

therein, and for other purposes" (25 U.S.C. 305e) is amended—

(1) by striking subsection (d);

(2) by redesignating subsections (a) through (c) as subsections (b) through (d), respectively;

(3) by inserting before subsection (b) (as redesignated by paragraph (2)) the following:

“(a) DEFINITIONS.—In this section:

“(1) INDIAN.—The term ‘Indian’ means an individual that—

“(A) is a member of an Indian tribe; or

“(B) is certified as an Indian artisan by an Indian tribe.

“(2) INDIAN PRODUCT.—The term ‘Indian product’ has the meaning given the term in any regulation promulgated by the Secretary.

“(3) INDIAN TRIBE.—

“(A) IN GENERAL.—The term ‘Indian tribe’ has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

“(B) INCLUSION.—The term ‘Indian tribe’ includes, for purposes of this section only, an Indian group that has been formally recognized as an Indian tribe by—

“(i) a State legislature;

“(ii) a State commission; or

“(iii) another similar organization vested with State legislative tribal recognition authority.

“(4) SECRETARY.—The term ‘Secretary’ means the Secretary of the Interior.”;

(4) in subsection (b) (as redesignated by paragraph (2)), by striking “subsection (c)” and inserting “subsection (d)”;

(5) in subsection (c) (as redesignated by paragraph (2))—

(A) by striking “subsection (a)” and inserting “subsection (b)”;

(B) by striking “suit” and inserting “the civil action”;

(6) by striking subsection (d) (as redesignated by paragraph (2)) and inserting the following:

“(d) PERSONS THAT MAY INITIATE CIVIL ACTIONS.—

“(1) IN GENERAL.—A civil action under subsection (b) may be initiated by—

“(A) the Attorney General, at the request of the Secretary acting on behalf of—

“(i) an Indian tribe;

“(ii) an Indian; or

“(iii) an Indian arts and crafts organization;

“(B) an Indian tribe, acting on behalf of—

“(i) the Indian tribe;

“(ii) a member of that Indian tribe; or

“(iii) an Indian arts and crafts organization;

“(C) an Indian; or

“(D) an Indian arts and crafts organization.

“(2) DISPOSITION OF AMOUNTS RECOVERED.—

“(A) IN GENERAL.—Except as provided in subparagraph (B), an amount recovered in a civil action under this section shall be paid to the Indian tribe, the Indian, or the Indian arts and crafts organization on the behalf of which the civil action was initiated.

“(B) EXCEPTIONS.—

“(i) ATTORNEY GENERAL.—In the case of a civil action initiated under paragraph (1)(A), the Attorney General may deduct from the amount—

“(I) the amount of the cost of the civil action and reasonable attorney’s fees awarded under subsection (c), to be deposited in the Treasury and credited to appropriations available to the Attorney General on the date on which the amount is recovered; and

“(II) the amount of the costs of investigation awarded under subsection (c), to reimburse the Board for the activities of the Board relating to the civil action.

“(ii) INDIAN TRIBE.—In the case of a civil action initiated under paragraph (1)(B), the Indian tribe may deduct from the amount—

“(I) the amount of the cost of the civil action; and

“(II) reasonable attorney’s fees.”; and

(7) in subsection (e), by striking “(e) In the event that” and inserting the following:

“(e) SAVINGS PROVISION.—If”.

### SEC. 3. MISREPRESENTATION OF INDIAN PRODUCED GOODS AND PRODUCTS.

Section 1159 of title 18, United States Code, is amended—

(1) by striking subsection (b) and inserting the following:

“(b) PENALTY.—Any person that knowingly violates subsection (a) shall—

“(1) in the case of a first violation by that person—

“(A) if the applicable goods are offered or displayed for sale at a total price of \$1,000 or more, or if the applicable goods are sold for a total price of \$1,000 or more—

“(i) in the case of an individual, be fined not more than \$250,000, imprisoned for not more than 5 years, or both; and

