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Civil Rights Act of 1991

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CIVIL RIGHTS ACT OF 1991. The Civil Rights Act of 1991 stands as the most far-reaching and controversial civil rights enactment since the Civil Rights Act of 1964. Ranging from racial harassment to age discrimination to numerical proofs of discrimination (disparate impact) to attorney fees, the 1991 act covered most aspects of equal-employment legislation and litigation. The breadth of this legislation, not surprisingly, brought with it sharp divisions among civil rights, business, and governmental interests. Most significant, the Bush White House strongly opposed significant features of the legislative reform effort—resulting in a successful veto of a 1990 civil rights package and marathon negotiations that preceded the President's eventual support of the 1991 act.

The 1991 act was a matter of great moment to the courts as well as to the White House and Congress. Through this legislation, nine Supreme Court decisions (decided from 1986 to 1991) were either modified or reversed. These decisions involved issues of statutory interpretation and, consequently, could be overturned by legislative enactment. That so many decisions were overturned, however, signaled strong displeasure with the Supreme Court. Most significant, of the sponsors act sought to clarify and expand the scope and sweep of Title VII of the 1964 Civil Rights Act's provisions for employment-discrimination litigation in the wake of three controversial 1989 Supreme Court decisions. One decision, *Price Waterhouse v. Hopkins* (1989), held that an employer who engages in purposeful discrimination can nonetheless escape liability by proving that motives not prohibited by Title VII would have otherwise caused the adverse employment action. A second decision, *Martin v. Wilks* (1989), held that persons not parties to litigation can challenge the terms of court-approved agreements between defendant employers and plaintiff employees. Third, and most significant, *Wards Cove v. Atonio* (1989), required a disparate-impact plaintiff to bear the burden of persuasion both in identifying the challenged employment practice and demonstrating that the practice does not significantly serve "the legitimate employment goals" of the defendant employer. The focus of the battle over the 1991 act was how these and other Court decisions should be modified.

The battle proved to be an epic, lasting twenty months and including one presidential veto and countless counterproposals and compromises. The principal division centered on whether disparate-impact lawsuits would encourage employers to engage in quota hiring in order to stave off costly litigation rooted in numerical proofs of discrimination. President Bush vowed that he would not sign a "quota bill" and, in 1990, he vetoed proposed legislation for precisely this reason. Claiming in his veto message that "the bill actually employs a maze of highly legalistic language to introduce the destructive force of quotas into our Nation's employment system" and that "[i]t is neither fair nor sensible to give the employers of our country a difficult choice between using quotas and seeking a clarification of the law through costly and very risky litigation," Bush concluded that "equal opportunity is not advanced but thwarted."

Bush's antiquota attack was subject to doubt. Legislation that Bush sent to Congress contemporaneous with his veto was nearly identical to the legislation he

vetoed on the disparate-impact issue. On race-exclusive scholarships, minority-business set-asides, and disparate-impact proofs contained in the Americans with Disabilities Act, moreover, Bush spoke of this longstanding commitment to AFFIRMATIVE ACTION. The President, nevertheless, was successful in his antiquota veto.

Bush persisted in opposing the 1991 Civil Rights Act as "a quota bill." Along with White House Counsel C. Boyden Gray, Attorney General Dick Thornburgh, and Chief of Staff John Sununu, the administration fiercely opposed the 1991 act. A compromise was eventually reached, however. On the rights of persons not parties to litigation, the availability of jury trials and punitive damages, and several other issues, the Bush administration acceded to congressional sponsors. On the disparate-impact issue, the act was purposefully opaque. While noting that Supreme Court decisions prior to the 1989 *Wards Cove* ruling would become the governing standard, ambiguities in these decisions made this a legislative compromise in which both sides could honestly proclaim victory. By not establishing a definitive standard, moreover, the judiciary will have broad latitude to redefine disparate-impact proofs.

The willingness of President Bush to sign the 1991 act is an outgrowth of events occurring in the weeks before the announced compromise. Specifically, former Ku Klux Klansman David Duke defeated incumbent Governor Buddy Roemer as Louisiana's Republican candidate for governor and, more significant, Clarence Thomas, Bush's choice to replace Thurgood Marshall on the Supreme Court, was subject to allegations of sexual harassment. A veto of civil rights legislation in the wake of these events would have proven difficult, especially since several moderate Republicans notified Bush that they would not support him in a veto-override fight.

The 1991 act is a by-product of compromise and circumstances. The purposeful ambiguity of critical provisions, moreover, reveals that two years of negotiation could not yield a definitive resolution of the conflicting desires of the elected branches. Ironically, legislation spurred on by dissatisfaction with Supreme Court decision making will only become clear in the wake of judicial interpretation.

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