

TITLE VII: LEGISLATIVE HISTORY

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I. EARLY LEGISLATIVE ACTION

In the legislative branch of the federal government, the history of FEP legislation prior to 1964 was characterized by repeated failures for civil rights advocates. The first FEP bill, H.R. 3994, entitled "A Bill to Prohibit Discrimination by Any Agency Supported in Whole or in Part with Funds Appropriated by the Congress of the United States, and to Prohibit Discrimination against Persons Employed or Seeking Employment on Government Contracts because of Race, Color or Creed," was offered in Congress by former Representative Vito Marcantonio from New York on March 13, 1941, and referred to the House Committee on the Judiciary. The next year, on July 20, 1942, Mr. Marcantonio introduced his second FEP bill, H.R. 7142, entitled "A Bill to Prohibit Discrimination in Employment because of Race, Color, Creed, Religion, National Origin, or Citizenship." Like its predecessor this bill also was referred to the Committee on the Judiciary.¹ Both of these bills apparently died in committee. During the succeeding years literally hundreds of bills were filed seeking FEP legislation at the federal level; all died, usually in the House or Senate Committee to which the bill was referred, and at times, if a bill was reported and reached the Senate floor, it died as the result of a Senate filibuster.²

But the pressures for federal legislation became too great to be withstood by the usual parliamentary maneuverings and the Senate filibuster. Civil rights for minorities received some recognition and protection from the enactment of the Civil Rights Act of 1957³ and the

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¹ 87 Cong. Rec. 2259 (1941) (H.R. 3994); 88 Cong. Rec. 6423 (1942) (H.R. 7412).

² 110 Cong. Rec. 7266 (1964) (remarks of Senator Ellender). For additional evidence of prior abortive attempts to secure federal FEP legislation, see, e.g., H.R. Rep. No. 187, 79th Cong., 1st Sess. (1945); Hearings on H.R. 2232 Before the House Committee on Rules, 79th Cong., 1st Sess. (1945); Hearings on S.551 and S.552 Before the Senate Committee on Labor and Public Welfare, 82d Cong. 2d Sess. (1952); Hearings on Anti-Discrimination in Employment Before the Subcommittee on Civil Rights of the Senate Committee on Labor and Public Welfare, 83d Cong., 2d Sess. (1954); Hearings on Civil Rights Before Subcommittee No. 5 of the House Committee on the Judiciary, 85th Cong., 1st Sess. (1957) (see, e.g., H.R. 4496, H.R. 2375, H.R. 140); Id., 86th Cong., 1st Sess. (1959) (see, e.g., H.R. 619, H.R. 351); Hearings on Civil Rights Before Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. (see, e.g., S. 2003). Apparently bills for federal FEP legislation were introduced at every session of Congress since 1944. Hearings Before Subcommittee No. 5 of House Committee on the Judiciary, 88th Cong., 1st Sess., ser. 4, pt. II, 1366 (1963).

³ Ch. 315, 71 Stat. 634 (1957) (codified in scattered sections of 5, 42 U.S.C.).

Civil Rights Act of 1960.⁴ The reports of the Commission on Civil Rights established pursuant to the 1957 legislation dramatized the plight of minorities.⁵ The NAACP and other organizations were pressing in courts and in legislative halls and lobbies for protection of minority rights. Demonstrations—and the tensions and counter violence that often accompanied them—heightened the sense of urgency. In their 1960 platforms, both Republicans and Democrats had pledged legislative action on civil rights in strong and sweeping terms. By 1964 the time had come to redeem those pledges.

While espousing "the democratic principle that no man should be denied employment commensurate with his abilities because of his race or creed or ancestry," President Kennedy's first special message to the 88th Congress on civil rights,⁶ submitted February 28, 1963, did not request legislation in the area of private employment. On the contrary, after referring to the steps taken to eliminate racial discrimination in employment by the federal government as an employer and by those doing business with the federal government, the message stated:

Outside of Government employment, the National Labor Relations Board is now considering cases involving charges of racial discrimination against a number of union locals. I have directed the Department of Justice to participate in these cases and to urge the National Labor Relations Board to take appropriate action against racial discrimination in unions. It is my hope that administrative action and litigation will make unnecessary the enactment of legislation with respect to union discrimination.⁷

Less than five months later, faced with "a rising tide of discontent that threatens the public safety" and "the events in Birmingham and elsewhere," President Kennedy on June 19, 1963, submitted to Congress a second message on civil rights.⁸ In this message he dealt at greater length with the problem of "Fair and Full Employment," stressing that the relief of Negro unemployment required progress in three major areas, namely, creating more jobs through greater economic growth, raising the level of skills through more education and training and eliminating racial discrimination in employment. The President also expressed his general approval of federal FEP legislation:

⁴ Ch. 449, 74 Stat. 86 (1960) (codified in scattered sections of 18, 20, 42 U.S.C.).

⁵ E.g., U.S. Comm'n on Civil Rights Employment Report, released Oct. 13, 1961, 48 L.R.R.M. 103 (summarized).

⁶ 109 Cong. Rec. 3245 (1963).

⁷ Id. at 3247.

⁸ Id. at 11174.

Finally I renew my support of pending Federal fair employment practices legislation, applicable to both employers and unions. Approximately two-thirds of the Nation's labor force is already covered by Federal, State, and local equal employment opportunity measures—including those in the 22 states and numerous cities which have enacted such laws as well as those paid directly or indirectly by Federal funds. But, as the Secretary of Labor testified in January 1962, Federal legislation is desirable, for it would help set a standard for all the Nation and close existing gaps.⁹

II. THE LEGISLATIVE HISTORY OF TITLE VII

At the outset of the Eighty-eighth Congress various Senators and Representatives submitted a plethora of civil rights bills. Some included comprehensive provisions relating to all areas of civic and economic life where discrimination existed, including private employment; others dealt primarily with equal employment opportunity in both private and public employment. The proposed methods of enforcement ran the gamut—from those providing for a strong administrative agency, like the NLRB, with power to hold hearings and issue cease-and-desist orders enforceable in court, to those providing simply for conciliation and persuasion or merely further study and recommendations.

Among the bills dealing primarily with equal employment opportunity was H.R. 405 entitled "A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age." H.R. 405 is the nominal ancestor of Title VII. It was introduced in the House by Mr. Roosevelt of California on January 9, 1963, the opening day of the 1st Session of the 88th Congress, and was promptly referred to the House Committee on Education and Labor. Following extensive hearings, the Committee reported the bill, with amendments, and recommended its passage.¹⁰

⁹ *Id.* at 11178. Cf. Hearings Before Subcommittee No. 5, *supra* note 2, pt. III at 2283-84 (remarks of Mr. Roosevelt).

¹⁰ H.R. Rep. No. 570, 88th Cong., 1st Sess. (1963) (to accompany H.R. 405, "Equal Employment Opportunity Act of 1963"). The other House bills introduced in the 1st Session of the 88th Congress relating to discrimination in employment (H.R. 27, 316, 1623, 1767, 1938, 2999, 2523, 3571, 4031, 4573, 4874, 6692) were also referred to the House Committee on Education and Labor and considered at the same time as H.R. 405. The comparable Senate bills (S.773, 1210, 1211, 1937) were referred to the Senate Committee on Labor and Public Welfare. That Committee's Subcommittee on Employment and Public Welfare conducted seven days of hearings on these bills. Hearings on Equal Employment Opportunity Before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess. (1963). As a result of these hearings, the Senate Committee on Labor and Public Welfare recommended passage of FEP legislation. S.1937, the Equal Employment Opportunity Act, S. Rep. No. 867, 88th Cong., 1st Sess. (1963).