“(ii) in the case of a person other than an individual, be fined not more than \$1,000,000; and

“(B) if the applicable goods are offered or displayed for sale at a total price of less than \$1,000, or if the applicable goods are sold for a total price of less than \$1,000—

“(i) in the case of an individual, be fined not more than \$25,000, imprisoned for not more than 1 year, or both; and

“(ii) in the case of a person other than an individual, be fined not more than \$100,000; and

“(2) in the case of a subsequent violation by that person, regardless of the amount for which any good is offered or displayed for sale or sold—

“(A) in the case of an individual, be fined under this title, imprisoned for not more than 15 years, or both; and

“(B) in the case of a person other than an individual, be fined not more than \$5,000,000.”; and

(2) in subsection (c), by striking paragraph (3) and inserting the following:

“(3) the term ‘Indian tribe’—

“(A) has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b); and

“(B) includes, for purposes of this section only, an Indian group that has been formally recognized as an Indian tribe by—

“(i) a State legislature;

“(ii) a State commission; or

“(iii) another similar organization vested with State legislative tribal recognition authority; and”.

### FEDERAL AVIATION ADMINISTRATION EXTENSION ACT OF 2008, PART II

Mr. MENENDEZ. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of H.R. 6984, which was received from the House.

The PRESIDING OFFICER. The clerk will report the bill by title.

The legislative clerk read as follows:

A bill (H.R. 6984) to amend title 49, United States Code, to extend authorizations for the airport improvement program, to amend the Internal Revenue Code of 1986 to extend the funding and expenditure authority of the Airport and Airway Trust Fund, and for other purposes.

There being no objection, the Senate proceeded to consider the bill.

Mr. KERRY. Mr. President, I want to say a few words about the FAA’s Disadvantaged Business Enterprise, DBE, Program and the Airport Concessions Disadvantaged Business Enterprise, ACDBE, Program. As we are all aware, case law over the past decade has made clear that Federal race-conscious programs are subject to strict constitutional scrutiny to ensure that programs serve a compelling governmental interest and are narrowly tailored to address that interest. Gender-conscious programs must meet heightened scrutiny to ensure that there is an exceedingly persuasive justification for the program. Still, under any reading of constitutional law, race- and gender-conscious programs are clearly permitted to remedy current discrimination and the present-day effects of past discrimination where there is a strong basis in evidence that such discrimination exists. As the Commerce Committee is aware, discrimination in business practices continues to be a serious problem. There are countless disparity studies and examinations of this topic and for that reason we have made only minor changes to the DBE and ACDBE program over time. Taken as a whole, the quantitative and qualitative evidence clearly suggests that discrimination remains a serious problem in our Nation.

I serve both as a member of the Commerce Committee and as chairman of the Senate Small Business Committee. In these roles, I have the opportunity to review enormous amounts of information about discrimination against women and minority entrepreneurs throughout our economy and across our Nation. While we have made very real progress over the time that I have been in the Senate, there is no doubt that a lot of work remains to be done. Programs such as the DBE and ACDBE programs are making an important difference by offering real opportunities to companies that otherwise might not ever get a chance to compete. These programs are critically important in airport-related industries as well as in other areas of Federal contracting.

The statistics are telling. On May 22, 2007, I held a hearing in the Small Business Committee addressing the effectiveness of SBA’s programs for minority businesses. One economist who testified, Dr. Jon Wainwright, presented a number of troubling statistics to the committee. For instance, he explained that according to the most recent economic census data available, while African Americans constitute 12.7 percent of the population, they own only 5.3 percent of businesses and those businesses account for only 1 percent of business sales and receipts. Latinos are 13.4 percent of the population, but only 7 percent of businesses and 2.5 percent of business sales and receipts. Dr. Wainwright also noted that Asian and Pacific Islanders own 5 percent of businesses but earned only 3.8 percent of business sales and receipts and Native Americans constituted .9 percent of the

business population but earned only .3 percent of business sales and receipts. For women the numbers are also shocking: women constitute 50.9 percent of the population but own only 28.9 percent of businesses and receive only 10.7 percent of business sales and receipts.

