

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Transition Record - Civil Rights (7 pages)	12/10/1992	Personal Misfile
002. report	Background on Title VI (4 pages)	n.d.	P5

COLLECTION:

Clinton Presidential Records
 Domestic Policy Council
 Stephen Warnath (Civil Rights)
 OA/Box Number: 9884

FOLDER TITLE:

[Civil Rights Working Group] [2]

ds51

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

MEMORANDUM

TO: Steve Warnath
FROM: Willie Epps, Jr.
DATE: 11 July 1994
**RE: Major Supreme Court Cases in
Employment Discrimination**

Title VII:

Griggs v. Duke Power Company, 401 U.S. 424 (1971):

Case established the disparate impact theory of discrimination.

This North Carolina power company had a policy of requiring a high school diploma or passing of intelligence tests as a condition of employment in or transfer to jobs at the plant. Black workers charged that these requirements were not directed at or intended to measure ability to learn to perform a particular job or categories of jobs; requirements operated to disqualify blacks at a substantially higher rate than white applicants; and the jobs in question formerly had been filled by white employees as part of a longstanding practice of giving preferences to whites.

Chief Justice Burger, writing for the 8-0 majority, stated that Title VII of the Civil Rights Act of 1964, requires the elimination of such artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race. If an employment practice that operates to exclude African-Americans cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent. The EEOC, comporting with the intent of Congress, must insure that tests used by employers measure the person for the job and not the person in the abstract.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973):

Case outlines burdens of proof in race discrimination cases.

African-American male claimed that he was denied re-employment "because of his involvement in civil rights activities" and "because of his race and color." Company denied discrimination and asserted that its failure to re-employ this man was based upon and justified by his participation in the unlawful conduct against it. The critical issue resolved in this case concerns the order and allocation of proof in a private, non-class action challenging employment discrimination.

Justice Powell, delivering the opinion for a unanimous Court, ruled that in a private, non-class-action complaint under Title VII charging racial employment discrimination, the plaintiff has the burden of establishing a prima facie case, which he or she can satisfy by showing that (1) s/he belongs to a racial minority; (2) s/he applied and was qualified for a job that the employer was trying to fill; (3) though qualified, s/he was rejected; and (4) thereafter the employer continued to seek applicants with plaintiff's qualifications. Employer then has the opportunity to provide non-discriminatory reasons for the company's decision. If the company provides "non-discriminatory reasons" for its decision, the plaintiff must then show that the employer's stated reasons were pretextual.

Pretext can be shown, for example, by presenting evidence that white employees involved in acts against the company of comparable seriousness were nevertheless retained or rehired; including facts as to the company's treatment of plaintiff during prior term of employment; analyzing company's reaction to plaintiff's legitimate civil rights activities; and examining the company's general policy and practice with respect to minority employment. This evidence will help to prove that the presumptively valid reasons for rejection of the applicant were in fact a coverup for a racially discriminatory decision.

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976):

Seniority rights.

Race discrimination was detected in company's employment of over-the-road (OTR) truck drivers. Black applicants were denied employment because of their race after the effective date and in violation of Title VII of the Civil Rights Act of 1964. The Court, 5-3, approved seniority awards by lower courts dating back to rejection of the job application. Retroactive seniority was appropriate remedy, and such awards should be made in most cases where a seniority system exists and discrimination is proved, Justice Brennan said while delivering the opinion of the Court.

Such awards fulfill the "make-whole" purposes of Title VII. Without them, the victim of job discrimination "will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferior."

The Court did not distinguish between benefit seniority, which determines such matters as length of vacation and pension benefits, and competitive seniority, which determines issues such as the order in which employees are laid off and rehired, promoted, and transferred.

General Electric Co. v. Gilbert, 429 U.S. 125 (1976):

Pregnancy not covered in company's health plan.

This class action was brought by women employees who charged that the disability plan of General Electric constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964. Under the plan GE provides nonoccupational sickness and accident benefits to all of its employees, but disabilities for pregnancy are excluded.

Justice Rehnquist wrote for the six-justice majority that "[E]xclusion of pregnancy from a disability benefits plan providing general coverage is not gender-based discrimination at all." The plan covered some risks, but not others; there was no risk from which men were protected, but not women, or vice versa.

In dissent, Justice Brennan wrote: "Surely it offends common sense to suggest...that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.' Pregnancy exclusions...both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force."

This decision led to the enactment of the Pregnancy Discrimination Act, which overturned Gilbert.

Trans World Airlines v. Hardison, 432 U.S. 63 (1977):

Seniority system-- absent intentional discrimination-- can have discriminatory consequences.

A TWA employee's religious beliefs prohibited him from working on Saturdays. TWA made attempts to accommodate him, and these were successful mainly because on his job at the time he had sufficient seniority to regularly observe Saturday as his Sabbath. But when he sought, and transferred to another job where he was asked to work Saturdays and where he had low seniority, problems began to rise. No accommodations could be reached in second job; employee claimed religious discrimination in violation of Title VII of the Civil Rights Act of 1964.

Justice White and the Court, 7-2, found that an employer's statutory duty reasonably to accommodate the religious practices of employees does not require a departure from a seniority system for the benefit of an individual whose religious beliefs prevented him from working on Saturday: "Absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."

Dothard v. Rawlinson, 433 U.S. 321 (1977):

Job requirements must be job related.

Woman's application for employment as a "correctional counselor" (prison guard) in Alabama was rejected because she failed to meet the minimum 120-pound weight requirement of an Alabama statute, which establishes a height minimum of 5 feet 2 inches. She filed a lawsuit with the EEOC challenging the statutory height and weight requirements and a regulation establishing gender criteria for assigning correctional counselors to "contact" positions as violative of Title VII of the Civil Rights Act of 1964. She also challenged the law on the grounds that it would disqualify more than 40 percent of the women in the country but less than 1 percent of the men.

Justice Stewart, delivering the opinion of the Court, ruled this prima facie evidence of sex discrimination because the apparently neutral physical requirements "select applicants for hire in a significantly discriminatory pattern." The state was then required to show that the height and weight requirements had a "manifest relationship" to the job in question. This the state failed to do, the Court said.

The Court did uphold, however, a provision of the Alabama statute that prohibited women from filling positions that brought them into close proximity with inmates. In this case, the majority said an employee's "very womanhood" would make her vulnerable to sexual and other attacks by inmates and thus "undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility."

Justice Marshall, with Brennan, dissented. The majority decision "perpetuates one of the most insidious of the old myths about women -- that women, wittingly or not, are

seductive sexual objects." The majority, Marshall wrote, makes women "pay the price in lost job opportunities for the threat of depraved conduct by prison inmates...The proper response to inevitable attacks on both female and male guards is ... to take swift and sure punitive actions against the inmate offenders."

Hazelwood School District v. United States, 433 U.S. 299 (1977):

Statistics can be used to prove discrimination.

United States brought action against the Hazelwood School District alleging that school district officials were engaged in a "pattern or practice" of teacher employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

Justice Stewart and the Court, 8-1, ruled that a prime facie case may be established by showing a general pattern of discrimination rather than individual acts of illegality. "Statistics can be an important source of proof in such cases since 'absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired,' even though Title VII 'imposes no requirement that a work force mirror the general population.'" That is, the proper statistical comparison in pattern-or-practice action against school district for alleged racial discrimination in hiring practices is between the percentage of black teachers employed in school district and the percentage of black teachers in relevant labor market.

City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1977):

Women do not have to contribute more money than men to pension fund to get the same benefits.

Suit was filed by present and former female employees of the L.A. Dept. of Water and Power, alleging that the Department's requirement that female employees make larger contributions to its pension fund than male employees violated Title VII of the Civil Rights Act of 1964, which make it unlawful to discriminate on the basis of an individual's sex.

Justice Stevens, writing for the Court, stated that even though women usually live longer than men, that generalization does not justify obligating women to make larger pension fund contributions in order to receive equal monthly benefits after retirement. Since the focus of Title VII is on the individual, the use of sex-segregated actuarial tables that differentiate solely on the basis of generalizations about life expectancy of women as a class violates Title VII.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981):

Burden shifts in discrimination cases outlined.

Employee filed suit alleging that her termination of employment with the State of Texas was predicated on gender discrimination in violation of Title VII of the Civil Rights Act of 1964. The case focuses on the burden of proof in Title VII cases.

Justice Powell, delivering the opinion for a unanimous Court, held that when a plaintiff in a Title VII case has proved a prima facie case of employment discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. That is to say, while the burden of production shifts to the employer upon establishment of a prima facie case, the burden of persuasion remains with the plaintiff at all times: "The burden that shifts to the defendant ... is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected ... for a legitimate, nondiscriminatory reason."

County of Washington v. Gunther, 462 U.S. 161 (1981):

Sex-based wage discrimination.

Women brought lawsuit alleging sex-based wage discrimination under Title VII of the Civil Rights Act of 1964. Employer's own job evaluations showed female jail-guard positions to be worth 95% as much as male guard positions, but the employer proceeded to pay women guards only 70% as much as men.

Court held that claims for sex-based wage discrimination may be brought under Title VII, whether or not a co-worker of the opposite sex receives higher pay for equal work. Sex-based wage discrimination may violate Title VII even if it does not violate Equal Pay Act.

Connecticut v. Teal, 457 U.S. 440 (1982):

Disparate impact claims can be based on a component of a selection process.

A Connecticut state agency had the policy of provisionally promoting employees to the position of supervisor. To attain permanent status as supervisors, employees had to participate in a selection process that required a written examination. A group of black employees who failed the test filed suit alleging that state agency violated Title VII of the Civil Rights Act of 1964 by requiring, as an absolute condition for consideration for promotion, that applicants pass a written test that disproportionately exclude blacks and was not job related. State agency claimed that plaintiffs were precluded from establishing a prima facie case because its job selection process, of which the test was a part, ultimately resulted in selection of greater proportion of blacks than whites.

Justice Brennan, delivering the opinion of the Court, 5-4, held that state agency's nondiscriminatory "bottom line" does not preclude respondents from establishing a prima facie case nor does it provide petitioners with a defense to such a case. The fact that a workforce is racially balanced does not immunize an employer from liability for acts of discrimination. A disparate impact claim can be based on a component of a selection process, even if there is no disparate impact in the entire selection process, i.e., at the "bottom line."

Newport News Shipbuilding and Dry Dock v. EEOC, 462 U.S. 669 (1983):

Men and women should receive comparable fringe benefits from employers regardless of sex.

After the passage of the Pregnancy Discrimination Act of 1978 (an amendment to Title VII of the Civil Rights Act of 1964), employer amended its health insurance plan to provide its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as for other medical conditions, but the plan provided less extensive pregnancy benefits for spouses of male employees. Employer filed action challenging the EEOC's guidelines which indicated that the amended plan was unlawful, and the EEOC in turn filed an action against employer alleging discrimination on the basis of sex against male employees in employer's provision of hospital benefits.

Justice Stevens, in a 7-2 decision, held that fringe benefits are part of the "compensation, terms, conditions and privileges of employment" which must be provided on non-discriminatory basis. Thus, employer's health plan, which provided female employees with hospitalization benefits for pregnancy but provided less extensive pregnancy benefits to spouses of male employees, discriminated against male employees in violation of Title VII.

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986):

Sexual harassment is a form of sex discrimination under Title VII.

Former female employee of a bank brought action against the bank and her supervisor at the bank, claiming that during her employment at the bank she had been subjected to sexual harassment by the supervisor in violation of Title VII of the Civil Rights Act of 1964. Bank and supervisor maintained that any sexual interaction between the former employee and the supervisor was voluntary.

Justice Rehnquist, in a unanimous decision, argued that the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment. Sexual harassment is a form of sex discrimination in violation of Title VII. A plaintiff can establish a violation of Title VII by proving that s/he was subjected to a hostile or abusive work environment, even if there was no economic or tangible injury. Agency principles should be used for guidance in determining employer liability for sexual harassment.

Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. 616 (1987):

Affirmative action "goals" are constitutional.

Agency voluntarily adopted an affirmative action plan for hiring and promoting minorities and women. The plan provides that in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the agency is authorized to consider as one factor the sex of a qualified applicant. Plan had no quotas, just short-term goals. Male employee and female employee applied for the same promotion, within the skilled craft worker job classification. Of the 238 existing positions, not one was held by a woman. Both the male employee and female employee were equally qualified. The job was given to the female employee, with her sex being the determining factors in her selection. Male employee then filed suit claiming that such actions violated Title VII of the Civil Rights Act of 1964.

Justice Brennan, writing for the 6-3 Court, stated that the agency appropriately took account of Joyce's sex as one factor in determining that she should be promoted. The agency plan represented a flexible, moderate, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the agency's work force, and is consistent with Title VII. Plan did not trammel the rights of non-minorities.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989):

Sex discrimination can be an element in a firing decision.

A female senior manager in an office of a large professional accounting partnership was neither offered nor denied partnership when she was proposed for partnership. Instead her candidacy was held for reconsideration the following year. Later the partners in her office refused to repropose her for partnership. She then filed suit under Title VII of the Civil Rights Act of 1964, charging that the partnership discriminated against her on the basis of sex in its partnership decisions.

Justice Brennan, delivering the 6-3 decision of the Court, stated that plaintiff proved that although gender discrimination played a part in the job decision, employer may avoid liability by proving that it had a "mixed motive," i.e., it would have made the same decision regardless of discrimination. That is, defendant is liable for discrimination in employment unless it shows by a preponderance of the evidence that the same employment decision would have been reached without the discrimination.

Case was overturned by the Civil Rights Act of 1991.

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989):

Case makes it tougher to prove race discrimination.

Jobs at packing company fall into two categories: unskilled, which are filled primarily by nonwhites; and skilled positions which are filled predominantly with white workers, and virtually all pay more than unskilled positions. A class of non-white workers filed suit under Title VII of the Civil Rights Act of 1964, alleging that the company's hiring/promotion practices were responsible for the work force's racial stratification and had denied them the opportunity to work at skilled jobs on the basis of race.