A. *Action by House Committee on the Judiciary*

The more comprehensive House bills respecting civil rights, including in some cases provisions outlawing discrimination in private employment, were referred to the House Committee on the Judiciary. Hearings on these bills were held before Subcommittee No. 5 on twenty-two separate days beginning May 8 and ending August 2, 1963. The Subcommittee formally considered a total of one hundred seventy-two bills, including six (H.R. 24, 2027, 6028, 6300, 6333 and 6757) that contained comprehensive provisions outlawing discrimination in private employment.

While the Subcommittee hearings were in progress, the administration's comprehensive bill on civil rights, H.R. 7152, was introduced in the House by Representative Celler of New York on June 20, 1963, the day after the President submitted his second special message on civil rights. H.R. 7152 was promptly referred to the Committee on the Judiciary (and thence to Subcommittee No. 4).¹¹ The bill as introduced contained no compulsory FEP provisions respecting private employment. In Title V thereof, it proposed expanding the powers of the Commission on Civil Rights established pursuant to the Civil Rights Act of 1957, so that the Commission would serve as a national clearing-house for information and would advise and assist both public and private agencies and individuals in combatting discrimination in employment and other areas.¹² Title VII of H.R. 7152, as first introduced in Congress, merely authorized the President to establish another commission, to be known as the "Commission on Equal Employment Opportunity." The purpose of the proposal was to give a statutory basis for the Commission on Equal Employment Opportunity, which had first been established in 1961 pursuant to Executive Order No. 10925.¹³ The primary function of the new statutory commission would have been to prevent discrimination by government contractors and subcontractors and in federally financed or assisted programs. In addition, the commission would have had such powers as the President "deems appropriate to prevent discrimination on the ground of race, color, religion or national origin in Government employment."¹⁴ During the Subcommittee hearings many witnesses, including George Meany, President of the AFL-CIO, Walter P. Reuther, President of the United Automobile Workers, AFL-CIO, and Sidney Zagri, legislative counsel

¹¹ 109 Cong. Rec. 11252 (1963). H.R. 7152, as introduced in the House, appears in *Hearings Before Subcommittee No. 5*, supra note 2, pt. I at 649-60 (1963).

¹² This concept was retained in Title V of H.R. 7152 as enacted. Civil Rights Act of 1964, § 504, 78 Stat. 251, 42 U.S.C. 1975c (1964) [hereinafter cited by section only].

¹³ 26 Fed. Reg. 1977 (1961).

¹⁴ *Hearings Before Subcommittee No. 5*, supra note 2, pt. I at 659. Cf. Civil Rights Act of 1964, §§ 601-05, 701(b) (2d proviso).

TITLE VII: LEGISLATIVE HISTORY

for the International Brotherhood of Teamsters, testified in favor of such provisions.¹⁵ Mr. James Roosevelt of California, who was Chairman of the General Subcommittee on Labor of the House Committee on Education and Labor and was to be a leading force in securing passage of the bill in the House, testified as a co-sponsor of H.R. 7152. Mr. Roosevelt favored amending H.R. 7152 by incorporating therein the provisions of H.R. 405, which had by then been favorably reported by the Committee on Education and Labor and was pending in the Rules Committee. The report of the House Committee on Education and Labor¹⁶ was included in the record of the Subcommittee hearings.¹⁷

At the conclusion of the hearings the Subcommittee met in executive session a total of seventeen days. As a result of its deliberations, H.R. 7152 was amended by striking out all after the enacting clause and inserting in lieu thereof an amendment in the nature of a substitute. The amended version was recommended to the full Judiciary Committee. This version included as Title VIII thereof the provisions of H.R. 405 as reported by the House Committee on Education and Labor.¹⁸ The full Judiciary Committee in turn also struck out all after the enacting clause in H.R. 7152 as recommended by its Subcommittee and adopted an amendment in the nature of a substitute. This amended version contained as Title VII thereof FEP provisions different in certain respects from those set forth in H.R. 405 and included in the bill recommended by Subcommittee No. 5.¹⁹

H.R. 405, as reported by the House Committee on Education and Labor and included as Title VIII of H.R. 7152 as recommended by Subcommittee No. 5 provided for an administrative agency, comparable to the NLRB, with the authority to hold hearings and issue cease-and-desist orders, enforceable in court, after a finding of discrimination in hiring or union membership. The administrative agency would have been an "Equal Employment Opportunity Commission" consisting of an "Equal Employment Opportunity Board" and an "Office of the Administrator of the Equal Employment Opportunity Commission." The Board would have been responsible for the judicial function of hearing and deciding the complaints brought before it by the Office of the Administrator. The separation within the proposed Commission of the investigating and prosecuting functions of the Office of the Administrator

¹⁵ Hearings Before Subcommittee No. 5, *supra* note 2, pt. III at 1790-1809 (testimony of Mr. Meany), 1942-53 (testimony of Mr. Reuther), 2052-62 (testimony of Mr. Zagri).

¹⁶ H.R. Rep. No. 570, 88th Cong., 1st Sess. (1963).

¹⁷ Hearings Before Subcommittee No. 5, *supra* note 2, pt. III at 2300-19.

¹⁸ H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reported in 2 U.S. Code Cong. & Ad. News 2391, 2411, 2414 (1964).

¹⁹ H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reported in 2 U.S. Code Cong. & Ad. News 2391, 2411, 2426 (1964).

from the quasi-judicial function of the "Equal Employment Opportunity Board" represented a departure from the integrated agency set-up envisaged by H.R. 405 as introduced in the House.²⁰ H.R. 405 as introduced also declared discrimination because of age to be "an unlawful employment practice"; the House Committee on Education and Labor provided instead for a study of discrimination because of age by the Secretary of Labor.²¹

While including the provisions for a study of discrimination because of age, Title VII of the Judiciary version differed radically from the Education and Labor proposal in that the Judiciary version gave the Equal Employment Opportunity Commission no enforcement powers as such but simply the power to bring a civil action against the discriminator in the event a settlement by agreement could not be secured. The reasons for this change, together with significant comments on the basic purpose of Title VII, are set forth in the "Additional Views on H.R. 7152" of Mr. McCulloch and others, included in the Judiciary Committee's Report:²²

... This title establishes an Equal Employment Opportunity Commission which shall be charged with the task of investigating complaints concerning the existence of discrimination in business establishments, labor unions, and employment agencies.

As the title was originally worded, the Commission would have had authority to not only conduct investigations, but also institute hearing procedures and issue orders of a cease-and-desist nature. A substantial number of committee members, however, preferred that the ultimate determination of discrimination rest with the Federal judiciary. Through this requirement, we believe that settlement of complaints will occur more rapidly and with greater frequency. In addition, we believe that the employer or labor union will have a fairer

²⁰ This departure represented a partial concession to those members of the House Committee on Labor and Welfare who were opposed to vesting any enforcement powers in the Equal Employment Opportunity Commission. Even so, it did not satisfy the objections of these members and represented a retreat from the "enforcement-by-the-courts" approach which the House Committee on Labor and Welfare and apparently Mr. Roosevelt himself favored in 1962. See Hearings Before Subcommittee No. 5, *supra* note 2, pt. III at 2313-16, 2318-19 (1963); H.R. Rep. No. 1370, 87th Cong., 2d Sess. (1962). One of the earliest of the FEP bills (H.R. 2232, 79th Cong., 1st Sess.) died in the House Rules Committee, an often-repeated objection to it being its provisions for an independent FEP Commission, comparable to the NLRB, with quasi-judicial functions. Hearings on H.R. 2233 Before the House Committee on Rules, 79th Cong., 1st Sess., *passim* (1945).

²¹ Cf. § 715.

²² H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reported in 2 U.S. Code Cong. & Ad. News 2391, 2515-16 (1964).

forum to establish innocence since a trial de novo is required in district court proceedings together with the necessity of the Commission proving discrimination by a preponderance of the evidence.

It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance; the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification.