Dr. Wainwright went on to explain that these disparities in business ownership and earnings exist in all 50 States and the District of Columbia and that similar outcomes had been evident in all previous versions of this same survey over the past 35 years. He also stated that he had conducted further analyses to determine whether the types of disparities he had observed were caused by discrimination or some other factor. He explained that he had conducted regression analyses to account for geography, industry, labor market status, age, and education among other factors. Even when this regression analysis was conducted, the disparities remained large, negative, and statistically significant for African Americans, Hispanics, Asian/Pacific Islander Americans, Native Americans, and women suggesting that race and gender discrimination are the cause.

Also troubling were Dr. Wainwright's comments on small business finance issues. We know that credit is the lifeblood of entrepreneurship, but it turns out that minority business owners are far more likely to be denied credit than nonminority owners. Dr. Wainwright explained that these findings held up even when regression analyses were conducted to adjust for a number of balance sheet, credit history, and other characteristics. And Dr. Wainwright found that women were also likely to face some discrimination in credit markets. Dr. Wainwright was only one witness at the May 22 hearing and there were several others whose testimony was equally compelling. The fact is that discrimination remains a very serious problem in Federal contracting markets across this country.

More recently, on September 11, 2008, our committee held another hearing on discrimination against minority- and women-owned businesses which focused on discrimination in access to capital. During the hearing we heard testimony from several witnesses about the serious barriers that minority- and women-owned businesses confront when attempting to obtain capital to start up, grow, and flourish. In the context of the FAA extension bill before us today, I want to specifically highlight the testimony of Don O'Bannon who is the current chair of the Airport Minority Advisory Council or AMAC. Mr. O'Bannon explained that, in his experience, access to capital is an enormous hurdle for minority- and women-owned businesses in airport-related industries. He gave us specific real-life examples of firms that had attempted to obtain both venture capital and more conventional debt capital and encountered extraordinary barriers due to discrimination that compromised their ability to grow and succeed.

Of course, there are many other sources of information about discrimination in contracting. Literally hundreds of disparity studies have been conducted around the country that contain compelling statistical data about discrimination in the public and private marketplaces related to airport-related contracting. Just a few of the studies that have been conducted recently and include airport-related data were put into the record by Mr. O'Bannon during our recent hearing. These include: "Race, Sex and Business Enterprise: Evidence from Denver, CO," NERA Economic Consulting, May 5, 2006; "Dallas/Fort Worth International Airport Board Disparity Study Final Report," MGT of America, October 17, 2000; "The City of Phoenix, Minority-, Women-Owned and Small Business Enterprise Program Update Study: Final Report," MGT of America, April 21, 2005; "Race, Sex and Business Enterprise: Evidence from the State of Maryland," NERA Economic Consulting, March 8, 2006; "Final Report: Broward County Small Disadvantaged Business Enterprise (SDBE) Disparity Study," MGT of America, Inc., April 3, 2001; and "Final Report for Development and Revision of Small, Minority and Women Business Enterprise Program, Nashville International Airport, (BNA)," Griffin and Strong, PC, September 19, 2007. There are hundreds of additional studies, including many relevant studies that cover entities other than airports but that analyze the same industries and enterprise populations that do airport-related work.