Justice White, delivering the 5-4 decision of the Court, wrote that the plaintiff maintains burden of persuasion in disparate impact case. Employer's burden is only to produce evidence that practice significantly serves business needs. To make out prima facie case of impact, plaintiff must show that disparity is result of one or more specific job practices.

Decision overturned by the Civil Rights Act of 1991.

United Auto Workers v. Johnson Controls, 499 U.S. 187 (1991):

Sex-specific fetal-protection policy illegal.

Battery manufacturing process at plant exposed workers to high level of lead, which entailed health risks, including the risk of harm to any fetus carried by a female employee.

After eight of its employees became pregnant while maintaining blood lead levels exceeding that noted by OSHA as critical for a worker planning to have a family, company announced a policy barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding OSHA standard. A group of female employees filed a class action claiming that the policy constituted sex discrimination violative of Title VII of the Civil Rights Act of 1964.

Justice Blackmun, delivering the 9-0 opinion of the Court, stated that Title VII, as amended by the Pregnancy Discrimination Act, forbids sex-specific fetal-protection policies. The policy is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females.

Such a policy also could not be justified as a bona fide occupational qualification analysis because women could perform the essential functions of the job at issue.

St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993):

Case creates higher standard to prove race discrimination.

Halfway house employed Hicks as a correctional officer and later a shift commander. After being demoted and ultimately discharged, Hicks filed suit, alleging that these actions had been taken because of his race in violation of Title VII of the Civil Rights Act of 1964. At trial court, Hicks established a prima facie case of racial discrimination; the halfway house rebutted that presumption by introducing evidence of two legitimate, nondiscriminatory reasons for their actions; and then the halfway house's reasons were determined to be pretextual.

The Supreme Court held, 5-4, that when the reasons offered for an adverse employment decision are not credible, the fact finder is not compelled to find for a plaintiff. Justice Scalia wrote that the burden of proof remains at all time with the plaintiff to show intentional discrimination.

Justice Souter, with whom Justices White, Blackmun and Stevens join, dissented. Justice Souter stated: "Ignoring language to the contrary in both **McDonnell Douglas** and **Burdine**, the Court holds that, once a Title VII plaintiff succeeds in showing at trial that the defendant has come forward with pretextual reasons for its actions in response to a prima facie showing of discrimination, the factfinder still may proceed to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove." The new scheme is termed "unfair and unworkable."

Old scheme announced in **McDonnell Douglas** and **Burdine**: (1) plaintiff has burden to show prima facie case; (2) if plaintiff shows prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection; (3) should defendant carry this burden, the plaintiff must then have the opportunity to prove by preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were pretext for discrimination.

Harris v. Forklift Systems, 114 S.Ct. 367 (1993):

Sexual harassment equals "abusive work environment."

Female employee sued former employer claiming that his conduct toward her constituted "abusive work environment" harassment because of her gender in violation of Title VII of the Civil Rights Act of 1964. Lower courts determined that employer's insults and sexual innuendos were not "so severe as to seriously affect [her] psychological well-being" or lead her to "suffer injury."

Justice O'Connor, writing for a unanimous Court, concluded that plaintiff is not required to prove psychological harm in order to prevail on a hostile environment sexual harassment claim. To prove hostile environment, plaintiff must prove that reasonable person would find environment hostile or abusive and that the plaintiff subjectively perceived environment as abusive.

Landgraf v. USI Film Products, 62 U.S.L.W. 4255 (U.S. Apr. 26, 1994):

Civil Rights Act of 1991 is NOT retroactive.

Justice O'Connor, writing for a unanimous Court, stated that Sections 101 and 102 of the Civil Rights Act of 1991 (overruling Patterson v. McLean Credit Union and authorizing damages and jury trials) may not be applied to pending cases. Neither language of Act nor its legislative history manifest clear Congressional intent that Act be retroactive. Substantive provisions such as Sections 101 and 102, that impair rights a party had when s/he acted or increased liability, are presumptively prospective.

Age Discrimination in Employment Act:

Johnson v. Mayor of Baltimore, 472 U.S. 353 (1985):

Mandatory retirement age must be based on a bona fide occupational qualification.

Age Discrimination in Employment Act of 1967 prohibits employers from discriminating on the basis of age against employees who are between the ages of 40 and 70 by discharging them or requiring them to retire involuntarily, except when age is shown to be "a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business." Some federal civil servants were not covered by this Act.

City of Baltimore maintained an age 55 mandatory retirement for firefighters based on the federal civil service state which applied an age 55 mandatory retirement for federal firefighters. City employee filed suit claiming that the Act was violated by the City of Baltimore.

Justice Marshall, writing for a unanimous Court, argued that City of Baltimore must prove that its age 55 mandatory retirement for firefighters was based on a BFOQ. It is not sufficient for the City to simply point out or reference a federal service state which applied an age 55 mandatory retirement for federal firefighters.

Western Airlines v. Criswell, 472 U.S. 400 (1985):

Flight engineer filed suit claiming that policy of airline to force flight engineers' retirement at age 60 violated the Age Discrimination in Employment Act of 1967. Airline's defense was bona fide occupational qualification (BFOQ).

Justice Powell, 8-0, wrote that in order to prove a BFOQ, an employer must show, first, that the age limitation is reasonably necessary to the essence of its business. It must then show either that it had a factual basis for believing that all or substantially all persons over the age in question would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or highly impractical to deal with older employees on an individualized basis. The Court said the greater the safety factor, measured by the likelihood of harm and probable severity of that harm in case of an accident, the more stringent may be the job qualification designed to insure safety.

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991):

Justice White, 7-2, stated that an individual's claim under the Age Discrimination Employment Act (ADEA) may be subjected to compulsory arbitration pursuant to an arbitration clause set forth in a registration application with a stock exchange. This holding does not preclude the individual from filing a charge with the EEOC or affect the EEOC's investigative and enforcement authority under ADEA.

Astoria Federal Savings and Loan Association v. Solimino, 501 U.S. 104 (1991):

Plaintiff filed a charge with EEOC, alleging employer dismissed him because of age in violation of the Age Discrimination in Employment Act of 1967 (ADEA). Under a worksharing agreement, the EEOC referred his claim to the state agency responsible for claims. State agency found no probable cause under state law to believe plaintiff was terminated on account of age, and its decision was upheld on administrative review. Rather than appealing that decision to state court, plaintiff filed the same suit in the Federal District Court and lost due to issue preclusion. Low court claimed the ADEA did not have a legislative intent to deny preclusive effect to such state administrative proceedings. Court of Appeals reversed, arguing issue preclusion.

Justice Souter, delivering the opinion for a unanimous Court, stated that judicially unreviewed state administrative findings have no preclusive effect on age-discrimination proceedings in federal court. While well-established common-law principles, such as preclusion rules, are presumed to apply in the absence of a legislative intent to the contrary, Congress need not state expressly its intention to overcome a presumption of administrative estoppel.

Gregory v. Ashcroft, 501 U.S. 452 (1991):

Appointed state court judges are not covered by the Age Discrimination in Employment Act (ADEA) because the Act's term "employee" excludes elected state officials (including judges) and most high-ranking state officials, including "appointees on the

policymaking level," a category to which an appointed judge could reasonably be said to belong.

Stevens v. Dept. of Treasury, 500 U.S. 1 (1991):

Justice Blackmun, delivering the opinion of the Court, stated that a federal employee who chooses to go directly to court must file a notice of an intent to sue with the EEOC within 180 days of the alleged unlawful practice, and file a lawsuit after the expiration of 30 days. This decision corrected an erroneous lower court reading of the statute to the effect that suit must be filed within 180 days and EEOC notified within 30 days of the filing.

Hazen Paper Co. v. Biggins, 113 S.Ct. 1701 (1993):

62 year old plaintiff brought suit alleging a violation of the Age Discrimination in Employment Act (ADEA). He claimed that age had been a determinative factor in his employer's decision to fire him. Employer contested the claim, asserting instead that plaintiff had been fired for doing business with competitors.

Justice O'Connor delivered the opinion for a unanimous Court. She stated that an employer does not violate the ADEA by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service. In a disparate treatment case, liability depends on whether the protected trait-- under ADEA, age-- actually motivated the employer's decision. When that decision is wholly motivated by factors other than age, the problem that prompted the passage of the ADEA-- inaccurate and stigmatizing stereotypes about older workers' productivity and competence-- disappears. Thus, it would be incorrect to say that a decision based on years of service is necessarily age based.

Also, the "knowing or reckless disregard" standard for determining willful violation of the ADEA applies not only where age discrimination entered into an employment decision through a formal and facially discriminatory policy but also in cases where age is an informal and undisclosed motivating factor.

Rehabilitation Act:

Southeastern Community College v. Davis, 442 U.S. 397 (1979):

Woman who suffers from a serious hearing disability and who seeks to be trained as a registered nurse, was denied admission to a nursing program because officials believed her hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patients.

Justice Powell, delivering the unanimous opinion of the Court, wrote that an educational institution may require reasonable qualifications for admission to a clinical training program. Woman was not qualified because she could not meet the college's legitimate physical requirement of ability to understand speech without lipreading, and no accommodation existed that would permit her to benefit from the program.

This case is significant to the EEOC because it explains that, if an otherwise qualified individual cannot meet a particular qualification standard because of a handicap, he or she must show either that the standard is not legitimate, or that there is a reasonable accommodation that will enable him or her to meet the standard.

School Board of Nassau County v. Arline, 480 U.S. 273 (1987):

Justice Brennan, in a 7-2 decision, stated that a person afflicted with a contagious disease may be a "handicapped individual" within the meaning of Section 504. This case is significant for EEOC because it sets forth the direct threat analysis adopted by Congress in enacting the ADA.

AFFIRMATIVE ACTION ANONYMOUS

A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION. By Melvin I. Urofsky.¹ New York: Charles Scribner's Sons. 1991. Pp. xii, 270. \$22.95.

Affirmative action has for decades aroused one of the most passionate and "starkly divisive" debates in American politics.² The issue calls up deeply held beliefs and values, and compelling arguments exist on both sides of the debate. This divisiveness is reflected in the jurisprudence of the Supreme Court: affirmative action cases have almost invariably produced 5-4 decisions that contain numerous concurrences and bitter dissents.³

In *A Conflict of Rights*, Melvin I. Urofsky tells the story behind the case that marked the high point of the Court's approval of affirmative action, *Johnson v. Transportation Agency*,⁴ in which the Court held that title VII of the Civil Rights Act of 1964⁵ permitted an affirmative action plan though there was no evidence of past discrimination by the employer.⁶ Urofsky attempts to inform the affirmative action debate by putting human faces on its participants and on the working women and men whom it most directly affects (pp. x-xi).⁷ He also engages in brief but wide-ranging discussions of the policy arguments for and against affirmative action, and he surveys the legal landscape in which the *Johnson* Court acted. *A Conflict of Rights* successfully shows that affirmative action "is not a question of good versus evil, an obviously 'correct' policy as opposed to one obviously 'wrong,' and certainly not a story of 'good guys' and 'bad guys'" (pp. ix-x). Unfortunately, it gives little attention to the role of the legal institutions involved in the affirmative action debate and thus fails to consider whether the duty and authority to resolve so vexing and close an issue rests with Congress rather than the Court.

¹ Professor of History and Constitutional Law, Virginia Commonwealth University.

² Sullivan, *The Supreme Court, 1985 Term — Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 78 (1986); cf. Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1327 (1986) ("No domestic struggle has been more protracted or more riddled with ironic complication.")

³ See, e.g., *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990) (5-4 decision); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (6-3 decision, plurality opinion); *United States v. Paradise*, 480 U.S. 149 (1987) (5-4 decision, plurality opinion); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (same); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (same).

⁴ 480 U.S. 616 (1987).

⁵ 42 U.S.C. § 2000e to 2000e-17 (1988).

⁶ See *Johnson*, 480 U.S. at 641-42.

⁷ Cf. *Excerpts From First Senate Session on the Souter Nomination*, N.Y. Times, Sept. 14, 1990, at B4, col. 1 ("[A]t the end of our task some human being is going to be affected. Some human life is going to be changed in some way by what we do . . .").

The circumstances of *Johnson* allow Urofsky to highlight the central problem in title VII jurisprudence. An employer faces potential liability under title VII if its employment statistics suggest that it has discriminated against minorities or women.⁸ The employer can avoid title VII lawsuits by implementing a remedial affirmative action plan, but the plan itself may spawn title VII lawsuits by men or whites. Before *Johnson*, the "basic prerequisite" for such plans to survive a title VII challenge was the existence of a persistent discriminatory policy by the employer (p. 74); a plan could not simply remedy "societal" discrimination caused by individually held assumptions about the "proper" employment for minorities or women. If an employer admitted past discrimination to justify its plan, however, it once again invited traditional title VII suits by minorities and women.⁹

In *Johnson*, a California county transportation agency, pursuant to its affirmative action plan, used Diane Joyce's gender as "the determining factor" in selecting her as a road dispatcher over Paul Johnson, whom the agency hiring board had judged the "more qualified" candidate.¹⁰ Before Joyce was promoted to dispatcher, not one of the agency's 238 skilled-craft positions, which included the dispatcher's job, was held by a woman (p. 61). Joyce's testimony at trial made it painfully clear that she had faced workplace harassment and had fought to overcome societal discrimination. Yet both of the officials responsible for the agency's affirmative action plan testified at trial that they were unaware of any discriminatory practice by the agency, and the trial court found no such discrimination (pp. 72-74). The absence of a single woman among its 238 skilled-craft workers thus left the agency unsure both whether it could be found liable in a traditional title VII suit and whether it could justify an affirmative action plan.

Urofsky shows that the *Johnson* Court was more concerned with this problem than any other. At oral argument, five Justices repeatedly asked both lawyers whether various hypotheticals constituted prima facie title VII cases of discrimination and whether they supported a gender-conscious hiring plan (pp. 141-51). In the end, the agency's lawyer argued that its affirmative action plan was justified by statistics that gave the agency "a firm basis to conclude that it may have discriminated" (p. 147) without admitting that such discrimination had actually taken place.