The foregoing fairly states what continued to be the consensus of the civil rights proponents of H.R. 7152 as they guided this controversial bill along the path toward its ultimate passage. A possible exception has been the change (adopted by the Senate) transferring the authority to bring a civil action from the Commission to the discriminatee. Experience will establish how far this change may have affected the enforcement of the act and made more or less likely the "settlement of complaints" with the rapidity and frequency contemplated by Representative McCulloch and his concurring associates.

B. *House Action*

The report of the House Committee on the Judiciary²³ was filed in the House on November 20, and referred to the Committee on Rules on November 27, 1963.²⁴ A discharge petition intended to bring H.R. 7152 to the floor of the House from the Rules Committee failed, presumably for lack of the necessary signatures. Nevertheless, the bill's proponents did not avail themselves of the chance for early consideration of the bill under the "Calendar Wednesday" rule, apparently deciding that for proper consideration on the floor of the House it would be better to have it taken up after the Rules Committee had granted a rule thereon. The Rules Committee chairman, Mr. Smith of Virginia, announced on December 9, 1963, that Committee hearings on H.R.

²³ H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reported in 2 U.S. Code Cong. & Ad. News 2391 (1964).

²⁴ 109 Cong. Rec. 22550-51, 22856-57 (1963).

7152 would start "reasonably soon in January," making it inevitable that House action on the bill would not take place until the 2d Session of the 88th Congress.²⁵

Hearings before the Rules Committee started January 9, and ended January 30, 1964. The Committee heard testimony from forty members of Congress. It reported H.R. 7152 without amendment on January 30, 1964, the day its hearings thereon ended.²⁶ Pursuant to the rule recommended by the Rules Committee and approved by the House on January 31, 1964, the House on that date resolved itself into a Committee of the Whole House on the State of the Union and began its debate on H.R. 7152.²⁷

In accordance with the rule as adopted, the general debate lasted for ten hours. When it concluded on February 1, 1964, each title was read and amendments thereto acted upon before the reading of the next title. Amendments to Title VII were considered on Saturday, February 8, and Monday, February 10, 1964. Of over forty such amendments which were proposed during these two days, only sixteen were adopted and all but two of the amendments so adopted survived the rewriting of the bill in the Senate. Most of the amendments which survived in the Senate were proposed by Representative Celler, Chairman of the Judiciary Committee. Such Celler amendments included:

(1) Inserting in section 704(b) the words "national origin" to ensure that the exemption with respect to advertising for employees, when "national origin" is a bona fide occupational qualification for employment, parallel the comparable exemption in section 703(e).²⁸

(2) Inserting in the early part of section 706(a) the words "where he has reasonable cause to believe a violation of this Act has occurred" to ensure that such cause be a condition precedent for the filing of a charge by a member of the EEOC.²⁹

(3) Substituting in section 706(g) the words "any reason other than discrimination on account of race" in place of "cause" to ensure that unlawful discrimination can be based only upon one of the proscribed grounds.³⁰

²⁵ Id. at 23831-33, 23898, 23967-68, 24206-07, 25550-52.

²⁶ H.R. Rep. No. 1119, 88th Cong., 2d Sess. (1964).

²⁷ 110 Cong. Rec. 1511 (1964).

²⁸ Representative Williams of Mississippi proposed amending the Celler amendment by the inclusion also in § 704(b) of the words "race" and "color." This proposal was defeated, the debate thereon making it abundantly clear that under no circumstances may "race" or "color" be considered a "bona fide occupational qualification" under the new law. Id. at 2550-63 (1964).

²⁹ Id. at 2563-66.

³⁰ Id. at 2567-71.

TITLE VII: LEGISLATIVE HISTORY

(4) Amending the language of section 709(a) respecting the EEOC's investigatory powers to conform with similar language in the Taft-Hartley Act (rather than the language of the Fair Labor Standards Act as first recommended by the Judiciary Committee).⁸¹

(5) Inserting the words "after public hearing" in section 709(c) respecting the adoption of record-keeping and reporting regulations to ensure that "those parties interested could be heard on the merits or demerits of any proposed regulation."⁸²

(6) Striking out what had been section 711 in the Judiciary version of H.R. 7152—authorizing the President to ensure non-discrimination among government employees and in connection with government contracts—with the understanding that the deletion of this language would have no effect on whatever authority the President might already have in these respects.⁸³

(7) Inserting the qualifying adjective "procedural" before "regulations" in section 713(a) to ensure that the regulation-making authority given to the EEOC under this section should not extend to what Mr. Celler described as "substantive regulations."⁸⁴

(8) Inserting in section 713(b) certain clarifying language—"failed to publish and file" in place of "published and filed"—correcting what was obviously a clerical error in the Judiciary version.⁸⁵

The remaining amendments adopted in the House and reflected in the law as enacted were proposed by other representatives. They included the following:

(9) The Smith amendment adding "sex" as a proscribed basis for discrimination.⁸⁶

(10) The Reid amendment clarifying section 703(d) respecting discrimination in apprenticeship or training programs by inserting the words "or retraining, including on-the-job training" before "programs."⁸⁷

(11) The Purcell amendment adding what is now clause (2) to section 703(e), thereby permitting a religiously affil-

⁸¹ Id. at 2571-73. Section 709(a) was further amended in the Senate. See p. 454 *infra*.

⁸² Id. at 2573-74.

⁸³ Id. at 2574-75.

⁸⁴ Id. at 2575.

⁸⁵ *Ibid*.

⁸⁶ Id. at 2577-84, 2718, 2720-21.

⁸⁷ Id. at 2584-85.

iated school or other institution of learning to hire an employee of a particular religion, regardless of the job for which he is hired and even though religion might not in fact be a "bona fide occupational qualification."³⁸

(12) The Cramer amendment to section 706(a) substituting "there is reasonable cause to believe that the charge is true" in place of "there is reasonable cause for crediting the charge."³⁹ A finding of such cause, following the filing of an unfair employment practice charge and the investigation thereof, is a condition precedent to any EEOC efforts to eliminate the alleged unlawful employment practice by the informal methods available to it.

(13) The Willis amendment to section 701(b) respecting the application of the act on a step-down basis to employers of less than one hundred employees or to unions with less than one hundred members. The Judiciary version called for annual step-downs from one hundred to fifty and then to twenty-five. The Willis amendment inserted the additional step-down to seventy-five, after the second year from date of enactment, thereby postponing for an additional year the effective dates of the step-downs to fifty and twenty-five.⁴⁰

(14) The Colmer anti-Communist amendment, inserting subsection (f) in section 703 thereby permitting discrimination against any individual who is a member of the Communist party or of a Communist-action or Communist-front organization.⁴¹

In describing the intent of his anti-Communist amendment—and the language is perfectly consistent with this description—Mr. Colmer stated in pertinent part:

Mr. Chairman, this is a very simple amendment. It simply provides that it shall not be deemed "unlawful employment practice" under the provisions of this bill to refuse employment to a Communist or a member of any subversive group heretofore constituted as such. Or to put it in different language, generally *an employer will not be penalized under the act if he fails to employ a Communist or a member of such subversive groups who otherwise would come under the provision of this section.*⁴² (Emphasis supplied.)

³⁸ Id. at 2585-92.

³⁹ Id. at 2715-16.

⁴⁰ Id. at 2716-18.

⁴¹ Id. at 2719-20.

⁴² Id. at 2719.

TITLE VII: LEGISLATIVE HISTORY

These remarks and the language of the amendment lead to the anomalous conclusion that if a Negro, for example, is a Communist then an employer could legally refuse to employ him for any reason whatsoever, including his race or color, without such refusal being an unfair employment practice.

To meet the dilemma of either accepting the Colmer amendment with this anomalous result or rejecting it and being accused of being "soft" on Communists, Mr. Celler read from a statement which he had prepared "for the purpose of legislative history":

There is nothing in this title or in this bill which has anything to do with political or subversive activities; it is a bill which deals solely with discrimination because of race, color, religion, or national origin; and now, sex. *The proposed amendment dealing with members of Communist Party neither broadens nor narrows the substantive terms of the title and thus, while I think it completely unnecessary, I do not oppose it.*⁴³ (Emphasis supplied.)