But the statistics can only tell part of the story. Overlooked aspects of disparity studies are the sections that address anecdotal evidence. These are the accounts that individual business people give about the challenges they confront in doing business. When you read these studies, it quickly becomes clear that discrimination remains a problem at literally every stage of the business process. It is harder for women and minority entrepreneurs to start companies. They often are denied credit even when they have the same creditworthiness of male, nonminority entrepreneurs. And because of past discrimination, minority entrepreneurs often do not have access to family wealth. As one African-American contractor reported in a study about discrimination in the state of Massachusetts:

Now I go to the bank—again I've been in business for 28 years, I've been very successful at times—I go to the bank and say "Okay. I need a \$250,000 line of credit." I walk out of there with \$50,000. A [White] gentleman that used to work with me was a former partner of mine, left, went to the same bank, and walked away with \$1.2 million. Okay? Now he walked away because his house is not mortgaged. So he has equity that they can touch to go back if he doesn't make payments. They are looking at me and saying, "He's already leveraged himself. He doesn't have anything that I can touch." So they don't want to give me any money. And not that the fact of my business—my business is very solid. It's just they won't give it to me because I started with nothing and

I've taken everything I've had and put it into the businesses. They still think I'm worth nothing. That's . . . discrimination . . . which is where minorities and women who start from scratch and build their businesses up, that's where we get hurt. That's where it comes back to backfire, because we don't have that same leverage that somebody who either inherited a business or had family that gave them land or some sort of inheritance that they got some money.

That is from "Race, Sex and Business Enterprise: Evidence from the Commonwealth of Massachusetts," Volume 1, NERA Economic Consulting, at 218–219.

Even once minorities and women manage to start up a business they face serious discrimination in every stage of the contracting process. Sometimes that discrimination comes in the form of explicit gender or racial harassment. In a study dealing with the State of Texas, one Hispanic-American woman business owner related the following story:

Some [of my male colleagues] do not want to work with a woman. They feel they are wasting their time. [On one occasion] a guy took me to check on a project, and when he got out of his truck, he wanted me to touch him. I said, "Come on, let's get back to work." I had to be very strong with him. There are not many women builders in the residential construction industry either.

That is from "Update of the State of Texas Disparity Study," Mason Tillman Associates, Ltd., January 2007, at 9–8.

Another Hispanic-American woman contractor in Texas explained that sometimes the discrimination is not so direct, but it is still unmistakable. She stated:

As a young woman, there have been several occasions where I was told that if I really wanted an award, there were other ways I could get it. This was not said directly to me, it was implied [by] a White male [manager] at a [State] university.

That is from "Update of the State of Texas Disparity Study," Mason Tillman Associates, Ltd., January 2007, at 9–8.

Sometimes the harassment rises to the level of threats of violence against a business owner or their property. In the NERA Commonwealth of Massachusetts study, one African-American businessman even gave an account of a threat to blow up his truck.

That is from "Race, Sex and Business Enterprise: Evidence from the Commonwealth of Massachusetts, Volume 1," NERA Economic Consulting, at 219.

Even when discrimination does not involve explicit harassment or threats, it still poses barriers to minority and women business owners. Unfortunately, the "old boy network" continues to be a problem in many industries. An analysis of the experiences of business owners in a study of contracting by the airport in Nashville, TN, demonstrates that discrimination not only hurts minority- and women-owned businesses, but it can also drive up the price of doing business:

[One business owner] said his firm has tried to get in on airport work and, in one instance, partnered with a much more experienced firm to get into one particular area of construction only to find that "a couple of firms had a lock on it". According to [this firm], it is hard to get jobs because people tend to use the same companies. [The business owner] said he believes that subcontractors tell "their" bidders where to come in with their numbers and they tell them where they can make up the difference on the project and how to pursue change orders. By the end of a project, his competitors have been paid more than his original estimate, which was rejected for being too high.

That is from "Final Report for Development and Revision of Small, Minority and Women Business Enterprise Program, Nashville International Airport," BNA, Griffin and Strong, PC, September 19, 2007, at 163.

Another business owner in Nashville was explicit about the informal networks that impose barriers on minority businesses and the need for programs like the DBE and ACDBE program to address these impediments. The study stated:

According to [one business owner], the airport made a mistake in disbanding SMWBE requirements because there are still a lot of "good old boys" playing golf and the like. Having a diversity manager helps "level the playing field" and provides "checks and balances".