⁸ See *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2121 (1989).

⁹ Justice Blackmun noted this problem in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), observing that employers were placed on a "high tightrope without a net beneath them." *Id.* at 209-10 (Blackmun, J., concurring) (quoting *Weber v. Kaiser Aluminum Corp.*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting)).

¹⁰ *Johnson*, 480 U.S. at 663-64 (Scalia, J., dissenting).

The Court itself was unwilling to settle this issue. Urofsky draws upon Justice Brennan's files on the *Johnson* case, which the Justice allowed him to examine, to trace the opinion-writing process through each successive draft (pp. 160-73). As the draft writing progressed, the separate concurrences of Justices Stevens and O'Connor revealed "diametrically opposed" views of what proof justified an affirmative action plan: "Stevens wanted to allow employers great latitude in their justification," while O'Connor wanted to allow affirmative action plans only when an employer faced a prima facie title VII case (p. 166).

In response, Justice Brennan amended his majority draft to state that employers need not establish a prima facie title VII case against themselves to support their plans (p. 166). He avoided saying what an employer *would* have to show, however, simply noting that the statistic of no females in 238 skilled-craft positions was enough (p. 161). Justice Brennan also added a footnote hinting that societal discrimination alone could justify an affirmative action plan. Justice Powell then suggested that he make clear that *Johnson* was not overruling the Court's previous holding that societal discrimination was an insufficient basis. Instead of providing clarification, however, Justice Brennan "decided to eliminate the footnote completely, and avoid the issue" (p. 173). In his dissent, Justice Scalia accused the majority of allowing societal discrimination as a rationale without saying so, calling it "an enormous expansion, undertaken without the slightest justification or analysis."¹¹

A Conflict of Rights sheds considerable light on the affirmative action debate, but its preoccupation with policy leaves the book short in its legal analysis. Although Urofsky amply demonstrates the confusion and inconsistency among Supreme Court affirmative action decisions,¹² he fails to recognize that the Court's ever-shifting standards inevitably flow from its attempts to reconcile affirmative action with title VII — a statute that explicitly forbids race- and gender-conscious hiring plans. These attempts, begun in *United Steelworkers v. Weber*,¹³ have unmoored the law of affirmative action from any statutory guidance and have instead created a jurisprudence based on nothing more than the Justices' own unstable compromises.¹⁴

Urofsky gives short shrift to Justice Scalia's arguments in his *Johnson* dissent that the *Weber* Court had distorted the meaning of title

¹¹ *Id.* at 668.

¹² Urofsky agrees with another commentator's assessment of these decisions: "We still cannot figure out when it is naughty to reverse-discriminate and when it is nice. . . . [T]he forecast here is for additional decades of ontological hairsplitting . . ." (p. 112) (quoting Seligman, *Dubious Distinctions*, *FORTUNE*, June 23, 1986, at 127, 127).

¹³ 443 U.S. 193 (1979).

¹⁴ See *Johnson*, 480 U.S. at 670-72 (Scalia, J., dissenting).

VII and that *Weber* should be overruled.¹⁵ Urofsky concedes that the clear language of title VII prohibits affirmative action, but he relates with approval the *Weber* majority's interpretation of the act's legislative history and purpose (p. 47). He only briefly mentions then-Justice Rehnquist's thirty-six page *Weber* dissent, left "literally unanswered" by the majority,¹⁶ which painstakingly laid out the legislative history of title VII to discredit each of the majority's interpretations.¹⁷ Justice Rehnquist's *Weber* dissent makes clear that the majority opinion was "supported more by assertion than by a careful review of the many pieces of evidence."¹⁸ Chief Justice Burger went so far as to label the majority's arguments "specious."¹⁹

In fact, *Weber* starkly broke from the Court's own understanding of title VII. In its first decision interpreting the statute, the Court had held that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."²⁰ Three years before *Weber*, a unanimous Court had found that the "uncontradicted legislative history" showed that title VII "prohibits racial discrimination against [whites] upon the same standards as would be applicable [to] Negroes."²¹ And in the Term preceding *Weber*, the Court had reemphasized, "It is clear beyond cavil that the obligation imposed by title VII is to provide equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."²²

In response, Urofsky offers an argument that pro-affirmative action Justices themselves have made in post-*Weber* opinions: if the *Weber* Court misinterpreted title VII, Congress could have corrected the error by amending the statute.²³ According to Urofsky, Congress's inaction "can, and should, be taken as an endorsement of the *Weber* position" (p. 171). Such a reading of congressional silence has been widely criticized, however, for ignoring the realities of the legislative process

¹⁵ For other arguments that *Weber* violated title VII's mandate, see Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 336-37, 365-66 (1990); and Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 302-06, 316-17 (1989).

¹⁶ *Johnson*, 480 U.S. at 665 n.3 (Scalia, J., dissenting).

¹⁷ *Weber*, 443 U.S. at 230-52 (Rehnquist, J., dissenting). Throughout the debate over passage of title VII, its strongest proponents maintained that an interpretation permitting any preference for blacks would "do violence to common sense." *Id.* at 242 (quoting 110 CONG. REC. 8921 (Statement of Sen. Williams)).

¹⁸ Eskridge & Frickey, *supra* note 15, at 366.

¹⁹ *Weber*, 443 U.S. at 217 (Burger, C.J., dissenting).

²⁰ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

²¹ *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

²² *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978) (emphasis in original).

²³ See *Johnson*, 480 U.S. at 629 n.7.

and subverting the Constitution.²⁴ Countless institutional hurdles stand in the way of corrective legislation.²⁵ And when the Court misinterprets a statute, it upsets a complicated compromise between a host of competing concerns. Especially when the statute involves a highly charged issue such as affirmative action, "there is little or no disposition on the part of the legislators to whom the judges have given a free victory to return to the matter and give the other side what it bargained for. The Court's alteration of the law becomes permanent."²⁶

More important, even if a majority of the current Congress approves of a statutory interpretation, such approval should not in itself legitimate that interpretation. As the Court has said, "[t]he views of members of a later Congress, concerning . . . Title VII . . . are entitled to little if any weight. It is the intent of the Congress that enacted [the statute] in 1964 . . . that controls."²⁷ Moreover, pointing to tacit congressional support for a statutory interpretation subverts the President's veto power over legislation. For example, the Court could not find legitimacy for an interpretation of title VII in the vetoed Civil Rights Act of 1990;²⁸ to do so would "freez[e] the President out of his constitutionally authorized role. . . . Yet affording significance to congressional inaction can have this very effect. Inaction enables Congress to effectuate its will without ever risking presidential veto (not to mention public scrutiny or pressure)."²⁹

It is thus up to the Court to overrule *Weber*, and it appears likely that the Court will in fact do so. The three dissenting members of the *Johnson* Court explicitly called for an overruling of *Weber*; a fourth, Justice O'Connor, indicated in her concurrence "that if faced by . . . a direct challenge to *Weber*, she might well vote the other way" (p. 179). Justice Kennedy's expressed views on affirmative action and statutory construction suggest a solid fifth vote. With the depar-

²⁴ See *id.* at 671-72 (Scalia, J., dissenting); H. HART & A. SACKS, *THE LEGAL PROCESS* 1394-1401 (tent. ed. 1958); Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90-108 (1988); Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 186 (1989); Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 530 (1982).

²⁵ Although a bill's passage requires the votes of a majority of both houses of Congress, it can be killed by only one or a few powerful committee chairmen or congressional leaders. See Marshall, *supra* note 24, at 188, 190. Hart and Sacks list many additional hurdles. See H. HART & A. SACKS, *supra* note 24, at 1395-96.

²⁶ R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 102 (1990). A Supreme Court decision, even one that misreads the intention of Congress, may also inculcate in society the norms and preferences it enforces.

²⁷ *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977); see also Eskridge, *supra* note 24, at 95; Marshall, *supra* note 24, at 193 & n.79.

²⁸ S.2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (1990).

²⁹ Marshall, *supra* note 24, at 194.

ture of Justice Brennan and the arrival of another Justice chosen in part for his strict constructionist approach,³⁰ the current Court may have as many as six members disposed to overrule *Weber*.

A rejection of *Weber* might prompt Congress to amend title VII to allow affirmative action explicitly.³¹ It is the role of Congress and not of the Court, however, to take such a step.³² A congressional enactment could establish specific statutory guidelines for permissible affirmative action plans, thereby imbuing the law with a stability and consistency it cannot hope to attain in its present form.

In *Weber* and *Johnson*, the Court "replaced Congress' solution to the problem of racial [and gender] inequality (eliminating discrimination) with [its] own solution (preferential hiring even in the absence of any evidence whatsoever of prior illegal discrimination)."³³ By slighting evidence of this abrogation of legislative supremacy, *A Conflict of Rights* avoids the question whether a case such as *Johnson* is the appropriate vehicle for attempting to settle the affirmative action debate. Nevertheless, by highlighting the difficulty of the issue and the constant swings in Supreme Court affirmative action decisions, Urofsky unwittingly demonstrates the need for Congress to make the necessary compromises. Although a return to a judicial interpretation of title VII that prohibits all race- and sex-based discrimination might be said to rend "the fabric of our law,"³⁴ *Weber* was itself a dramatic rejection of previous Court precedents that had "unambiguously endorsed the neutral approach" to title VII.³⁵ A reading of title VII that forces Congress to make clear its position on affirmative action will rectify a jurisprudence that otherwise seems doomed to continued contradictions, reversals, and uncertainty.

³⁰ See *Comments by President on His Choice of Justice*, N.Y. Times, July 24, 1990, at A18, col. 1.

³¹ Statutes such as 42 U.S.C. § 6705(f)(2) (1988), which the Court upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), suggest that Congress may do so, although the history of the Civil Rights Act of 1990, see Lewis, *President's Veto of Rights Measure Survives by 1 Vote*, N.Y. Times, Oct. 25, 1990, at A1, col. 3, suggests that compromises would be necessary to achieve enactment. The equal protection clause places additional constraints on the ability of Congress to allow affirmative action plans for public employers. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion).

³² Cf. *United Steelworkers v. Weber*, 443 U.S. 193, 216 (1979) (Burger, C.J., dissenting) ("The Court reaches a result I would be inclined to vote for were I a Member of Congress considering a proposed amendment of Title VII. [But] the Court's judgment [is] arrived at by means wholly incompatible with long-established principles of separation of powers.")

³³ Farber, *supra* note 15, at 316.

³⁴ *Johnson*, 480 U.S. at 644 (Stevens, J., concurring) (disagreeing with *Weber* but concluding that the need for stability in the law required him to uphold its result).

³⁵ *Id.* at 643.

218

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

July 18, 1994

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-3314

TO: Legislative Liaison Officer -

LABOR - Robert A. Shapiro - (202)219-8201 - 330
CIVIL RIGHTS - Mary K. Mathews - (202)376-7700 - 296
EEOC - Claire Gonzales - (202)663-4900 - 213
OPM - James N. Woodruff - (202)606-1424 - 331

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

OMB CONTACT: Ingrid SCHROEDER (395-3883)
Secretary's line (for simple responses): 395-3454

**SUBJECT: JUSTICE Proposed Report RE: S 1776, Civil
Rights Standards Restoration Act**

DEADLINE: July 22, 1994

COMMENTS: Attached is a copy of S.1776 for your reference.

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

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

CC:

Adrien Silas
Bob Damus
Clarissa Cerda
Cookie Walden
Jeremy Benami
Joe Wire
Bob Rideout
Ray Kogut

Margaret Shaw

RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

If your response to this request for views is simple (e.g., concur/no comment) we prefer that you respond 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 secretary.

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); (2) sending us a memo or letter; or (3) if you are an OASIS user in the Executive Office of the President, sending an E-mail message. Please include the LRM number shown above, and the subject shown below.

TO: Ingrid SCHROEDER
 Office of Management and Budget
 Fax Number: (202) 395-3109
 Analyst/Attorney's Direct Number: (202) 395-3883
 Branch-Wide Line (to reach secretary): (202) 395-3454

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

SUBJECT: JUSTICE Proposed Report RE: S 1776, Civil Rights Standards Restoration Act

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

Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Chairman Kennedy:

I am writing to urge enactment of S. 1776, the "Civil Rights Standards Restoration Act." This bill would overturn the Supreme Court decision in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993). In our view, that decision will make it more difficult for victims of intentional discrimination to obtain redress and should be overturned by legislation. S. 1776 is a carefully drafted, straightforward reversal of that decision. It would reinstate the standard for proving a prima facie case of intentional discrimination that had been applied consistently by the Civil Rights Division of the Department of Justice and a majority of federal courts.

I. Background

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court established the order of proof and allocation of burdens that govern cases alleging intentional employment discrimination in violation of Title VII of the Civil Rights Act of 1964 when the plaintiff does not have direct evidence of discrimination, but must rely on circumstantial proof. The presentation begins with evidence of a prima facie case, the elements of which vary according to the employment action being challenged. For example, a black applicant alleging a racially discriminatory refusal to hire would show that (1) he was black, (2) he was qualified for the position for which he applied, (3) he was not offered the position, and (4) the position remained open. The burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. at 802. The employer is required to produce an explanation, but does not bear the burden of persuading the trier of fact of its truth. If the employer fails to produce any explanation, the employee prevails. If the employer meets his burden of production, the employee may then prevail by proving by

a preponderance of the evidence that the reason offered by the defendant was not its true reason, but was a pretext for discrimination. This approach has governed such cases for the past twenty years and has been imported judicially into other areas in which liability turns on proof of intent.¹

Prior to Hicks, the Civil Rights Division of the Department of Justice, the Equal Employment Opportunity Commission and a majority of federal courts had concluded that an employee satisfied the burden of proving pretext by persuading the trier of fact that discrimination more likely than not motivated the employment decision or "by showing that the employer's proffered explanation is unworthy of credence." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); see also United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716 (1983). Hicks, however, posed the question whether a court is compelled to find discrimination once the employee proves that the explanation offered by the employer was not the true reason for its action. The district court held that even though Hicks had proven false the explanation offered by his employer for firing him he was not entitled to judgment in his favor. The court of appeals reversed, holding that once Hicks satisfied this burden he was entitled to judgment. The Supreme Court, by a vote of 5-4, reversed the court of appeals. The Department of Justice and the EEOC filed a brief (copy attached) as amicus curiae in the Supreme Court supporting the position of the employee and urging affirmance of the judgment of the court of appeals.