Mr. Roosevelt announced his acceptance of the amendment on these same terms.⁴⁴

The Smith amendment on sex deserves more than the cursory treatment accorded to it in the above summary. Mr. Smith, long-time Chairman of the House Committee on Rules—and not a civil rights enthusiast—offered his amendment in a spirit of satire and ironic cajolery. In support of the amendment he quoted at length from a letter he had just received from a lady, presumably one of his constituents:

The census of 1960 shows that we had 88,331,000 males living in this country, and 90,992,000 females, which leaves the country with an "imbalance" of 2,661,000 females

Just why the Creator would set up such an imbalance of spinsters, shutting off the "right" of every female to have a husband of her own, is, of course, known only to nature

But I am sure you will agree that this is a grave injustice to womankind and something the Congress and President

⁴³ Ibid.

⁴⁴ Ibid. Whether the courts will "interpret" the Colmer amendment as suggested by Mr. Celler, thereby engrafting limitations on the broad language of the law, or whether they will interpret the language strictly as written and explained by Mr. Colmer—and then strike down the amendment as unconstitutional—remains to be seen. If § 703(f) were interpreted strictly as written and explained by Mr. Colmer, anyone who is a member of the Communist Party, or of a Communist-action or Communist-front organization, would have no rights under Title VII. Would not such discrimination be an obvious violation of due process? "[W]hile the Fifth Amendment contains no equal protection clause it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

Johnson should take immediate steps to correct, especially in this election year

Would you have any suggestions as to what course our Government might pursue to protect our spinster friends in their "right" to a nice husband and family?⁴⁵

Some of the leading proponents of H.R. 7152 (Representatives Emanuel Celler of New York, Chairman of the Judiciary Committee, James Roosevelt of California, Chairman of the subcommittee of the Education and Labor Committee which recommended H.R. 405, John V. Lindsay of New York, member of the Judiciary Committee, and Frank Thompson, Jr. of New Jersey, Chairman of the subcommittee of the Education and Labor Committee which recommended the Equal Pay Act of 1963) spoke in opposition to the amendment, as did Mrs. Edith Green of Oregon, a member of the President's Commission on the Status of Women and authoress of the Equal Pay Act of 1963.⁴⁶ Speaking in favor of the amendment were many Southern Representatives, together with five lady Representatives (Mesdames Frances P. Bolton of Ohio, Martha W. Griffiths of Michigan, Katharine St. George of New York, Catherine May of Washington, and Edna F. Kelly of New York). The amendment was agreed to 168 to 133.⁴⁷ No hearings had been held on the subject matter of the amendment before either the Judiciary Committee or the Education and Labor Committee. It was proposed and quickly adopted after hasty debate in the House under the "five-minute" rule which had been approved for House consideration of possible amendments to H.R. 7152. The House debate thereon covers no more than nine pages of the Congressional Record.⁴⁸

The two amendments adopted in the House which did not survive in the Senate were (1) the Celler amendment providing in effect that government agencies and departments should not be required to furnish information to the EEOC if disclosure of such information was prohibited by law,⁴⁹ and (2) the Ashbrook amendment allowing discrimination because of atheism.⁵⁰ The former amendment was in effect

⁴⁵ 110 Cong. Rec. 2577 (1964).

⁴⁶ *Id.* at 2577-84.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* Nevertheless the application of the act to discrimination in employment on the basis of sex promises to be among the most controversial and difficult tasks relating to its administration. During the first one hundred days that the unfair employment practice provisions of the act were in effect, for example, complaints alleging discrimination on the basis of sex have made up about fifteen per cent of the EEOC's total case load. Report to the President by the Chairman of the Equal Employment Opportunity Commission, submitted October 29, 1965, and made public November 5, 1965. CCH Employment Practices Guide ¶ 8024.

⁴⁹ 110 Cong. Rec. 2574 (1964).

⁵⁰ *Id.* at 2607-11.

rejected in the Senate when the Mansfield-Dirksen substitute amendment for H.R. 7152 eliminated the provisions of the bill (section 710(b) of Judiciary version) expressly requiring other governmental agencies and departments to furnish information to the EEOC.⁵¹ The Ashbrook amendment was deliberately omitted from the Mansfield-Dirksen substitute largely because of its doubtful constitutionality.⁵²

When the Committee of the Whole House on the State of the Union completed its consideration of H.R. 7152, the bill was referred to the House, with the opportunity being given for any member to demand a separate vote on any amendment agreed to by the Committee of the Whole. Separate votes were demanded on only two such amendments—the Smith amendment, adding sex as a proscribed basis for discrimination, and the Ashbrook amendment, allowing discrimination because of atheism. On the passage of the bill, as amended by the Committee of the Whole, the votes were two hundred ninety in favor and one hundred thirty opposed with eleven not voting. The date of House passage was February 10, 1964.⁵³

C. Senate Action

The struggle in the Senate was titanic and protracted. It consisted of three principal phases: (1) The efforts of civil rights proponents to have the Senate take up consideration of the bill, (2) the general or unlimited debate thereon prior to the approval of cloture and (3) the debate following cloture.

1. *Phase One: The Efforts to Secure Consideration of H.R. 7152.*—H.R. 7152 was received from the House and read for the first time on Monday, February 17,⁵⁴ and for the second time on Wednesday, February 26, 1964.⁵⁵ Before the bill was placed on the Senate calendar under section 4 of Senate Rule 14, Senator Russell of Georgia raised the point of order that it should be referred to committee under Senate Rule 25. His argument was that the Legislative Reorganization Act of 1946⁵⁶ had repealed and nullified section 4 of Senate Rule 14. The Chair overruled the point of order.⁵⁷ The Senate affirmed this ruling by approving a motion to table an appeal therefrom.⁵⁸ Senator Mansfield, the majority leader, then asked that the

⁵¹ Compare § 710 of Judiciary version of H.R. 7152, id. at 2512, with § 710 of Mansfield-Dirksen substitute, Amendment No. 656, id. at 11934.

⁵² Id. at 12722-23.

⁵³ Id. at 2804-05.

⁵⁴ Id. at 2882.

⁵⁵ Id. at 3692.

⁵⁶ Ch. 753, 60 Stat. 812 (1946). Senator Russell apparently was relying on § 102 of this act.

⁵⁷ 110 Cong. Rec. 3693-96 (1964).

⁵⁸ Id. at 3719.

bill be referred to the Committee on the Judiciary with instructions to report the bill back by March 4, 1964, without recommendation or amendments. When Senator Javits of New York objected, the Chair announced that the bill was on the Senate calendar.⁵⁹ The following day Senator Mansfield repeated his request, asking unanimous consent thereto. Senator Eastland from Mississippi promptly objected.⁶⁰

On Monday, March 9, 1964, Senator Mansfield moved that the Senate take up consideration of H.R. 7152. The Senate then proceeded to debate the Mansfield motion during the next fourteen days on which it met. On Thursday, March 26, 1964, by a sixty-seven to seventeen vote, it finally adopted the Mansfield motion and proceeded formally to consider the merits of the bill.⁶¹

On this date occurred an ironic twist in the tortuous legislative history of H.R. 7152. Following adoption of the Mansfield motion, although an ardent civil rights advocate and a man who voted both for cloture and for later passage of H.R. 7152, Senator Morse of Oregon promptly moved to refer the bill to the Judiciary Committee. His argument in support of his motion is worthwhile reading for all who are interested in the role that legislative history plays in the interpretation of an act of Congress.⁶² Senator Dirksen of Illinois, the majority leader and perhaps the Senator whose efforts were most significant and effective in securing passage of H.R. 7152 in the Senate, supported the Morse motion. In his speech he stressed the defects in H.R. 7152 as passed by the House and strongly urged that the best way to remove such defects and secure ultimate passage was to refer the bill to Committee.⁶³ Although the Morse motion was defeated, the reasons for its proposal left their mark on the subsequent handling of the bill. Seldom has similar legislation been debated with greater consciousness of the need for "legislative history," or with greater care in the making thereof, to guide the courts in interpreting and applying the law.

