraph (1), and

(6) an examination of the extent to which the tests described in paragraph (1) are cost effective, safe, and comply with Federal civil rights Acts and regulations.

(b) Advisory Guidelines.--Not later than 4 years after the date of enactment of this Act, the Chairman shall develop and issue, based on the results of the study required by subsection (a), advisory guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of law enforcement officers and firefighters to perform the requirements of their jobs.

(c) Consultation Requirement; Opportunity for Public Comment.--(1) The Chairman shall, during the conduct of the study required by subsection (a), consult with-

(A) the United States Fire Administration

(B) the Federal Emergency Management Agency

(C) organizations that represent law enforcement officers, firefighters, and their employers, and

(D) organizations that represent older individuals.

(2) Before issuing the advisory guidelines required in subsection (b), the Chairman shall allow for public comment on the proposed guidelines.

(d) Development of Standards for Wellness Programs.--Not later than 2 years after the date of the enactment of this Act, the Chairman shall propose advisory standards for wellness programs for law enforcement officers and firefighters.

(e) Authorization of Appropriations.--There is authorized to be appropriated to carry out this section $5,000,000.

SEC. 4. EFFECTIVE DATES.

(a) General Effective Date.--Except as provided in subsection (b), this Act shall take effect on the date of the enactment of this Act.

(b) Special Effective Date.--Section 2(b)(1) shall take effect on December 31, 1993.

APPENDIX 2

1986 ADEA Amendments pertinent to law enforcement officers and firefighters

SEC. 3. EMPLOYMENT AS FIREFIGHTERS OR LAW ENFORCEMENT OFFICER.

(a) GENERAL RULE.--Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended by adding at the end thereof the following new subsection:

"(i) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken--

"(1) with respect to the employment of an individual as a firefighter or as a law enforcement office and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

"(2) pursuant to a bona fide hiring retirement plan that is not a subterfuge to evade the purposes of this Act.".

SEC. 4. DEFINITIONS.

Section 11 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 630) is amended by adding at the end thereof the following new subsections:

"(j) The term 'firefighter' means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

"(k)" The term 'law enforcement officer' means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purposes of this subsection, 'detention'

includes the duties of employees assigned to guard individuals incarcerated in any penal institution.".

SEC. 5. STUDY AND PROPOSED GUIDELINES RELATING TO POLICE OFFICERS AND FIREFIGHTERS

(a) STUDY.--Not later than 4 years after the date of enactment of this Act, the Secretary of Labor and the Equal Employment Opportunity Commission, jointly, shall--

(1) conduct a study--

(A) to determine whether physical and mental fitness tests are valid measurements of the ability and competency of police officers and firefighters to perform the requirements of their jobs,

(B) if such tests are found to be valid measurements of such ability and competency, to determine which particular types of tests most effectively measure such ability and competency; and

(C) to develop recommendations with respect to specific standards that such tests, and the administration of such tests should satisfy, and

(2) submit a report to the Speaker of the House of Representatives and the President pro tempore of the Senate that includes--

(A) a description of the results of such study, and

(B) a statement of the recommendations developed under paragraph (1)(C).

(b) CONSULTATION REQUIREMENT.--The Secretary of Labor and the Equal Employment Opportunity Commission shall, during the conduct of the study required under subsection (a) and prior to the development of recommendations under paragraph (1)(C), consult with the United States Fire Administration, the Federal Emergency Management Agency, organizations representing law enforcement officers, firefighters, and their employers, and organization representing older Americans.

(c) PROPOSED GUIDELINES.--Not later than 5 years after the date of the enactment of this Act, the Equal Employment Opportunity Commission shall propose, in accordance with subchapter II of chapter 5 of title 5 of the United States Code, guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of police

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3 Noms
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Nick Inzeo, Assoc. Legal Counsel @ EEOC
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Elliot Mincberg, PFAW
Rick Seymour, Lawyers' Comitee for Civil Rts Under Law
(Natl Office)

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