II. The Decision

Melvin Hicks, an African American male, was hired as a correctional officer at St. Mary's Honor Center in 1978 and promoted to a supervisory position in 1980. In January 1984, in response to complaints about the operation of the institution, the superintendent, who was white, was replaced by a new white superintendent. At the same time, three black supervisors were replaced by whites, one of whom became Hicks's immediate supervisor. Hicks and one other black supervisor were initially retained. Until this time, Hicks had never been subject to any disciplinary action. Six months later, following several instances involving petty violations of institution rules, Hicks was fired.

¹ See, e.g., Age Discrimination in Employment Act, 29 U.S.C. 621; Civil Rights Act of 1866, 42 U.S.C. 1981; Civil Rights Act of 1866, 42 U.S.C. 1982; Civil Rights Act of 1871, 42 U.S.C. 1983; Civil Rights Act of 1964, Title II, 42 U.S.C. 2000a; Fair Housing Act of 1968, 42 U.S.C. 3601; Rehabilitation Act of 1973, 29 U.S.C. 794; Employee Retirement Income Security Act, 29 U.S.C. 1140; Fair Labor Standards Act, 29 U.S.C. 215.

Hicks brought suit pursuant to Title VII and 42 U.S.C. 1983. He established a prima facie case pursuant to McDonnell Douglas. The employer responded that Hicks had not been discharged because of his race, but because of his violations of institution rules. Hicks persuaded the district court, however, that the employer's explanation was false. The district court found that Hicks was the only supervisor disciplined for violations committed by subordinates, similar violations by Hicks's peers were not dealt with as harshly, and his supervisor had provoked a final confrontation so that Hicks would threaten him. The district court concluded, however, that, although there had been a crusade to fire him, Hicks had not proven that the crusade was motivated by race rather than personal animosity.

The court of appeals reversed, holding that once Hicks proved that the employer's explanation of the reason for his firing was not the true reason, the district court was compelled to enter judgment in his favor. The Supreme Court reversed and remanded the case to the court of appeals.

The Supreme Court agreed that the McDonnell Douglas order of proof applied to the case and affirmed that Hicks had presented a prima facie case of discrimination, defendant had articulated nondiscriminatory reasons for the firing, and Hicks had proven that those reasons were not the true explanation for his firing. The Court held, however, that simply proving that the explanations articulated by the employer were not the employer's true reasons did not entitle Hicks to judgment because he retained the ultimate burden of persuading the trier of fact that the true explanation for the firing was race. The Court determined that simply proving the employer's explanations pretextual did not necessarily amount to the required showing that they were a pretext for discrimination. Such proof, the Court held, permits the trier of fact to find discrimination, but does not compel such a finding.

The dissent accused the majority of abandoning settled law to allow triers of fact to roam freely through the record to discover nondiscriminatory reasons for employment decisions that were not offered by employers. The dissent alleged that the majority rewrote or rejected the plain language of prior cases, and predicted that the majority's approach would undermine the purposes behind the McDonnell Douglas order of proof, and prove unworkable and unfair to plaintiffs.

B. Impact of the Decision

Hicks means that in some cases plaintiffs will be required to rebut defenses that defendants did not present. This will make it more difficult for plaintiffs to prevail in cases alleging intentional discrimination in which they rely on circumstantial evidence. The decision vests triers of fact with considerable discretion to rule against plaintiffs on the basis that the employer's action may have been motivated by a reason

that was not proffered at trial as the motivating reason.

- In our view, the decision should not be read to require as a matter of law that a plaintiff produce evidence of discrimination beyond the inference that arises from proof that the employer has put forward a false explanation. A so-called "pretext-plus" standard would be inconsistent with the Court's statement that proof that an employer's explanation was false would be sufficient to sustain a finding of discrimination. Some courts, however, appear to have suggested that plaintiffs must produce additional evidence of discrimination beyond rebuttal of the employer's explanation. See Biggins v. Hazen Paper Co., No. 91-1591, slip op. 12 (1st Cir. Oct. 18, 1993) (plaintiff prevailed in age discrimination case, but only because "he proved a prima facie case; the jury disbelieved the employer's reasons for discharging the plaintiff; and the plaintiff met his ultimate burden of persuasion by adducing additional admissible evidence of age discrimination"); Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 959 (5th Cir. 1993) ("St. Mary's instructs plaintiffs in employment discrimination cases to provide substantially more proof than [plaintiff] did."); Mitchell v. Data General Corp., No. 93-1238, slip op. 10 (4th Cir. Dec. 22, 1993) (plaintiff's age claim fails in part because "no direct evidence exists to indicate that age was a factor in * * * discharging him"). Thus, some courts appear to have read Hicks to impose a "pretext-plus" standard on plaintiffs.

Any requirement that a plaintiff produce some direct evidence of discrimination is inconsistent with McDonnell Douglas and its progeny. McDonnell Douglas laid out the requirements for establishing a prima facie case and distributed burdens on employers and employees for the very reason that there often is no direct evidence of an employer's motivation, particularly if race was the reason. Prior to Hicks, it was widely held that if the employee persuaded the trier of fact that the employer's articulated reason was not the true reason, an inference sufficient to compel judgment for the employee arose that the employer's stated reason was a pretext for an impermissible reason. That inference arose because employers rarely act for no reason and if they are unwilling to articulate the true reason it may be inferred that it is illegitimate and, more likely than not, based on impermissible discrimination. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

Hicks has been read to make it more difficult for plaintiffs to survive motions for summary judgment. The Fifth Circuit has stated that after Hicks "even if an employee has established that he was clearly better qualified than his or her replacement, that showing may be insufficient to clear the summary judgment hurdle." Bodenheimer v. PPG Industries, Inc., 5 F.3d at 959 n.8. The court went on to acknowledge that "prior to St. Mary's, such evidence certainly would be sufficient to avoid summary judgment and perhaps prevail at trial." Ibid. See also Leblanc v. Great American Insurance Co., 6 F.3d 836 (1st Cir. 1993) (summary

judgment for employer in age discrimination case in reliance on Hicks).

Moreover, many cases alleging intentional discrimination are now tried before a jury, which does not make reviewable findings of fact, but merely announces its judgment on the ultimate issue. And Hicks may result in jury instructions that offer very little guidance. Juries may be told that they may consider as a basis for the employer's action any reason for which they can find support in the record. As in any case where there is confusion on the record, it may make identification of error more difficult.

The Court's decision turns pursuit of a disparate treatment claim into a gamble for plaintiffs. A vigilant plaintiff now must try to discover and attempt to rebut every explanation for an employer's conduct, but it cannot be certain that it has found and addressed them all. This effort will increase the cost of pursuing a discrimination claim by requiring more extensive discovery and prolonged trial proceedings. The uncertainty about whether every explanation has been addressed will place added pressure on plaintiffs to settle without pursuing their claims fully. The added expense of pursuing discrimination claims will make attorneys less likely to take such cases, particularly when coupled with the decreased likelihood of prevailing. As a result, more discrimination will go unredressed.

The principal argument against overturning Hicks is that some defendants may be found liable for discrimination when other reasons motivated them if the employee need prove only that the employer's articulated justification was not the true reason. Presumably, an employer could decline to articulate the true explanation because it was otherwise unlawful or embarrassing and not because it violated Title VII. See Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990).

Structuring an approach to uncovering intent, however, requires a distribution of burdens that will ensure that the employee is given a fair opportunity to establish that the employer's intent was discriminatory, while ensuring the employer a reasonable opportunity to inform the trier of fact of its true nondiscriminatory intent. In a case dependent on circumstantial evidence of intent, direct knowledge of the employer's true intent lies uniquely with the employer. It seems essential as a matter of fairness to the employee, who has established a prima facie case pursuant to McDonnell Douglas, that the employer be required to articulate its asserted reason so that the employee can attempt to rebut it. Even Hicks, itself, acknowledges that it imposes no unfairness on the employer to put it on notice that it must articulate its reason for an employment action or be found liable for discrimination. It, therefore, hardly seems any less fair to put the employer on notice that it must articulate the true reason for its conduct or be found liable for discrimination. Surely, it is no less fair to impose liability

on an employer who produces a false explanation than one who produces no explanation at all. And least fair of all is forcing the employee to guess as to the employer's motivation.

III. S. 1776

S. 1776 would overturn Hicks through reliance on language taken from major Supreme Court decisions that preceded Hicks. It would apply to any proceeding pursuant to federal law in which a complaining party proved a prima facie case of intentional discrimination. Although Hicks involved employment discrimination pursuant to Title VII, the McDonnell Douglas approach to proving intentional discrimination has been adopted to the application of numerous statutes in which proof of intent is crucial. It is, therefore, appropriate not to limit the reversal to Title VII cases, but to extend it to all proceedings alleging intentional discrimination in violation of federal law. Importantly, proposed section 1979A(b) would impose a rule of construction limiting application of the statute to proceedings "in which the method of proof articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), applies" and states that the approach of S. 1776 "shall not be construed to specify the exclusive means" of establishing intentional discrimination. Thus, this method of proving intentional discrimination will not extend beyond those areas of law where the use of the McDonnell Douglas prima facie case is appropriate.

The bill also applies only to cases of intentional discrimination. Thus, it will not have any effect on cases alleging discrimination based on the application of facially neutral policies or practices that produce a disparate impact.

The language used to define the burden of employers to respond to the prima facie case by articulating a justification is drawn from Supreme Court cases. The requirement that the explanation be clear and specific appears in Burdine, 450 U.S. at 255, 258. The required articulation of "a legitimate, nondiscriminatory explanation" has been repeated consistently since it first appeared in McDonnell Douglas, 411 U.S. at 802. See Burdine, *supra* at 254; U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. at 714. The requirement that the articulation occur through the "introduction of admissible evidence" is well accepted. See Burdine, 450 U.S. at 255; Aikens, 460 U.S. at 714. Hicks did not change the standard for establishing a prima facie case or the standard governing the employer's articulation of a justification and the language of S. 1776 accurately codifies those standards.

The bill states that once an employer has come forward with a justification, the complainant may still prevail in two ways. First, the complainant may show by a preponderance of the evidence that "a discriminatory reason more likely motivated the respondent." This standard does not work a change in the law.

This means of prevailing remains available after Hicks.

The second way for a complainant to prevail is to prove by a preponderance of the evidence that "the respondent's proffered explanation is unworthy of credence." This provision overturns the holding of Hicks and reinstates the standard previously articulated by the Supreme Court in Burdine, 450 U.S. at 256.

The Department of Justice strongly supports the reinstatement of this standard. It means that if the complainant is able to show that the reason articulated by the employer to justify a decision is not the true reason for the employer's action the complainant will prevail. This standard gives due recognition to the important purpose served by requiring the employer to articulate a justification: "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." Id. at 255-256. If the employer is permitted to articulate a false explanation and still prevail, the important burden shifting scheme first established in McDonnell Douglas will be undermined.

The Department of Justice, therefore, believes that S. 1776 strikes the proper balance between the interests of employers and the need to ensure that victims of intentional discrimination secure redress. We suggest, however, the inclusion of language that would establish the effective date of this legislation and its effect on pending cases. We urge its passage and look forward to working with Congress toward its enactment.

The Office of Management and Budget has advised that there is no objection to this report from the standpoint of the Administration's program.

Sincerely,

Sheila F. Anthony
Assistant Attorney General

cc: Honorable Nancy Landon Kassebaum
Ranking Minority Member

103D CONGRESS
1ST SESSION

S. 1776

To amend the Revised Statutes to restore standards for proving intentional discrimination.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 22, 1993

Mr. METZENBAUM (for himself, Mr. FEINGOLD, Mr. WOFFORD, Mrs. MURRAY, and Mr. SIMON) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

A BILL

To amend the Revised Statutes to restore standards for proving intentional discrimination.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Civil Rights Standards
5 Restoration Act".

6 **SEC. 2. FINDINGS.**

7 Congress finds that—

8 (1) the Supreme Court enunciated a method of
9 proving intentional discrimination under Federal law
10 in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792

1 (1973), and Texas Department of Community
2 Affairs v. Burdine, 450 U.S. 248 (1981);

3 (2) such method has been applied to establish
4 intentional discrimination in cases and proceedings
5 under title VII of the Civil Rights Act of 1964 (42
6 U.S.C. 2000e et seq.), title VIII of the Civil Rights
7 Act of 1968 (42 U.S.C. 3601 et seq.), the Age Dis-
8 crimination in Employment Act of 1967 (29 U.S.C.
9 621 et seq.), and other Federal laws; and

10 (3) the standards established in St. Mary's
11 Honor Center v. Hicks, No. 92-602 (1993), regard-
12 ing the effect of a finding of pretext on proof of un-
13 lawful intentional discrimination, are contrary to—

14 (A) such method established by the Su-
15 preme Court in McDonnell Douglas Corp. v.
16 Green and Texas Department of Community
17 Affairs v. Burdine; and

18 (B) congressional intent regarding such
19 Federal laws.

20 **SEC. 3. PURPOSES.**

21 The purposes of this Act are—

22 (1) to restore the standards (regarding the
23 effect of a finding of pretext on proof of unlawful in-
24 tentional discrimination) enunciated by the Supreme
25 Court in McDonnell Douglas Corp. v. Green and

1 Texas Department of Community Affairs v. Burdine
2 as part of a method of proving intentional discrimi-
3 nation; and

4 (2) to ensure the application of such restored
5 standards in all cases and proceedings under Fed-
6 eral law (including title VII of the Civil Rights Act
7 of 1964, title VIII of the Civil Rights Act of 1968,
8 the Age Discrimination in Employment Act of 1967,
9 and other Federal laws) to which such method
10 applies.