2. *Phase Two: General Debate.*—The Senate now moved to the second phase of its struggle on civil rights, its formal debate on the merits of H.R. 7152. For this phase, the supporters of the bill had made elaborate preparations. Acting under the banner of bipartisanship, they had agreed on the following program: Senator Humphrey of Minnesota, the majority whip, and Senator Kuchel of California, the minority whip, were selected as the bipartisan leaders to speak generally in favor of H.R. 7152 and explain the provisions thereof. For

⁵⁹ Ibid.

⁶⁰ Id. at 3830.

⁶¹ Id. at 6417.

⁶² Id. at 6417-27.

⁶³ Id. at 6445-51 (remarks of Senator Dirksen).

each important title of the bill, bipartisan captains had been selected with the responsibility of explaining that title in detail, defending it and leading additional discussion on it. Senators Clark of Pennsylvania and Case of New Jersey were the bipartisan captains responsible for Title VII. Steps were also taken to ensure that sufficient Senators known to support H.R. 7152 would be present if necessary in the event of quorum calls. Bipartisan floor captains were designated from day to day (and for designated hours during each day) to marshal the forces supporting the bill and to ensure that its proponents would at all times be adequately represented on the floor of the Senate.⁶⁴

Another step taken by the bipartisan supporters of the bill was the publication by the floor leaders, Senators Humphrey and Kuchel, of a daily newsletter entitled "Bipartisan Civil Rights Newsletter." These newsletters were distributed whenever circumstances warranted (often daily) to the offices of the Senators who supported H.R. 7152. Copies of all these newsletters were included in the Congressional Record.⁶⁵ They form a fascinating chronicle of what was truly an epic legislative struggle, as well as a pragmatic testimonial to the proponents of federal civil rights legislation.

The Senate began its great debate on the merits of H.R. 7152 on March 30, 1964, having already spent seventeen days in debating procedural questions and whether or not it should even consider the bill. The debate was to continue for fifty-eight additional days before its end would become foreseeable under the cloture rule and for another eight days after adoption of the Mansfield cloture motion.

Meanwhile a bipartisan group, under the leadership of Senators Dirksen, Mansfield, Humphrey and Kuchel, were working outside the floor of the Senate to reach agreement on amendments to H.R. 7152 that would ensure its passage. This effort required many conferences with the leaders of the House—including particularly Mr. McCulloch, referred to by Senator Clark of Pennsylvania as the "czar" of the Senate in this matter⁶⁶—with the Attorney General and other administration representatives and with leading Senators who were basically civil rights proponents but who were sincerely concerned about various provisions of the bill. What these efforts entailed was best described by Senator Dirksen himself when on May 26, 1964, on behalf of himself and Senators Mansfield, Humphrey and Kuchel, he presented in the Senate as Amendment No. 656 the so-called Mansfield-Dirksen amendment in the nature of a substitute for the entire bill.⁶⁷ As a result of the same bipartisan efforts, Senator Dirksen, again on

⁶⁴ Id. at 6528 (remarks of Senator Humphrey).

⁶⁵ Id. at 7474-83 (Nos. 1-25); id. at 14464-80 (Nos. 26-76).

⁶⁶ Id. at 7203.

⁶⁷ Id. at 11935-36.

behalf of himself and Senators Mansfield, Humphrey and Kuchel, later submitted on June 10, 1964, the day cloture was voted, a second substitute amendment to the entire bill, Amendment No. 1052, in the form of a substitute for Amendment No. 656.⁶⁸ Many other amendments to H.R. 7152, amendments to the Mansfield-Dirksen substitutes and amendments to all pending amendments were submitted and laid on the table—to be later withdrawn or voted on finally after adoption of cloture.

3. *Phase Three: Cloture and Passage in Senate.*—Senator Mansfield filed a cloture motion on Saturday, June 6, 1964, but pursuant to a prior agreement withdrew this motion after adoption of a unanimous consent agreement establishing time limitations for debate on three specified amendments, including the modified Morton amendment to the Talmadge amendment respecting jury trials in certain criminal contempt cases arising under the proposed legislation.⁶⁹ On June 8 and 9, 1964, these amendments were debated and voted upon. Senator Mansfield having refiled his cloture motion on June 8, 1964, the vote thereon took place on Wednesday, June 10, 1964. By a seventy-one to twenty-nine vote—four votes more than the required two-thirds majority—the Senate imposed cloture on its members.⁷⁰ It was the second time since the procedure on cloture had become part of the Standing Rules of the Senate in 1917—and the first time in connection with a civil rights measure—that cloture had in fact been invoked.⁷¹

The ensuing limited debate and action on the multitude of pending amendments centered procedurally on proposed amendments to the second Mansfield-Dirksen substitute (Amendment No. 1052). The Senate considered some twenty-four amendments to Title VII, accepting five and rejecting the balance.

The second Mansfield-Dirksen substitute as amended by amendments adopted during the cloture period was agreed to on June 17, 1964, by a vote of seventy-six to eighteen with six Senators not voting, and the bill H.R. 7152 was read for a third time.⁷² H.R. 7152, as amended by the second Mansfield-Dirksen substitute (including the amendments thereto agreed to during the cloture period), was finally passed in the Senate on Friday, June 19, 1964, by a vote of seventy-

⁶⁸ Id. at 13310-19.

⁶⁹ The modified Morton amendment was adopted on June 9, 1964, and was included as § 1101 in the second Mansfield-Dirksen substitute, Amendment No. 1052. Id. at 13051, 13310-19. On June 9, 1964, the Senate met at 10 a.m. and had not recessed by the time the daily edition of the Congressional Record went to press. In fact, it recessed at 9:51 a.m. on Wednesday, June 10, 1964, to meet again at 10 a.m. for its Thursday session. Id. at 13219.

⁷⁰ Id. at 13327.

⁷¹ Id. at 13319 (remarks of Senator Dirksen).

⁷² Id. at 14239.

three to twenty-seven.⁷³ The fact that each and every Senator was present—and voting—on this historic date attests to the significance of the issue. Whatever the reasons for an individual Senator's vote, at least he had the courage to "stand up and be counted" when the Senate made its final decision.

4. *Senate Amendments to Title VII.*—Title VII of the first Mansfield-Dirksen substitute (Amendment No. 656) is the same as Title VII of the second such substitute. Both substitutes were intended to satisfy the more significant objections to the House version of H.R. 7152, including particularly the objections of Senator Dirksen, which he had set forth in large part when he spoke in support of the Morse motion (following the Senate vote to take up consideration of H.R. 7152) to refer the bill to the Senate Committee on the Judiciary.⁷⁴

The following summary highlights the Title VII amendments to the House version thereof, including both those reflected in the Mansfield-Dirksen substitute and the five additional amendments agreed to during cloture. Unless otherwise indicated, all amendments summarized were reflected in the Mansfield-Dirksen substitute.

a. *Section 701—Definitions.* The subsection (b) definition of an employer as including a person engaged in an industry affecting commerce having twenty-five or more employees was limited by adding the requirement that the employer have the requisite number of employees "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." The intention was to exclude seasonal employers who employ less than twenty-five regular employees regardless of the number of seasonal employees they may employ during their peak or seasonal periods.⁷⁵ The Mundt amendment, adopted during cloture, excluded "an Indian tribe" from the definition of "employer" in subsection (b).⁷⁶

Added at the end of subsection (b) was the last proviso, establishing the policy of non-discrimination in federal employment and directing the President to utilize "his existing authority to effectuate

⁷³ Id. at 14511.