11 **SEC. 4. STANDARDS FOR PROVING INTENTIONAL DISCRIMI-**
12 **NATION IN CERTAIN CIRCUMSTANCES.**

13 The Revised Statutes are amended by inserting after
14 section 1979 (42 U.S.C. 1983) the following new section:

15 **"SEC. 1979A. STANDARDS FOR PROVING INTENTIONAL DIS-**
16 **CRIMINATION IN CERTAIN CIRCUMSTANCES.**

17 **"(a) STANDARDS.—**In a case or proceeding brought
18 under Federal law in which a complaining party meets its
19 burden of proving a prima facie case of unlawful inten-
20 tional discrimination and the respondent meets its burden
21 of clearly and specifically articulating a legitimate, non-
22 discriminatory explanation for the conduct at issue
23 through the introduction of admissible evidence, unlawful
24 intentional discrimination shall be established where the

1 complaining party persuades a trier of fact, by a prepon-
2 derance of the evidence, that—

3 “(1) a discriminatory reason more likely moti-
4 vated the respondent; or

5 “(2) the respondent’s proffered explanation is
6 unworthy of credence.

7 “(b) **RULE OF CONSTRUCTION.**—This section shall
8 apply only to those cases and proceedings in which the
9 method of proof articulated in *McDonnell Douglas Corp.*
10 *v. Green*, 411 U.S. 792 (1973), and *Texas Department*
11 *of Community Affairs v. Burdine*, 450 U.S. 248 (1981),
12 applies and shall not be construed to specify the exclusive
13 means by which the complaining party may establish un-
14 lawful intentional discrimination under Federal law.”

○

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

URGENT

July 26, 1994

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-3419

TO: Legislative Liaison Officer -

NEC - Sonyia Matthews - (202)456-6722 - 429
EEOC - Claire Gonzales - (202)663-4900 - 213
DEFENSE - Samuel T. Brick, Jr. - (703)697-1305 - 325
VA - Robert Coy - (202)273-6666 - 229
OPM - James N. Woodruff - (202)606-1424 - 331
TRANSPORTATION - Tom Herlihy - (202)366-4687 - 226
CIVIL RIGHTS - Mary K. Mathews - (202)376-7700 - 296
LABOR - Robert A. Shapiro - (202)219-8201 - 330

FROM: JANET R. FORSGREN (for) *Connie Bowers*
Assistant Director for Legislative Reference

OMB CONTACT: **Connie BOWERS (395-3803)**
Secretary's line (for simple responses): 395-7362

SUBJECT: **REVISED JUSTICE Proposed Testimony**
RE: S 2238, Employment Non-Discrimination Act
of 1994

DEADLINE: **WEDNESDAY, 4:00 P.M. July 27, 1994**

COMMENTS: The Senate Labor Committee's hearing on S. 2238 has been rescheduled for Friday, July 29. Justice's testimony has been revised.

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

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

cc: *Joel Klein*
Clarissa Cerda
Stephen Neuwirth
David Levine (CEA)
Bob Damus
Steve Redburn
Daryl Hennessy
Harry Meyers
Larry Matlack

Joe Wire
Bob Rideout
Ray Kogut
Phoebe Vickers
Delphine Motley
Janet Forsgren

→ *Steve Wornath*

Justice Reversed Testimony

Senate Labor Committee
July 29, 1994

DRAFT 7/26

Mr. Chairman and Members of the Committee, I am pleased to provide this testimony today on the problems addressed by S. 2238, the Employment Non-Discrimination Act of 1994.

On behalf of the President, I want to commend you, Mr. Chairman, your colleagues in the House, Mr. Frank and Mr. Studds, and your more than 130 cosponsors in both chambers, for introducing this bill. It is a serious and thoughtful approach to address the problem of discrimination against gay men and lesbians. Because the President strongly supports the principle of non-discrimination based on sexual orientation, he will sign into law legislation passed by Congress that prohibits discrimination in employment based on sexual orientation.

The President and his Administration have consistently supported the principle of non-discrimination in employment. All Americans should be able to find jobs, keep jobs and earn promotions based on their qualifications and the quality of their work, not on irrelevant characteristics. This has been a core value in this country for many years.

As you know, thirty years ago, Congress enacted the Civil Rights Act of 1964, including Title VII which prohibits discrimination in employment based on race, color, religion, sex

and national origin. In 1967, the Age Discrimination in Employment Act was enacted to protect older Americans. Most recently, in 1990, Congress enacted the Americans with Disabilities Act to extend full civil rights protections to persons with disabilities. All of these are legislative markers on the road to full and productive participation in our free society.

These laws reflect Congress' deepening understanding of the notion that characteristics such as race, religion, sex, age and disability have no relevance to the ability of an individual to perform required functions of a job. Quite often, unfortunately, prejudice and stereotypes held by some employers still limit a gay or lesbian person's ability to obtain and keep a job. But as the President said in Riga, Latvia, recently, "Freedom without tolerance is freedom unfulfilled." In that spirit, this Administration believes the principle of non-discrimination in employment should be extended to include sexual orientation. The Administration wants to work with Congress to enact such a bill to make this principle a reality.

Our Nation prides itself on embracing the principle that persons should be judged based on merit and ability, not on class, culture or other extraneous factors. Our civil rights laws reflect this principle. By allowing employment discrimination on the basis of sexual orientation, our society

cheats itself out of the contributions of very able and talented individuals throughout the Nation. As the international market place becomes increasingly competitive, America does not have the luxury of wasting talent.

The Administration supports using the framework of Title VII to provide protections against discrimination based on sexual orientation. These well known standards -- covering the same employers, using the same standards, and providing the same enforcement mechanisms -- provide employers and employees with solid guidance on the law. S. 2238 takes this sound approach, building on 30 years of Title VII jurisprudence.

S. 2238 makes a number of exceptions to the basic Title VII provisions. The first is for instances of disparate impact. Disparate impact was first recognized as a basis for establishing a violation of Title VII by the U.S. Supreme Court in Griggs v. Duke Power, 401 U.S. 424 (1971). In Griggs, the Court recognized that a facially neutral practice that appears fair in form but discriminatory in operation, and if not justified by business necessity, is prohibited by Title VII. The Civil Rights Act of 1991 amended Title VII to codify the disparate impact standard. S. 2238, however, explicitly excludes disparate impact as a method of proof in cases of discrimination on the basis of sexual orientation.

The President has always supported, and strongly respects, freedom of religion. The administration supports carefully crafted provisions to insure that civil rights laws do not unduly interfere with that freedom. Title VII excludes religious organizations from the prohibition from discrimination based upon religion. The Employment Non-Discrimination Act respects freedom of religion by providing a broad exemption for religious organizations, an exemption broader than in other employment discrimination laws.

The third distinction from Title VII pertains to benefits. Under Title VII, discrimination in the provision of employee benefits is prohibited. The Employment Non-Discrimination Act, by contrast, would not apply to the provision of employee benefits to an individual for the benefit of his or her partner.

The fourth exception is for members of the armed forces. Title VII does not apply to members of the armed forces. S. 2238 would not apply and would have absolutely no impact on uniformed military employment practices. The Administration agrees with this approach.

The President has consistently opposed the use of quotas in employment discrimination law and his position is no different here. In addition to the exceptions outlined above, S. 2238

explicitly prohibits the use of quotas. The Administration agrees that any bill addressing this issue should rule out the use of quotas.

The notion of providing antidiscrimination protection is not so novel as to be untested in the public and private sectors. Longstanding Federal employment policy prohibits discrimination based on non-job-related conduct, including discrimination based on sexual orientation. We know of nothing in that experience to suggest a loss or reduction in productive capacity or workplace goodwill. Eight states and over 80 local governments provide some form of protection. Indeed, ___ of your colleagues in the House and Senate have pledged not to discriminate in employment based on sexual orientation.

In the private sector, numerous companies such as General Motors, Miller Brewing Company, Citicorp, IBM, and AT&T have policies of non-discrimination based on sexual orientation. A number of these employers also provide the same degree of employee benefits to a person's partner, without regard to sexual orientation.

Until this year, Congress had not heard testimony on the issue of employment discrimination based on sexual orientation in nearly 15 years. I trust that over the course of these hearings you will hear from many witnesses who will document the problems

faced by lesbians and gay men in employment, and that their testimony will build a useful and solid record on the problem of employment discrimination based on sexual orientation. Hearing that testimony should lead you to the same conclusion we have reached: that Congress should pass a bill to embody the principle against discrimination in employment based on sexual orientation.

Mr. Chairman, thank you for the opportunity to testify today. We expect to have some technical comments on the bill, which we would like to supply for the hearing record. Beyond that, we look forward to working with you and the Committee to eliminate employment discrimination based upon sexual orientation.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Transition Record - Civil Rights (7 pages)	12/10/1992	Personal Misfile

**This marker identifies the original location of the withdrawn item listed above.
For a complete list of items withdrawn from this folder, see the
Withdrawal/Redaction Sheet at the front of the folder.**

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9884

FOLDER TITLE:

[Civil Rights Working Group] [2]

ds51

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

EXECUTIVE ORDER 8801

[Exemption of Archie W. Davis from compulsory retirement for age]

EXECUTIVE ORDER 8802

REAFFIRMING POLICY OF FULL PARTICIPATION IN THE DEFENSE PROGRAM BY ALL PERSONS, REGARDLESS OF RACE, CREED, COLOR, OR NATIONAL ORIGIN, AND DIRECTING CERTAIN ACTION IN FURTHERANCE OF SAID POLICY

WHEREAS it is the policy of the United States to encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color, or national origin, in the firm belief that the democratic way of life within the Nation can be defended successfully only with the help and support of all groups within its borders; and

WHEREAS there is evidence that available and needed workers have been barred from employment in industries engaged in defense production solely because of considerations of race, creed, color, or national origin, to the detriment of workers' morale and of national unity:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and the statutes, and as a prerequisite to the successful conduct of our national defense production effort, I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin, and I do hereby declare that it is the duty of employers and of labor organizations, in furtherance of said policy and of this order, to provide for the full and equitable participation of all workers in defense industries, without discrimination because of race, creed, color, or national origin;

And it is hereby ordered as follows:

1. All departments and agencies of the Government of the United States concerned with vocational and training programs for defense production shall take special measures appropriate to assure that such programs are adminis-

tered without discrimination because of race, creed, color, or national origin;

2. All contracting agencies of the Government of the United States shall include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin;

3. There is established in the Office of Production Management a Committee on Fair Employment Practice, which shall consist of a chairman and four other members to be appointed by the President. The Chairman and members of the Committee shall serve as such without compensation but shall be entitled to actual and necessary transportation, subsistence and other expenses incidental to performance of their duties. The Committee shall receive and investigate complaints of discrimination in violation of the provisions of this order and shall take appropriate steps to redress grievances which it finds to be valid. The Committee shall also recommend to the several departments and agencies of the Government of the United States and to the President all measures which may be deemed by it necessary or proper to effectuate the provisions of this order.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,

June 25, 1941.

EXECUTIVE ORDER 8803

AMENDING SCHEDULE A OF THE CIVIL SERVICE RULES

By virtue of the authority vested in me by Paragraph Eighth of Subdivision Second of Section 2 of the Civil Service Act (22 Stat. 403, 404), it is hereby ordered as follows:

SECTION 1. Paragraph 7, Subdivision I of Schedule A of the Civil Service Rules is hereby amended to read as follows:

7. Any person employed in a foreign country, or in the Virgin Islands, or in Puerto Rico when public exigency warrants, or in any island possession of the United States in the Pacific Ocean (except the Hawaiian Islands), or in the

FAIR EMPLOYMENT PRACTICES

for and submit to registration. The Director of Selective Service shall also arrange for and supervise the registration of persons who present themselves for registration at times other than on the day or days fixed for any registration.

PART 617—REGISTRATION CERTIFICATE

IN GENERAL

Sec. 617.1 Effect of failure to have Registration Certificate in personal possession.

IN GENERAL

§ 617.1 Effect of failure to have Registration Certificate in personal possession. Every person required to present himself for and submit to registration must have a Registration Certificate (SSS Form No. 2) in his personal possession at all times. The failure of any person to have such Registration Certificate (SSS Form No. 2) in his personal possession shall be prima facie evidence of his failure to register.

2. The Director of Selective Service is hereby authorized to appoint, and to fix, in accordance with the Classification Act of 1923, as amended, the compensation of, State Directors of Selective Service and to appoint members of local boards, members of appeal boards, medical advisors to the State Directors of Selective Service, medical advisors to the local boards, government appeal agents, and associate government appeal agents provided for in Part 604, Selective Service Officers, of the Selective Service Regulations.

HARRY S. TRUMAN

THE WHITE HOUSE,
July 20, 1948.

No. 9980

13 F. R. 4311

REGULATIONS GOVERNING FAIR EMPLOYMENT PRACTICES WITH- IN THE FEDERAL ESTABLISHMENT

WHEREAS the principles on which our Government is based require a policy of fair employment throughout the Federal establishment, without discrimination because of race, color, religion, or national origin; and

WHEREAS it is desirable and in the public interest that all steps be taken necessary to insure that this long-established policy shall be more effectively carried out:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, by the Constitution and the laws of the United States, it is hereby ordered as follows:

1. All personnel actions taken by Federal appointing officers shall be based solely on merit and fitness; and such officers are authorized and directed to take appropriate steps to insure that in all such actions there shall be no discrimination because of race, color, religion, or national origin.

2. The head of each department in the executive branch of the Government shall be personally responsible for an effective program to insure that fair employment policies are fully observed in all personnel actions within his department.

3. The head of each department shall designate an official thereof as Fair Employment Officer. Such Officer shall be given full operating responsibility, under the immediate supervision of the department head, for carrying out the fair-employment policy herein stated. Notice of the appointment of such Officer shall be given to all officers and employees of the department. The Fair Employment Officer shall, among other things—

EXECUTIVE ORDERS

(a) Appraise the personnel actions of the department at regular intervals to determine their conformity to the fair-employment policy expressed in this order.

(b) Receive complaints or appeals concerning personnel actions taken in the department on grounds of alleged discrimination because of race, color, religion, or national origin.

(c) Appoint such central or regional deputies, committees, or hearing boards, from among the officers or employees of the department, as he may find necessary or desirable on a temporary or permanent basis to investigate, or to receive, complaints of discrimination.

(d) Take necessary corrective or disciplinary action, in consultation with, or on the basis of delegated authority from, the head of the department.

4. The findings or action of the Fair Employment Officer shall be subject to direct appeal to the head of the department. The decision of the head of the department on such appeal shall be subject to appeal to the Fair Employment Board of the Civil Service Commission, hereinafter provided for.

5. There shall be established in the Civil Service Commission a Fair Employment Board (hereinafter referred to as the Board) of not less than seven persons, the members of which shall be officers or employees of the Commission. The Board shall—

(a) Have authority to review decisions made by the head of any department which are appealed pursuant to the provisions of this order, or referred to the Board by the head of the department for advice, and to make recommendations to such head. In any instance in which the recommendation of the Board is not promptly and fully carried out the case shall be reported by the Board to the President, for such action as he finds necessary.

(b) Make rules and regulations, in consultation with the Civil Service Commission, deemed necessary to carry out the Board's duties and responsibilities under this order.

(c) Advise all departments on problems and policies relating to fair employment.

(d) Disseminate information pertinent to fair-employment programs.

(e) Coordinate the fair-employment policies and procedures of the several departments.

(f) Make reports and submit recommendations to the Civil Service Commission for transmittal to the President from time to time, as may be necessary to the maintenance of the fair-employment program.

6. All departments are directed to furnish to the Board all information needed for the review of personnel actions or for the compilation of reports.

7. The term "department" as used herein shall refer to all departments and agencies of the executive branch of the Government, including the Civil Service Commission. The term "personnel action," as used herein, shall include failure to act. Persons failing of appointment who allege a grievance relating to discrimination shall be entitled to the remedies herein provided.

8. The means of relief provided by this order shall be supplemental to those provided by existing statutes, Executive orders, and regulations. The Civil Service Commission shall have authority, in consultation with the Board, to make such additional regulations, and to amend existing regulations, in such manner as may be found necessary or desirable to carry out the purposes of this order.

HARRY S. TRUMAN

THE WHITE HOUSE,
July 26, 1948.

ARMED SERVICES—EQUALITY WITHIN

No. 9981

13 F. R. 4313

ESTABLISHING THE PRESIDENT'S COMMITTEE ON EQUALITY OF
TREATMENT AND OPPORTUNITY IN THE ARMED SERVICES

WHEREAS it is essential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of treatment and opportunity for all those who serve in our country's defense:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, by the Constitution and the statutes of the United States, and as Commander in Chief of the armed services, it is hereby ordered as follows:

1. It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin. This policy shall be put into effect as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale.

2. There shall be created in the National Military Establishment an advisory committee to be known as the President's Committee on Equality of Treatment and Opportunity in the Armed Services, which shall be composed of seven members to be designated by the President.

3. The Committee is authorized on behalf of the President to examine into the rules, procedures and practices of the armed services in order to determine in what respect such rules, procedures and practices may be altered or improved with a view to carrying out the policy of this order. The Committee shall confer and advise with the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force, and shall make such recommendations to the President and to said Secretaries as in the judgment of the Committee will effectuate the policy hereof.

4. All executive departments and agencies of the Federal Government are authorized and directed to cooperate with the Committee in its work, and to furnish the Committee such information or the services of such persons as the Committee may require in the performance of its duties.

5. When requested by the Committee to do so, persons in the armed services or in any of the executive departments and agencies of the Federal Government shall testify before the Committee and shall make available for the use of the Committee such documents and other information as the Committee may require.

6. The Committee shall continue to exist until such time as the President shall terminate its existence by Executive order.

HARRY S. TRUMAN

THE WHITE HOUSE,
July 26, 1948.

SECTION 1. The following office and position is placed in level IV of the Federal Executive Salary Schedule:

(1) Special Assistant to the Secretary (for Enforcement), Treasury Department.

LYNDON B. JOHNSON

THE WHITE HOUSE,
September 16, 1965.

Executive Order 11245

PLACING A POSITION IN LEVEL V OF THE FEDERAL EXECUTIVE SALARY SCHEDULE

By virtue of the authority vested in me by subsection (f) of Section 303 of the Government Employees Salary Reform Act of 1964, and as President of the United States, it is ordered as follows:

SECTION 1. The following office and position is placed in level V of the Federal Executive Salary Schedule:

(1) Commissioner on Aging, Department of Health, Education, and Welfare.

LYNDON B. JOHNSON

THE WHITE HOUSE,
September 16, 1965.

Executive Order 11246

EQUAL EMPLOYMENT OPPORTUNITY

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I—NONDISCRIMINATION IN GOVERNMENT EMPLOYMENT

SECTION 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.

SEC. 102. The head of each executive department and agency shall establish and maintain a positive program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in Section 101.

SEC. 103. The Civil Service Commission shall supervise and provide leadership and guidance in the conduct of equal employment opportunity programs for the civilian employees of and applications

for employment within the executive departments and agencies and shall review agency program accomplishments periodically. In order to facilitate the achievement of a model program for equal employment opportunity in the Federal service, the Commission may consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Part.

SEC. 104. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, creed, color, or national origin. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

SEC. 105. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this Part, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Part.

PART II—NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

SUBPART A—DUTIES OF THE SECRETARY OF LABOR

SEC. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B—CONTRACTORS' AGREEMENTS

SEC. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under

Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of Sept. 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

SEC. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided,* That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the con-

tractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, creed, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

SEC. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

SUBPART C—POWERS AND DUTIES OF THE SECRETARY OF LABOR AND THE CONTRACTING AGENCIES

SEC. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of

Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

SEC. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

SEC. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

SEC. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

SUBPART D—SANCTIONS AND PENALTIES

SEC. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the non-discrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a)(5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

SEC. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

SEC. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

SEC. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209(a) (6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor, or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

SUBPART E—CERTIFICATES OF MERIT

SEC. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel, training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

SEC. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

SEC. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III—NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS

SEC. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 202 of this Order or such modification thereof, preserving in substance the contractor's obligations there-

under, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

SEC. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

SEC. 303. (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

SEC. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of nondiscrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: *Provided*, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV—MISCELLANEOUS

SEC. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

SEC. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

SEC. 403. (a) Executive Orders Nos. 10590 (January 19, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

SEC. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

SEC. 405. This Order shall become effective thirty days after the date of this Order.

LYNDON B. JOHNSON

THE WHITE HOUSE,
September 24, 1965.

Executive Order 11247

PROVIDING FOR THE COORDINATION BY THE ATTORNEY GENERAL OF ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

WHEREAS the Departments and agencies of the Federal Government have adopted uniform and consistent regulations implementing Title VI of the Civil Rights Act of 1964 and, in cooperation with the President's Council on Equal Opportunity, have embarked on a coordinated program of enforcement of the provisions of that Title;

WHEREAS the issues hereafter arising in connection with coordination of the activities of the departments and agencies under that Title will be predominantly legal in character and in many cases will be related to judicial enforcement; and

WHEREAS the Attorney General is the chief law officer of the Federal Government and is charged with the duty of enforcing the laws of the United States:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States by the Constitution and laws of the United States, it is ordered as follows:

SECTION 1. The Attorney General shall assist Federal departments and agencies to coordinate their programs and activities and adopt consistent and uniform policies, practices, and procedures with respect to the enforcement of Title VI of the Civil Rights Act of 1964. He may promulgate such rules and regulations as he shall deem necessary to carry out his functions under this Order.

SEC. 2. Each Federal department and agency shall cooperate with the Attorney General in the performance of his functions under this Order and shall furnish him such reports and information as he may request.

SEC. 3. Effective 30 days from the date of this Order, Executive Order No. 11197 of February 5, 1965, is revoked. Such records of the President's Council on Equal Opportunity as may pertain to the enforcement of Title VI of the Civil Rights Act of 1964 shall be transferred to the Attorney General.

Executive Order 11374**ABOLISHING THE MISSILE SITES LABOR COMMISSION AND PROVIDING FOR THE PERFORMANCE OF ITS FUNCTIONS**

By virtue of the authority vested in me as President of the United States, it is ordered as follows:

SECTION 1. The Missile Sites Labor Commission is hereby abolished, and its functions and responsibilities are transferred to the Federal Mediation and Conciliation Service.

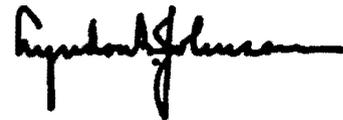
SEC. 2. The Director of the Federal Mediation and Conciliation Service shall establish within the Federal Mediation and Conciliation Service such procedures as may be necessary to provide for continued priority for resolution of labor disputes or potential labor disputes at missile and space sites, and shall seek the continued cooperation of manufacturers, contractors, construction concerns, and labor unions in avoiding uneconomical operations and work stoppages at missile and space sites.

SEC. 3. The Department of Defense, the National Aeronautics and Space Administration, and other appropriate government departments and agencies shall continue to cooperate in the avoidance of uneconomical operations and work stoppages at missile and space sites. They shall also assist the Federal Mediation and Conciliation Service in the discharge of its responsibilities under this order.

SEC. 4. All records and property of the Missile Sites Labor Commission are hereby transferred to the Federal Mediation and Conciliation Service.

SEC. 5. Any disputes now before the Missile Sites Labor Commission shall be resolved by the personnel now serving as members of the Missile Sites Labor Commission under special assignment for such purposes by the Director of the Federal Mediation and Conciliation Service.

SEC. 6. Executive Order No. 10946 of May 26, 1961, is hereby revoked.



THE WHITE HOUSE,
October 11, 1967

Executive Order 11375**AMENDING EXECUTIVE ORDER NO 11246, RELATING TO EQUAL EMPLOYMENT OPPORTUNITY**

It is the policy of the United States Government to provide equal opportunity in Federal employment and in employment by Federal contractors on the basis of merit and without discrimination because of race, color, religion, sex or national origin.

The Congress, by enacting Title VII of the Civil Rights Act of 1964, enunciated a national policy of equal employment opportunity in private employment, without discrimination because of race, color, religion, sex or national origin.

Executive Order No. 11246 of September 24, 1965, carried forward a program of equal employment opportunity in Government employment, employment by Federal contractors and subcontractors and employment under Federally assisted construction contracts regardless of race, creed, color or national origin.

It is desirable that the equal employment opportunity programs provided for in Executive Order No. 11246 expressly embrace discrimination on account of sex.

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered that Executive Order No. 11246 of September 24, 1965, be amended as follows:

(1) Section 101 of Part I, concerning nondiscrimination in Government employment, is revised to read as follows:

"SEC. 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, color, religion, sex or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice."

(2) Section 104 of Part I is revised to read as follows:

"SEC. 104. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex or national origin. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission."

(3) Paragraphs (1) and (2) of the quoted required contract provisions in section 202 of Part II, concerning nondiscrimination in employment by Government contractors and subcontractors, are revised to read as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay

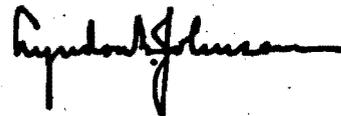
¹ 30 F.R. 12319; 3 CFR, 1964-1965 Comp., p. 339.

or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin." (4) Section 203 (d) of Part II is revised to read as follows:

"(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require."

The amendments to Part I shall be effective 30 days after the date of this order. The amendments to Part II shall be effective one year after the date of this order.



THE WHITE HOUSE,
October 13, 1967.

Executive Order 11376

AMENDING EXECUTIVE ORDER NO. 11022, RELATING TO THE PRESIDENT'S COUNCIL ON AGING

By virtue of the authority vested in me as President of the United States, it is ordered that Executive Order No. 11022¹ of May 14, 1962, entitled "Establishing the President's Council on Aging," be, and it is hereby, amended by substituting for subsection (b) of section 1 thereof the following:

¹ 27 F.R. 4659; 3 CFR, 1959-63 Comp., p. 602.

ishable any act done or omitted prior to the effective date of this Manual which was not punishable when done or omitted: *Provided further*, That the maximum punishment for an offense committed prior to August 1, 1969, shall not exceed the applicable limit in effect at the time of the commission of such offense: *And provided further*, That for cases arising under section 12 of the Act of May 5, 1950, 64 Stat. 147 (50 U.S.C. 740), the provisions of paragraph 110, Manual for Courts-Martial, United States, 1951, shall remain in effect.



THE WHITE HOUSE,
June 19, 1969.

NOTE: The complete text of the "Manual for Courts-Martial, United States, 1969 (Revised Edition)" appeared at 34 F.R. 10503, June 28, 1969. The Manual was also published by the Department of Defense and may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Executive Order 11477

AUTHORIZING THE ATOMIC ENERGY COMMISSION TO MAKE CERTAIN AWARDS WITHOUT THE APPROVAL OF THE PRESIDENT

By virtue of the authority vested in me by section 301 of title 3 of the United States Code, and as President of the United States, it is ordered as follows:

The Atomic Energy Commission is hereby designated and empowered, without approval, ratification, or other action by the President, to grant by the unanimous affirmative vote of all of its members not more than five awards in any calendar year, not exceeding the sum of \$5,000 each, pursuant to the last sentence of section 157b(3) of the Atomic Energy Act of 1954 (42 U.S.C. 2187(b)(3)) which authorizes the Commission to grant awards for especially meritorious contributions to the development, use, or control of atomic energy.



THE WHITE HOUSE,
August 7, 1969.

Executive Order 11478

EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.

As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government.

NOW, THEREFORE, under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

SECTION 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

SEC. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out.

SEC. 3. The Civil Service Commission shall provide leadership and guidance to departments and agencies in the conduct of equal employment opportunity programs for the civilian employees of and applicants for employment within the executive departments and agencies in order to assure that personnel operations in Government departments and agencies carry out the objective of equal opportunity for all persons. The Commission shall review and evaluate agency program operations periodically, obtain such reports from departments and agencies as it deems necessary, and report to the President as appropriate on overall progress. The Commission will consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Order.