⁷⁴ Id. at 6445-51 (remarks of Senator Dirksen). Senator Dirksen's specific objections to Title VII appear id. at 6449-51. Compare the House version of Title VII, id. at 13166-69; the first Mansfield-Dirksen substitute therefor, Amendment No. 656, id. at 11930-34; and the second such substitute, Amendment No. 1052, id. at 13314-18.

⁷⁵ Id. at 6450 (remarks of Senator Dirksen). Although a comparable limitation was not added to the "step-down" provisions in the latter part of the subsection (b) definition, the limitation should be implied so that a seasonal employer, for example, who employs 25 or more but less than 50 regular employees may not be considered an "employer" until July 2, 1968. Cf. memorandum prepared by a staff member of the Senate Judiciary Committee, id. at 14331-32 (included by Senator Williams). The EEOC has reached the same conclusion. Cf. proposed instructions accompanying Form EEO-1, CCH Employment Practices Guide ¶ 19,592, at 7884.

⁷⁶ Id. at 13701-02.

this policy.” Thus the Mansfield-Dirksen substitute reinstated in substance a portion of what the House had eliminated when it adopted the Celler amendment, deleting section 711 of the Judiciary version.⁷⁷

By the insertion of appropriate language in subsection (e), Title VII was thereby made applicable to a labor organization which maintains or operates a hiring hall servicing an “employer,” regardless of the number of members the labor organization might have. If this change had not been made, an “employer” could have been held to have committed an unfair employment practice, for example, but the labor organization operating the hiring hall in fact responsible for the discrimination would have been exempt.

b. *Section 702—Exemption.* The broad exemption for religious organizations—recommended by the House Judiciary Committee and approved in the House—was narrowed to simply permitting such an organization to employ individuals of a particular religion to perform work connected with the carrying on of the organization’s religious activities. In addition, the exemption was extended—in broad terms—to “an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.” This means in effect that a religious organization may discriminate in employment in favor of a particular religion, but not on the basis of race, color, sex or national origin. An educational institution, on the other hand, if it is not religiously affiliated in the manner described in clause (2) of section 703(e), may discriminate on any grounds with respect to work connected with its “educational activities”; but if it is religiously affiliated under clause (2) of section 703(e), it may discriminate in favor of a particular religion with respect to all of its activities and not merely its “educational activities.” However, for educational institutions or religious organizations located in states with FEP legislation, discrimination otherwise permissible under Title VII might constitute a violation of state law.

c. *Section 703—Unlawful Employment Practices.* The exception for discrimination on the basis of “religion, sex, or national origin” under subsection (e) “in those certain instances where religion, sex or national origin is a bona fide occupational qualification” was extended to cover all agencies (in addition to employers) for which such discrimination would otherwise be an unfair employment practice.

The Ashbrook amendment on atheism, section 704(f) of the House version, was deleted because of its doubtful constitutionality.

The Mansfield-Dirksen substitute added subsection (g) to section 703 to ensure that the treatment of an employee or applicant for employment by reason of his failure to satisfy applicable government

⁷⁷ Id. at 2574-75; cf. text accompanying note 33 supra.

TITLE VII: LEGISLATIVE HISTORY

security requirements would not constitute an unlawful employment practice.

Subsection (h) was likewise added to make it clear that differences in wages or other employment conditions (i) pursuant to a bona fide seniority or merit system or an incentive system based on quantity or quality of production or (ii) with respect "to employees who work in different locations" would not be the basis for an unfair employment practice "provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."

The modified Tower amendment to section 703(h), adopted during cloture, expressly authorizes an employer's use of professionally developed ability tests.⁷⁸ This amendment, resisted as unnecessary by many proponents of the bill, was obviously designed to prevent any ruling under Title VII comparable to the ill-fated and notorious holding in *Motorola, Inc. v. Illinois Fair Employment Practices Comm'n*,⁷⁹ under the Illinois FEP law.⁸⁰ The amendment is limited to an employer's use of such tests. Does this leave the door open for the EEOC or for a court to hold that use of such a test by an employment agency, a labor organization or a joint labor-management committee is an unfair employment practice if it results in "*de facto* discrimination" and the user knows or should have known that this would be the result?

The Bennett amendment, adding the last sentence now found in section 703(h), was also adopted during cloture.⁸¹ It permits differentiation in wages or compensation upon the basis of sex if such differentiation is authorized by section 6(d) of the Fair Labor Standards Act.⁸² Adoption of this amendment reflects the concern of many Senators over the hasty adoption by the House of "sex" as a proscribed basis for discrimination. In the words of the amendment's sponsor, Senator Bennett: "The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified."⁸³

Thus a wage or fringe differential between employees of opposite sexes based upon one of the factors, for example, seniority or merit, referred to in section 6(d) of the Fair Labor Standards Act cannot constitute an unfair employment practice under Title VII. Title VII would probably have been so interpreted without the Bennett amendment, but the amendment makes this clear; just as the other amend-

⁷⁸ Id. at 13492-505, 13724.

⁷⁹ 51 CCH Lab. Cas. ¶ 51323 (Ill. Cir. Ct. 1965).

⁸⁰ Illinois has since amended its Fair Employment Practices Act by incorporating into its definition of unfair employment practices substantially the language of the Tower amendment. Ill. Rev. Stat. ch. 48, § 853 (Smith-Hurd Supp. 1965).

⁸¹ 110 Cong. Rec. 13647 (1964).

⁸² As amended, 71 Stat. 56 (1963), 29 U.S.C. § 206(d) (1964).

⁸³ 110 Cong. Rec. 13647 (1964).

ments reflected in subsections (g) and (h) confirm and clarify what the House Judiciary Committee seems to have intended when it reported H.R. 7152 but which the bill itself did not articulate in unequivocal terms. In addition to facilitating final passage, amendments such as these will clearly restrain a "crusading" EEOC or court from finding unfair employment practices in situations which Congress never intended to reach.

These objectives were also achieved by the Mansfield-Dirksen addition of subsection (j) to section 703. This subsection makes it clear that preferential treatment for an individual or minority group, to correct an existing "imbalance," may not be required under Title VII.

An employer cannot be forced to discharge employees or employ additional employees in order to achieve a racial balance. An employer with 100 employees who may all be white cannot be required to meet a quota even though his plant is located in a neighborhood that is 50 percent Negro.⁸⁴

Despite this amendment, however, the evidentiary problem remains as to what probative value should be given an existing "imbalance" in determining motivation for the overt act of denying employment to a member of a minority group. In practice, to avoid possible harassment by the EEOC or organizations representing minority groups, will the typical employer in whose plant there is an "imbalance" strive to correct that "imbalance" by according "preferential treatment" to qualified members of minority groups? If this means denying employment to equally qualified individuals who are not members of a minority group, does this "discrimination in reverse" constitute an unfair employment practice under Title VII? If so, will the EEOC and the courts be as zealous in applying the law to such practices as they might be in eliminating the more common discrimination against minorities?

The remaining amendment to section 703—the insertion of subsection (i), permitting the preferential treatment of Indians in connection with an enterprise located on or near an Indian reservation—was first proposed by Senator Mundt and then incorporated in the first Mansfield-Dirksen substitute. Permitting such preferential treatment is consistent with, but does not go so far as, the total exemption of "an Indian tribe" from the act under the definition of "employer" in section 701(b).

d. *Section 705—Equal Employment Opportunity Commission.* Consistent with the objective of allaying the fear that the EEOC would develop into another expensive octopus like the NLRB and

⁸⁴ Memorandum prepared by a staff member of the Senate Judiciary Committee, id. at 14331 (included by Senator Williams).

with the lessening of the EEOC's responsibilities under the House version, the Mansfield-Dirksen substitute removed the requirement, formerly in section 705(f), that the EEOC "shall establish at least one such office in each of the major geographical areas of the United States, including its territories and possessions."