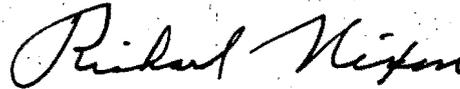
SEC. 4. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex, or na-

tional origin. Agency systems shall provide access to counseling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

SEC. 5. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out this Order and assure that the executive branch of the Government leads the way as an equal opportunity employer, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Order.

SEC. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States.

SEC. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

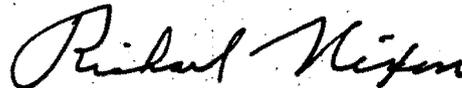


THE WHITE HOUSE,
August 8, 1969.

Executive Order 11479

THE HONORABLE EVERETT MCKINLEY DIRKSEN

As an added mark of respect to the memory of the Honorable Everett McKinley Dirksen, late Minority Leader and Member of the Senate of the United States, it is hereby ordered that the flag of the United States shall be flown at half-staff on all buildings, grounds, and naval vessels of the Federal Government in the metropolitan area of the District of Columbia from the day of death until interment, as the flag will be flown in his home State of Illinois under the provisions of Proclamation 3044 of March 1, 1954.



THE WHITE HOUSE,
September 8, 1969.

shall be pecuniarily or otherwise interested in any organization of railroad employees or any carrier.

1-102. *Report.* The board shall report its finding to the President with respect to the dispute within 30 days from the date of this Order.

1-103. *Maintaining Conditions.* As provided by Section 10 of the Railway Labor Act, as amended, from this date and for 30 days after the board has made its report to the President, no change, except by agreement, shall be made by the Norfolk and Western Railway Company, or by its employees, in the conditions out of which the dispute arose.

JIMMY CARTER

THE WHITE HOUSE,
September 28, 1978.

Executive Order 12086

October 5, 1978

Consolidation of Contract Compliance Functions for Equal Employment Opportunity

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Section 202 of the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 581c), in order to provide for the transfer to the Department of Labor of certain contract compliance functions relating to equal employment opportunity, it is hereby ordered as follows:

1-1. *Transfer of Functions.*

1-101. The functions concerned with being primarily responsible for the enforcement of the equal employment opportunity provisions under Parts II and III of Executive Order No. 11246, as amended, are transferred or reassigned to the Secretary of Labor from the following agencies:

- (a) Department of the Treasury.
- (b) Department of Defense.
- (c) Department of the Interior.
- (d) Department of Commerce.
- (e) Department of Health, Education, and Welfare.
- (f) Department of Housing and Urban Development.
- (g) Department of Transportation.
- (h) Department of Energy.
- (i) Environmental Protection Agency.
- (j) General Services Administration.
- (k) Small Business Administration.

1-102. The records, property, personnel and positions, and unexpended balances of appropriations or funds related to the functions transferred or reassigned

by this Order, that are available and necessary to finance or discharge those functions, are transferred to the Secretary of Labor.

1-103. The Director of the Office of Management and Budget shall make such determinations, issue such orders, and take all actions necessary or appropriate to effectuate the transfers or reassignments provided by this Order, including the transfer of funds, records, property, and personnel.

1-2. *Conforming Amendments to Executive Order No. 11246.*

1-201(a). In order to reflect the transfer of enforcement responsibility to the Secretary of Labor, Section 201 of Executive Order No. 11246, as amended, is amended to read:

"Sec. 201. The Secretary of Labor shall be responsible for the administration and enforcement of Parts II and III of this Order. The Secretary shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of Parts II and III of this Order."

(b) Paragraph (7) of the contract clauses specified in Section 202 of Executive Order No. 11246, as amended, is amended to read:

"“(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.””

1-202. In subsection (c) of Section 203 of Executive Order No. 11246, as amended, delete "contracting agency" in the proviso and substitute "Secretary of Labor" therefor.

1-203. In both the beginning and end of subsection (d) of Section 203 of Executive Order No. 11246, as amended, delete "contracting agency or the" in the phrase "contracting agency or the Secretary".

1-204. Section 205 of Executive Order No. 11246, as amended, is amended by deleting the last two sentences, which dealt with agency designation of compliance officers, and revising the rest of that Section to read:

"Sec. 205. The Secretary of Labor shall be responsible for securing compliance by all Government contractors and subcontractors with this Order and any implementing rules or regulations. All contracting agencies shall comply with the terms of this Order and any implementing rules, regulations, or orders of the Secretary of Labor. Contracting agencies shall cooperate with the Secretary of Labor and shall furnish such information and assistance as the Secretary may require."

1-205. In order to delete references to the contracting agencies conducting investigations, Section 206 of Executive Order No. 11246, as amended, is amended to read:

“Sec. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor.”.

“(b) The Secretary of Labor may receive and investigate complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order.”.

1-206. In Section 207 of Executive Order No. 11246, as amended, delete “contracting agencies, other” in the first sentence.

1-207. The introductory clause in Section 209(a) of Executive Order No. 11246, as amended, is amended by deleting “or the appropriate contracting agency” from “In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:”.

1-208. In paragraph (5) of Section 209(a) of Executive Order No. 11246, as amended, insert at the beginning the phrase “After consulting with the contracting agency, direct the contracting agency to”, and at the end of paragraph (5) delete “contracting agency” and substitute therefor “Secretary of Labor” so that paragraph (5) is amended to read:

“(5) After consulting with the contracting agency, direct the contracting agency to cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with equal employment opportunity provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the Secretary of Labor.”.

1-209. In order to reflect the transfer from the agencies to the Secretary of Labor of the enforcement functions, substitute “Secretary of Labor” for “each contracting agency” in Section 209(b) of Executive Order No. 11246, as amended, so that Section 209(b) is amended to read:

“(b) Pursuant to rules and regulations prescribed by the Secretary of Labor, the Secretary shall make reasonable efforts, within a reasonable time limitation, to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under subsection (a)(5) of this Section.”.

1-210. In order to reflect the responsibility of the contracting agencies for prompt compliance with the directions of the Secretary of Labor, Sections 210 and 211 of Executive Order No. 11246, as amended, are amended to read:

“Sec. 210. Whenever the Secretary of Labor makes a determination under Section 209, the Secretary shall promptly notify the appropriate agency. The agency shall take the action directed by the Secretary and shall report the results of the action it has taken to the Secretary of Labor within such time as the Secretary shall

specify. If the contracting agency fails to take the action directed within thirty days, the Secretary may take the action directly.”

“Sec. 211. If the Secretary of Labor shall so direct, contracting agencies shall not enter into contracts with any bidder of prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor.”

1-211. Section 212 of Executive Order No. 11246, as amended, is amended to read:

“Sec. 212. When a contract has been cancelled or terminated under Section 209(a)(5) or a contractor has been debarred from further Government contracts under Section 209(a)(6) of this Order, because of noncompliance with the contract provisions specified in Section 202 of this Order, the Secretary of Labor shall promptly notify the Comptroller General of the United States.”

1-212. In order to reflect the transfer of enforcement responsibility to the Secretary of Labor, references to the administering department or agency are deleted in clauses (1), (2), and (3) of Section 301 of Executive Order No. 11246, as amended, and those clauses are amended to read:

“(1) to assist and cooperate actively with the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations and relevant orders of the Secretary, (2) to obtain and to furnish to the Secretary of Labor such information as the Secretary may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor pursuant to Part II, Subpart D, of this Order,”

1-213. In order to reflect the transfer from the agencies to the Secretary of Labor of the enforcement functions “Secretary of Labor” shall be substituted for “administering department or agency” in Section 303 of Executive Order No. 11246, as amended, and Section 303 is amended to read:

“Sec. 303(a). The Secretary of Labor shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor and to furnish the Secretary such information and assistance as the Secretary may require in the performance of the Secretary’s functions under this Order.”

“(b) In the event an applicant fails and refuses to comply with the applicant’s undertakings pursuant to this Order, the Secretary of Labor may, after consulting with the administering department or agency, take any or all of the following actions: (1) direct any administering department or agency to cancel, terminate, or suspend in whole or in part the agreement, contract or other arrangement with such applicant with respect to which the failure or refusal occurred; (2) direct any administering department or agency to refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received by the Secretary of Labor from such applicant; and (3) refer the case to the Department of Justice or the Equal Employment Opportunity Commission for appropriate law enforcement or other proceedings.”

“(c) In no case shall action be taken with respect to an applicant pursuant to clause (1) or (2) of subsection (b) without notice and opportunity for hearing.”.

1-214. Section 401 of Executive Order No. 11246, as amended, is amended to read:

“Sec. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order.”.

1-3. *General Provisions.*

1-301. The transfers or reassignments provided by Section 1-1 of this Order shall take effect at such time or times as the Director of the Office of Management and Budget shall determine. The Director shall ensure that all such transfers or reassignments take effect within 60 days.

1-302. The conforming amendments provided by Section 1-2 of this Order shall take effect on October 8, 1978; except that, with respect to those agencies identified in Section 1-101 of this Order, the conforming amendments shall be effective on the effective date of the transfer or reassignment of functions as specified pursuant to Section 1-301 of this Order.

JIMMY CARTER

THE WHITE HOUSE,
October 5, 1978.

Executive Order 12087

October 7, 1978

Adjustments of Certain Rates of Pay and Allowances

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

1-1 *Adjusted Rates of Pay and Allowances.*

1-101. *Statutory Pay Systems.* Pursuant to the provisions of subchapter I of Chapter 53 of Title 5 of the United States Code, the rates of basic pay and salaries are adjusted, as set forth at the schedules attached hereto and made a part hereof, for the following statutory pay systems:

- (a) The General Schedule (5 U.S.C. 5332(a)) at Schedule 1;
- (b) the schedules for the Foreign Service (22 U.S.C. 867 and 870(a)) at Schedule 2; and
- (c) the schedules for the Department of Medicine and Surgery, veterans Administration (38 U.S.C. 4107) at Schedule 3.

1-102. *Pay and Allowances for Members of the Uniformed Services.* Pursuant to the provisions of Section 1009 of Title 37 of the United States Code, the rates of monthly basic pay (37 U.S.C. 203(a) and (c)), the rates of basic allowances for subsistence (37 U.S.C. 402), and the rates of basic allowances for quarters (37

hereby revoked. Nothing in this subsection shall be deemed to alter or otherwise affect the regulations prescribed by the Surgeon General (42 CFR Parts 21 and 22) to replace the regulations prescribed by the orders described in the preceding sentence.

LYNDON B. JOHNSON

THE WHITE HOUSE,
January 30, 1964.

Executive Order 11141

DECLARING A PUBLIC POLICY AGAINST DISCRIMINATION ON THE BASIS OF AGE

WHEREAS the principle of equal employment opportunity is now an established policy of our Government and applies equally to all who wish to work and are capable of doing so; and

WHEREAS discrimination in employment because of age, except upon the basis of a *bona fide* occupational qualification, retirement plan, or statutory requirement, is inconsistent with that principle and with the social and economic objectives of our society; and

WHEREAS older workers are an indispensable source of productivity and experience which our Nation can ill afford to lose; and

WHEREAS President Kennedy, mindful that maximum national growth depends on the utilization of all manpower resources, issued a memorandum on March 14, 1963¹, reaffirming the policy of the

¹ The text of the Memorandum of March 14, 1964, reads as follows:

**MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES,
MARCH 14, 1963**

SUBJECT: POLICY ON UTILIZING OLDER WORKERS IN THE FEDERAL SERVICE

In the message to the Congress transmitting my recommendations relating to a program for our older citizens, I pointed out that it is the policy of the Federal Government as an employer to evaluate each job applicant on the basis of ability, not age. This policy is intended to assure that the Government obtains the best possible talent from the widest range of choice.

The Federal Government has been an exemplary employer in this regard. There is no age restriction on appointments to competitive positions. However, with older persons constituting an ever increasing proportion of the Nation's work force and with growing evidence that older persons are capable of the highest quality work, Federal appointing officers shall take positive steps to insure that current practice carries out this policy. Older persons must receive fair and full consideration for employment and advancement in the competitive service. Personnel actions should be based, in accordance with merit principles, solely on the ability of candidates to meet qualification requirements and physical standards of the position to be filled.

With respect to Federal personnel systems outside the competitive service, these same principles are to be followed. All departments and agencies are requested to review their policies and practices regarding maximum age limits in other than the competitive service, and to take steps to insure that such limits are established only when absolutely necessary.

/s/ JOHN F. KENNEDY.

Executive Branch of the Government of hiring and promoting employees on the basis of merit alone and emphasizing the need to assure that older people are not discriminated against because of their age and receive fair and full consideration for employment and advancement in Federal employment; and

WHEREAS, to encourage and hasten the acceptance of the principle of equal employment opportunity for older persons by all sectors of the economy, private and public, the Federal Government can and should provide maximum leadership in this regard by adopting that principle as an express policy of the Federal Government not only with respect to Federal employees but also with respect to persons employed by contractors and subcontractors engaged in the performance of Federal contracts:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States and as President of the United States, I hereby declare that it is the policy of the Executive Branch of the Government that (1) contractors and subcontractors engaged in the performance of Federal contracts shall not, in connection with the employment, advancement, or discharge of employees, or in connection with the terms, conditions, or privileges of their employment, discriminate against persons because of their age except upon the basis of a *bona fide* occupational qualification, retirement plan, or statutory requirement, and (2) that contractors and subcontractors, or persons acting on their behalf, shall not specify, in solicitations or advertisements for employees to work on Government contracts, a maximum age limit for such employment unless the specified maximum age limit is based upon a *bona fide* occupational qualification, retirement plan, or statutory requirement. The head of each department and agency shall take appropriate action to enunciate this policy, and to this end the Federal Procurement Regulations and the Armed Services Procurement Regulation shall be amended by the insertion therein of a statement giving continuous notice of the existence of the policy declared by this order.

LYNDON B. JOHNSON

THE WHITE HOUSE,
February 12, 1964.