Express restrictions were also put on the EEOC's discretionary powers (1) to establish regional or state offices by confining the exercise thereof to those the EEOC "deems necessary to *accomplish the purpose of this title*"⁸⁵ (section 703(f)); (2) to cooperate with existing state and local agencies, both public and private, by providing that this should be done only "with their consent" (section 703(g)(1)); and (3) upon request to assist employers and labor organizations in effectuating the provisions of Title VII by limiting the "other remedial action" which the EEOC might take to "*such . . . as is provided by this title*" (section 703(g)(4)). At the same time the EEOC's power to render such assistance was expanded to include as a recipient of such assistance "*any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title*" (instead of having such assistance limited to an employer whose employees so refuse or threaten, as provided in the House version). In addition, the EEOC's power to make its studies available to others was expanded to include "*the public*" instead of being limited to "interested governmental and nongovernmental agencies."

The modified Miller amendment, adopted during cloture, made "all officers, agents, attorneys, and employees of the Commission" subject to the Hatch Act (section 705(j)). During the debate on his amendment as originally proposed, Senator Miller agreed to delete therefrom the words "including the members of the Commission," thereby confirming that the EEOC members should not be deemed officers or employees of the Commission at least for purposes of the Hatch Act.⁸⁶

The most significant change in section 705 was the addition of subsection (6) authorizing the EEOC

to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General under section 707, and to advise, consult, and assist the Attorney General on such matters.

Since the Mansfield-Dirksen substitute stripped the EEOC of

⁸⁵ The Mansfield-Dirksen substitute added the language italicized in this paragraph.

⁸⁶ 110 Cong. Rec. 13473 (1964).

any obligation or authority to institute a civil action in its own name, as was proposed in the House version, presumably the granting of the above powers to the EEOC to refer matters with recommendations for action to the Attorney General and to advise and assist the Attorney General on such matters constituted the *quid pro quo* to satisfy the House and Senate advocates of a "strong" EEOC with enforcement powers.

e. *Section 706—Prevention of Unlawful Employment Practices.* The changes wrought in this section by the Mansfield-Dirksen substitute were the most basic and far-reaching of all the Senate amendments:

The Senate amendment struck out the power of the Federal agency that was established to enforce this title of the bill in court suits. Under the Senate version the Equal Employment Opportunity Commission cannot bring suit against employers,⁸⁷ nor for that matter can charges be filed by other groups, "on behalf of"⁸⁸ aggrieved persons. . . . Its function now is limited to an attempt at voluntary conciliation of alleged unlawful practices and the conciliation efforts must be conducted in confidence and not even the charge against the employer may be made public. . . .⁸⁹

Under the Senate amendment only an aggrieved person can bring suit against an employer unless there is a pattern or practice of resistance and then only the Attorney General can bring suit.⁹⁰ The Commission cannot institute suit at all.

One of the principal changes made by the Senate was to preserve State sovereignty. A State can maintain exclusive jurisdiction over unfair employment practices for a limited

⁸⁷ Compare § 707(b) of the House version, *id.* at 13168, with § 706(e) of the final enactment.

⁸⁸ The Mansfield-Dirksen substitute struck out the words "or on behalf of" from the phrase "by or on behalf of a person claiming to be aggrieved" in the first sentence of § 707(a) of the House version (§ 706(a) of the final enactment).

⁸⁹ This was accomplished by (1) adding the proviso "that such charge shall not be made public by the Commission" at the end of the first sentence of § 706(a); (2) inserting the words "made public by the Commission without the written consent of the parties or" in the second sentence ("Nothing said or done during and as a part of such endeavors may be used as evidence in subsequent proceedings" in House version); and (3) adding the last sentence, making publication in violation of § 706(a) a misdemeanor punishable by fine or imprisonment.

⁹⁰ This was provided for in § 707(a):

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described. . . .

There was no counterpart for § 707 in the House version.

time if it has State or local laws prohibiting such practices. . . .⁹¹

A further safeguard that was provided by the Senate amendment deals with proceedings against employers in Federal court. It provides that the unlawful employment practice complained of must be an intentional one:⁹² The employer must have intended to discriminate before a court could grant any relief.⁹³

Other Senate amendments reflected in section 706 include (1) requiring that the "reasonable cause" determination be made by the Commission, and not simply by two or more members thereof, before the Commission may initiate efforts under section 706(a) to eliminate an alleged unlawful employment practice, (2) authorizing the court to appoint an attorney for the complainant to permit the commencement of the action "without the payment of fees, costs or security" and to permit the Attorney General to intervene in a civil action commenced by an individual under section 706(e), (3) changing the language of section 706(g) in some respects to clarify the intent that the remedies thereunder (except for the mandatory reduction of the back pay otherwise allowable to the discriminatee by his interim earnings or amounts he could have earned with reasonable diligence) be within the court's discretion and (4) authorizing the court in section 706(k) to allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs.

Permitting the appointment of an attorney for the individual complainant and allowing his attorney's fee to be included in the

⁹¹ Under § 708(b) of the House version, "Where there is a State or local agency which has effective power to eliminate and prohibit discrimination in employment in cases covered by this title, and the Commission determines the agency is effectively exercising such power. . . ." the Commission was required to seek written agreements with the state or local agency in effect ceding jurisdiction to the state or local agency. Compare this power with the NLRB power to cede its jurisdiction to an agency of a state or territory under § 10(a) of the LMRA, 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1964). This power of cession by agreement was retained in effect, but without the restrictions found in the House version, in § 709(b). The solution to the problem of overlapping federal and state jurisdiction approved by the House and its Judiciary Committee was the basis for one of Senator Dirksen's principal objections to the House version. 110 Cong. Rec. 6449-50 (1964) (remarks of Senator Dirksen). Subsections (b) and (c) of § 706 reflect the bipartisan solution to this objection.

⁹² The Mansfield-Dirksen substitute inserted the word "intentionally" in the two places where it appears in the first sentence of § 706(g): "If the court finds that the respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent. . . ." (Emphasis supplied.)

⁹³ Memorandum prepared by a staff member of Senate Judiciary Committee, 110 Cong. Rec. 14331-32 (1964) (footnotes have been added).

costs strengthen the likelihood of voluntary compliance. They are part of the price which had to be paid to secure bipartisan agreement on striking out the power of the EEOC to enforce Title VII by court action.

The Miller amendment requiring the Attorney General to certify "that the case is of general public importance" before he may intervene in a civil action under section 706(e) was adopted during cloture.⁹⁴ It parallels the requirement for such intervention found in sections 204(a) and 901 of the act.

f. *Section 709—Investigations, Inspections, Records, State Agencies.* Particularly significant is the effort represented by the Senate version to minimize the record-keeping requirements which the EEOC might prescribe "after public hearing." The House version was highly objectionable to Senator Dirksen:

What records are employers required to keep by title VII? Employers voluntarily participating in the program of the President's Commission on Equal Opportunity are apprised in detail of the records which they must keep; and the records are, I believe, more comprehensive than those that would be required by title VII. Are we to superimpose another set of records on the employer, in addition to a third set that he may be keeping for a State FEPC?

What of the conflict between State and Federal record requirements? Illinois prohibits any reference to color or religion in employers' records. Title VII would require this information to be kept. Are we now to force an employer to violate a State law in order to comply with a Federal statute, each of which has the same purpose?

.... Only a few plants do not have a defense contract of some kind; so all the others are required to keep records for the President's Commission on Defense Contracts. In addition, under the Illinois law they are required to keep records. In addition, under the provisions of this bill they would be required to keep records. In short they would be required to keep three sets of records.

Under the Illinois law, if I remember correctly, it is not permissible to show on the records whether a person is of color. But under the Federal requirement that is shown. So what would happen?