Executive Order 11142

PRESCRIBING REGULATIONS GOVERNING THE ALLOWANCE OF TRAVEL EXPENSES OF CLAIMANTS AND BENEFICIARIES OF THE VETERANS' ADMINISTRATION AND THEIR ATTENDANTS

By virtue of the authority vested in me by Section 111 of Title 38 of the United States Code, it is hereby ordered as follows:

SECTION 1. The Administrator of Veterans' Affairs may authorize or approve the payment of the actual necessary expenses of travel, including lodging and subsistence, of any claimant or beneficiary of the Veterans' Administration traveling to or from a Veterans' Administration facility, or other place, in connection with vocational rehabilitation or counseling, or for the purpose of examination, treatment, or care. The Administrator may authorize or approve such payment to

Codification of Presidential Proclamations and Executive Orders

By virtue of the authority vested in me by section 301 of title 3 of the United States Code, and as President of the United States, it is ordered as follows:

1. The Housing and Home Finance Administrator¹ is hereby designated and empowered to perform, without the approval, ratification, or other action by the President, the functions vested in the President by section 611 of the act entitled "An Act to expedite the provision of housing in connection with national defense, and for other purposes," approved October 14, 1940, as amended (42 U.S.C. 1589a).

2. The meaning of the terms "perform" and "functions" as used in this order shall be the same as the meaning of those terms as used in chapter 4 of title 3 of the United States Code.

Executive Order 11063—Equal opportunity in housing

SOURCE: The provisions of Executive Order 11063 of Nov. 20, 1962, appear at 27 FR 11527, 3 CFR, 1959-1963 Comp., p. 652, unless otherwise noted.

WHEREAS the granting of Federal assistance for the provision, rehabilitation, or operation of housing and related facilities from which Americans are excluded because of their race, color, creed, or national origin is unfair, unjust, and inconsistent with the public policy of the United States as manifested in its Constitution and laws; and

WHEREAS the Congress in the Housing Act of 1949 has declared that the general welfare and security of the Nation and the health and living standards of its people require the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family; and

WHEREAS discriminatory policies and practices based upon race, color, creed, or national origin now operate to deny many Americans the benefits of housing financed through Federal assistance and as a consequence prevent such assistance from providing them with an alternative to substandard, unsafe, unsanitary, and overcrowded housing; and

WHEREAS such discriminatory policies and practices result in segregated patterns of housing and necessarily produce other forms of discrimination and segregation which deprive many Americans of equal opportunity in the exercise of their unalienable rights to life, liberty, and the pursuit of happiness; and

WHEREAS the executive branch of the Government, in faithfully executing the laws of the United States which authorize Federal financial assistance, directly or indirectly, for the provision, rehabilitation, and operation of housing and related facilities, is charged with an obligation and duty to assure that those laws are fairly administered and that benefits thereunder are made available to all Americans without regard to their race, color, creed, or national origin:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States by the Constitution and laws of the United States, it is ordered as follows:

¹ EDITORIAL NOTE: The Housing and Home Finance Administration was terminated by Pub. L. 89-174 (79 Stat. 667, 42 U.S.C. 3531 note) and its functions were transferred to the Department of Housing and Urban Development.

SECT
ative
relate
of faci
crimin:
(a) u
erty an
use) o
faciliti
(i) o
(ii) ;
grants.
Govern
(iii)
need, c
(iv)
erty [
public
or urt
grant
(b)
relate
lendin
sured
SE
velop
good
cludin
the a
prop
cial
(iv).
[Sec.
307]
I
SI
orde
port
(her
from
min
S
spo:
the
ope
Cor
gion

Chapter 24—Housing and Urban Development

PART I—PREVENTION OF DISCRIMINATION

Section 101. I hereby direct all departments and agencies in the executive branch of the Federal Government, insofar as their functions relate to the provision, rehabilitation, or operation of housing and related facilities, to take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin—¹

(a) in the sale, leasing, rental, or other disposition of residential property and related facilities (including land to be developed for residential use) in the use or occupancy thereof, if such property and related facilities are—

(i) owned or operated by the Federal Government, or

(ii) provided in whole or in part with the aid of loans, advances, grants, or contributions hereafter agreed to be made by the Federal Government, or

(iii) provided in whole or in part by loans hereafter insured, guaranteed, or otherwise secured by the credit of the Federal Government, or

(iv) provided by the development or the redevelopment of real property purchased, leased, or otherwise obtained from a State or local government agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under a loan or grant contract hereafter entered into; and

(b) in the lending practices with respect to residential property and related facilities (including land to be developed for residential use) of lending institutions, insofar as such practices relate to loans hereafter insured or guaranteed by the Federal Government.

Sec. 102. I hereby direct the Department of Housing and Urban Development and all other executive departments and agencies to use their good offices and to take other appropriate action permitted by law, including the institution of appropriate litigation, if required, to promote the abandonment of discriminatory practices with respect to residential property and related facilities heretofore provided with Federal financial assistance of the types referred to in Section 101(a)(ii), (iii), and

Sec. 101 amended by EO 12259 of Dec. 31, 1980, 46 FR 1253, 3 CFR, 1980 Comp., p. 307.

PART II—IMPLEMENTATION BY DEPARTMENTS AND AGENCIES

SEC. 201. Each executive department and agency subject to this order is directed to submit to the President's Committee on Equal Opportunity in Housing established pursuant to Part IV of this order (hereinafter sometimes referred to as the Committee), within thirty days from the date of this order, a report outlining all current programs administered by it which are affected by this order.

SEC. 202. Each such department and agency shall be primarily responsible for obtaining compliance with the purposes of this order as the order applies to programs administered by it; and is directed to cooperate with the Committee, to furnish it, in accordance with law, such

¹ EDITORIAL NOTE: Executive Order 12259 of Dec. 31, 1980, 46 FR 1253, 3 CFR, 1980 Comp., p. 307, revises section 101 to apply to discrimination because of race, color, religion (creed), sex, or national origin.

U.S. Department of Justice
Civil Rights Division

What will the Federal agency do with my complaint?

Once a complaint is filed, it will be reviewed by the agency to determine whether it has jurisdiction to investigate the issues you have raised. Each agency's procedures are different, but an agency generally will investigate your allegations and attempt to resolve violations it has found. If negotiations to correct a violation are unsuccessful, enforcement proceedings may be instituted.

What is the Department of Justice's role?

The Department of Justice, under Executive Order 12250, coordinates the enforcement of Title VI and related statutes by all agencies that administer federally assisted programs.

If you cannot determine what Federal agency may have Title VI jurisdiction, or if you do not know where to send your complaint, you may send it to the Department of Justice. As the government-wide Title VI "clearinghouse," the Department of Justice will refer your complaint to the appropriate agency. The address is:

Coordination and Review Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66560
Washington, D.C. 20035-6560
(202) 307-2222 TDD (202) 307-2678

What if the agency retaliates against me for asserting my rights or filing a complaint?

You should be aware that a recipient is prohibited from retaliating against you or any person because he or she opposed an unlawful policy or practice, or made charges, testified, or participated in any complaint action under Title VI. If you believe that you have been retaliated against, you should immediately contact the Federal agency with authority to investigate your complaint.

Your Rights Under Title VI of the Civil Rights Act of 1964

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."



U.S. Department of Justice
Civil Rights Division
P.O. Box 66560
Washington, D.C. 20035-6560

"Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

(President John F. Kennedy, in his message calling for the enactment of Title VI, 1963).

What is Title VI?

Title VI of the Civil Rights Act of 1964 is the Federal law that protects individuals from discrimination on the basis of their race, color, or national origin in programs that receive Federal financial assistance.

What programs are covered by Title VI?

Approximately 30 Federal agencies provide Federal financial assistance in the form of funds, training, and technical and other assistance to State and local governments, and non-profit and private organizations. These recipients of Federal assistance, in turn, operate programs and deliver benefits and services to individuals (known as "beneficiaries") to achieve the goals of the Federal legislation that authorizes the programs.

Federally assisted programs address such broad and diverse areas as:

- elementary, secondary, and higher education
- health care, social services, and public welfare
- public transportation
- parks and recreation
- natural resources and the environment
- employment and job training
- housing and community development
- law enforcement and the administration of justice
- agriculture and nutrition

What discrimination is prohibited by Title VI?

There are many forms of illegal discrimination based on race, color, or national origin that can limit the opportunity of minorities to gain equal access to services and programs. Among other things, in operating

a federally assisted program, a recipient cannot, on the basis of race, color, or national origin, either directly or through contractual means:

- Deny program services, aids, or benefits;
- Provide a different service, aid, or benefit, or provide them in a manner different than they are provided to others; or
- Segregate or separately treat individuals in any matter related to the receipt of any service, aid, or benefit.

How can I file a discrimination complaint?

Each Federal agency that provides Federal financial assistance is responsible for investigating complaints of discrimination on the basis of race, color, or national origin in the use of its funds. If you believe that you or others protected by Title VI have been discriminated against, you may file a complaint with the Federal agency that provides funds for the program where you believe the discrimination is occurring.

A signed, written complaint should be filed with the appropriate Federal agency, generally within 180 days of the date of the alleged discrimination. It should describe:

- Your name, address, and telephone number. Your complaint must be signed. If you are filing on behalf of another person, include your name, address, telephone number, and your relation to that person (e.g., friend, attorney, parent, etc.)
- The name and address of the agency, institution, or department you believe discriminated against you.
- How, why, and when you believe you were discriminated against. Include as much background information as possible about the alleged acts of discrimination. Include names of individuals whom you allege discriminated against you, if you know them.
- The names of any persons, if known, that the investigating agency could contact for additional information to support or clarify your allegations.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. report	Background on Title VI (4 pages)	n.d.	P5

**This marker identifies the original location of the withdrawn item listed above.
For a complete list of items withdrawn from this folder, see the
Withdrawal/Redaction Sheet at the front of the folder.**

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9884

FOLDER TITLE:

[Civil Rights Working Group] [2]

ds51

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

Executive Order 11374

ABOLISHING THE MISSILE SITES LABOR COMMISSION AND PROVIDING FOR THE PERFORMANCE OF ITS FUNCTIONS

By virtue of the authority vested in me as President of the United States, it is ordered as follows:

SECTION 1. The Missile Sites Labor Commission is hereby abolished, and its functions and responsibilities are transferred to the Federal Mediation and Conciliation Service.

SEC. 2. The Director of the Federal Mediation and Conciliation Service shall establish within the Federal Mediation and Conciliation Service such procedures as may be necessary to provide for continued priority for resolution of labor disputes or potential labor disputes at missile and space sites, and shall seek the continued cooperation of manufacturers, contractors, construction concerns, and labor unions in avoiding uneconomical operations and work stoppages at missile and space sites.

SEC. 3. The Department of Defense, the National Aeronautics and Space Administration, and other appropriate government departments and agencies shall continue to cooperate in the avoidance of uneconomical operations and work stoppages at missile and space sites. They shall also assist the Federal Mediation and Conciliation Service in the discharge of its responsibilities under this order.

SEC. 4. All records and property of the Missile Sites Labor Commission are hereby transferred to the Federal Mediation and Conciliation Service.

SEC. 5. Any disputes now before the Missile Sites Labor Commission shall be resolved by the personnel now serving as members of the Missile Sites Labor Commission under special assignment for such purposes by the Director of the Federal Mediation and Conciliation Service.

SEC. 6. Executive Order No. 10946 of May 26, 1961, is hereby revoked.

THE WHITE HOUSE,
October 11, 1967

Executive Order 11375

AMENDING EXECUTIVE ORDER NO 11246, RELATING TO EQUAL EMPLOYMENT OPPORTUNITY

It is the policy of the United States Government to provide equal opportunity in Federal employment and in employment by Federal contractors on the basis of merit and without discrimination because of race, color, religion, sex or national origin.

The enunciate religion,

Executive a program, employment of race

It is provided nation

NOV President United tember

(1) emmer "SEC States qualifi of race realiza tining of equ: policy

(2) "SEC promp crimm sex or shall in ment Comm

(3) visions employ revised

"(1) applic nation that an employ nation follow ment

The Congress, by enacting Title VII of the Civil Rights Act of 1964, enunciated a national policy of equal employment opportunity in private employment, without discrimination because of race, color, religion, sex or national origin.

Executive Order No. 11246 of September 24, 1965, carried forward a program of equal employment opportunity in Government employment, employment by Federal contractors and subcontractors and employment under Federally assisted construction contracts regardless of race, creed, color or national origin.

It is desirable that the equal employment opportunity programs provided for in Executive Order No. 11246 expressly embrace discrimination on account of sex.

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered that Executive Order No. 11246 of September 24, 1965, be amended as follows:

(1) Section 101 of Part I, concerning nondiscrimination in Government employment, is revised to read as follows:

"SEC. 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, color, religion, sex or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice."

(2) Section 104 of Part I is revised to read as follows:

"SEC. 104. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex or national origin. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission."

(3) Paragraphs (1) and (2) of the quoted required contract provisions in section 202 of Part II, concerning nondiscrimination in employment by Government contractors and subcontractors, are revised to read as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay

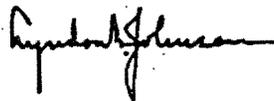
¹ 30 F.R. 12319; 3 CFR, 1964-1965 Comp., p. 339.

or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin." (4) Section 203 (d) of Part II is revised to read as follows:

"(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require."

The amendments to Part I shall be effective 30 days after the date of this order. The amendments to Part II shall be effective one year after the date of this order.



THE WHITE HOUSE,
October 13, 1967.

Executive Order 11376

AMENDING EXECUTIVE ORDER NO. 11022, RELATING TO THE PRESIDENT'S COUNCIL ON AGING

By virtue of the authority vested in me as President of the United States, it is ordered that Executive Order No. 11022¹ of May 14, 1962, entitled "Establishing the President's Council on Aging," be, and it is hereby, amended by substituting for subsection (b) of section 1 thereof the following:

¹ 27 F.R. 4659; 3 CFR, 1959-63 Comp., p. 602.