.... Who is in the ascendancy? Who will proclaim its power and finally win?⁹⁵

⁹⁴ Id. at 13467-68.

⁹⁵ Id. at 6449, 6450 (remarks of Senator Dirksen).

TITLE VII: LEGISLATIVE HISTORY

The intended solution to Senator Dirksen's dilemma is found in subsection (d) added to section 709 by the Mansfield-Dirksen substitute. Its provisions make the record-keeping and reporting requirements promulgated by the EEOC under subsection (c) inapplicable to any employer, employment agency or labor organization with respect to matters occurring in any state or political subdivision thereof so long as there is in effect therein an FEP law to which the employer, employment agency or labor organization is subject. Instead the EEOC may require such notations on the records kept or required to be kept "as are necessary because of differences in coverage or methods of enforcement between the state or local law and the provisions of this title."⁹⁶

g. *Section 710—Investigatory Powers.* Section 710 of the House version provided in pertinent part:

SEC. 710(a). For the purposes of any investigation provided for in this title, the provisions of section 9 and 10 of the Federal Trade Commission Act of September 16, 1914, as amended (15 U.S.C. 49, 50), are hereby made applicable to the jurisdiction, powers, and duties of the Commission, except that the provisions of section 307 of the Federal Power Commission Act shall apply with respect to grants of immunity, and except that the attendance of a witness may not be required outside the State where he is found, resides, or transacts business, and the production of evidence may not be required outside the State where such evidence is kept.⁹⁷

The Mansfield-Dirksen substitute retained only that part of the House version which exempts a witness from being required to testify outside of his state of residence or business and prevents the production of evidence from being required outside the state where the evidence is kept. In other respects the House version was radically altered. For example, except as authorized by Section 7(b) of the Administrative Procedure Act,⁹⁸ only the Commission (rather than the Commission and its individual members or representatives) is now expressly authorized "to examine witnesses under oath"; the strict statutory penalties for failure to obey a subpoena or other "lawful requirement" of the EEOC, specified in Section 10 of the Federal

⁹⁶ Questions still remain, however. E.g., what alternatives are open to the employer if the EEOC requires him to make notations on his records which are not permitted to be made under state law? What reporting requirements, if any, may the EEOC impose upon employers who are subject to state or local FEP laws? Should employers subject to such laws refuse to file reports required by EEOC rules or regulations which arguably do not comply with the § 709(d) exemption?

⁹⁷ 110 Cong. Rec. 13168-69 (1964).

⁹⁸ 60 Stat. 241 (1946), 5 U.S.C. § 1006(b) (1964).

Trade Commission Act, are no longer applicable;⁹⁹ the power vested in the Federal Trade Commission to "order testimony to be taken by deposition . . . before any person designated by the commission" has not been granted to the EEOC; and, absent the immunity granted by Section 307 of the Federal Power Commission Act, a witness in an EEOC proceeding could properly plead the fifth amendment.

h. *Section 711—Notices to be Posted.* Sections 711 of the House version and of the Mansfield-Dirksen substitute are identical, except that in the last part of section 711(a) the latter provided for the inclusion in the notices to be posted of "excerpts from or, (sic) summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint" in place of the broader notice content language of the House version ("excerpts of this title and such other relevant information which the Commission deems appropriate to effectuate the purposes of this title"). In addition, the fine for a violation of the section was reduced from "not less than \$100 or more than \$500" to "not more than \$100."¹⁰⁰

5. *Rejected Amendments.*—The foregoing summary highlights what appear to be the most significant of the many Senate amendments to the House version of H.R. 7152. The fact that the Senate saw fit to amend the House version in so many respects—usually after extended debate—should itself be given substantial weight in the administration and interpretation of Title VII. Of comparable significance may be the Senate's rejection of numerous other amendments proposed during the Senate debate but withdrawn or rejected during cloture.¹⁰¹ For example, Senator McClellan proposed that an unfair employment practice should be found to exist only when the discrimination complained of was *solely* because of race, color, religion, sex or national origin. This proposal was rejected.¹⁰² The fact that it was made points up what is a continuing issue under the Labor Management Relations Act (LMRA). For an unfair employment practice to exist, what must be the causal nexus or relationship between the improper motive and the overt act? Must the improper motive be the dominant factor, a substantial contributing factor or merely a factor leading to the overt act? The answers to these questions await the clarification of the law by administrative practice and

⁹⁹ 38 Stat. 723 (1914), as amended, 15 U.S.C. § 50 (1964).

¹⁰⁰ 110 Cong. Rec. 13169 (1964).

¹⁰¹ On June 19, 1964, Senator Holland from Florida included in the Record a list of 106 amendments to H.R. 7152 rejected by the Senate. Id. at 14460-62. He had previously summarized on June 17, 1964 what he described in effect as the 65 amendments which the Senate adopted to the House bill and which were regarded by the professional staff of the Senate Judiciary as the most significant among the more than 100 amendments which the Senate adopted. Id. at 14219-21.

¹⁰² Id. at 13837-38.

TITLE VII: LEGISLATIVE HISTORY

judicial decision. Presumably court decisions under the LMRA will be the more reliable and significant guide, rather than the more onerous interpretation which the NLRB has occasionally applied.¹⁰³

D. Concurrence by the House and Presidential Approval

After passage by the Senate, H.R. 7152 was referred to the House for its concurrence with the amendments in the Senate. The House Committee on Rules reported the bill without amendments on June 30, 1964, and on July 2, 1964, the House adopted (289-126) House Resolution 789 providing for concurrence of the House to the Senate's amendments.¹⁰⁴ The President signed the bill on the same date. In accordance with section 716 of the new act, the provisions of Title VII defining unfair employment practices and providing for their prevention (sections 703, 704, 706 and 707) became effective one year later, while the remaining provisions of Title VII became effective immediately.

III. CONCLUSION

The significance of what Congress has done and the extent of its labors cannot be overstated. The protracted subcommittee hearings before the Subcommittee of the Senate Committee on Labor and Public Welfare, the Subcommittee of the House Committee on Education and Labor and Subcommittee No. 5 of the House Committee on the Judiciary, the executive sessions of these Committees and the reports emanating therefrom, the extended debates in the House and Senate—and above all the work of the bipartisan Senate group led by Senators Mansfield and Dirksen who developed the Mansfield-Dirksen substitute—brought to fruition the labors and aspirations of civil rights proponents everywhere, made possible that which has never before been possible in America and will leave a lasting mark on the structure of American society.

Unfortunately the legislative history of the Civil Rights Act of 1964 is recorded not so much in Committee Reports as in the pages of the Congressional Record in which are recorded the debates and arguments of both opponents and proponents, as well as the hundreds of amendments which were considered and accepted or rejected prior to final passage. For the formulation of the Mansfield-Dirksen substitute amendments (Amendment Nos. 656 and 1052)—which forms a significant part of that history—the Congressional Record itself is not complete. Admittedly this is not the kind of legislative history on

¹⁰³ See, e.g., *NLRB v. Lowell Sun Publishing Co.*, 320 F.2d 835, 842 (1st Cir. 1963) (concurring opinion); *Frosty Morn Meats, Inc. v. NLRB*, 296 F.2d 617, 620 (5th Cir. 1961); *NLRB v. Whitin Machine Works*, 204 F.2d 883, 885 (1st Cir. 1953); *Bussmann Mfg. Co. v. NLRB*, 111 F.2d 783, 787 (8th Cir. 1940).

¹⁰⁴ 110 Cong. Rec. 15897 (1964).

which courts are accustomed to rely. The proponents of the act were fully conscious of this problem but on balance believed they had no practical alternative, if a satisfactory law was to be passed in the 88th Congress. In the circumstances they did their best. Whether that will be of material assistance in the administration of the act is a question to which there is no present answer. Experience with the act and the judgments of the courts in due time will provide the answer.