That is from "Final Report for Development and Revision of Small, Minority and Women Business Enterprise Program, Nashville International Airport," BNA, Griffin and Strong, PC, September 19, 2007, at 164.

Another point that these studies make clear is that discrimination against business owners is something that is experienced by all minority groups and women. It is not limited to only some groups. One study summarized its analysis of anecdotal evidence as follows:

Nineteen percent of the respondents indicated that they had experienced discrimination because of race, ethnicity, or gender on one or more occasions (three percent very often, 10 percent sometimes, and six percent seldom). Forty percent reported they had not experienced discrimination. The fact that 19 percent of respondents reported experiencing discrimination on at least an occasional basis suggests that discrimination is not confined to isolated incidents. The 19 percent that experienced discrimination account for 63 surveyed respondents categorized as follows: 22 African Americans, 17 Hispanic Americans, 16 non-minority females, two Asian Americans, two non-minority males, and one Native American. Three people reported discriminatory incidents but did not indicate their demographic background.

That is from "Final Report: Broward County Small Disadvantaged Business Enterprise (SDBE) Disparity Study," MGT of America, Inc., April 3, 2001, at 6-30.

These examples I have given are but a few from the voluminous body of research about race and gender discrimination in business. The evidence is troubling and should cause all of us to redouble our efforts to ensure that we do everything we can to eliminate the barriers confronted by women and mi-

nority business owners. The DBE and ACDBE program are indispensable tools in this effort.

Mr. MENENDEZ. Mr. President, I ask unanimous consent that the bill be read a third time and passed, the motion to reconsider be laid upon the table, and that any statements relating to the bill be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The bill (H.R. 6984) was ordered to a third reading, was read the third time, and passed.

#### PROVIDING FOR THE APPOINTMENT OF THE CHIEF HUMAN CAPITAL OFFICER OF THE DEPARTMENT OF HOMELAND SECURITY

Mr. MENENDEZ. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 971, S. 2816.

The PRESIDING OFFICER. The clerk will report the bill by title.

The legislative clerk read as follows:

A bill (S. 2816) to provide for the appointment of the Chief Human Capital Officer of the Department of Homeland Security by the Secretary of Homeland Security.

There being no objection, the Senate proceeded to consider the bill.

Mr. MENENDEZ. Mr. President, I ask unanimous consent that the bill be read a third time and passed, the motion to reconsider be laid upon the table, with no intervening action or debate, and that any statements related thereto be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The bill (S. 2816) was ordered to be engrossed for a third reading, was read the third time, and passed, as follows:

S. 2816

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

#### SECTION 1. APPOINTMENT OF THE CHIEF HUMAN CAPITAL OFFICER BY THE SECRETARY OF HOMELAND SECURITY.

Section 103(d) of the Homeland Security Act of 2002 (6 U.S.C. 113(d)) is amended—

- (1) by striking paragraph (3); and
- (2) redesignating paragraphs (4) and (5) as paragraphs (3) and (4), respectively.

#### POISON CENTER SUPPORT, ENHANCEMENT, AND AWARENESS ACT OF 2008

Mr. MENENDEZ. Mr. President, I ask unanimous consent that the HELP Committee be discharged from further consideration of S. 2932, and the Senate proceed to its immediate consideration.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will report the bill by title.

The legislative clerk read as follows:

A bill (S. 2932) to amend the Public Health Service Act to reauthorize the poison center national toll-free number, national media campaign, and grant program to provide assistance for poison prevention, sustain the

funding of poison centers, and enhance the public health of people of the United States.

There being no objection, the Senate proceeded to consider the bill.

Mr. MENENDEZ. Mr. President, I ask unanimous consent that the substitute amendment which is at the desk be agreed to, the bill, as amended, be read three times and passed, the motions to reconsider be laid upon the table, with no intervening action or debate, and that any statements relating to this measure be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment (No. 5639) was agreed to, as follows:

(Purpose: To provide a complete substitute)

Strike all after the enacting clause and insert the following:

#### SECTION 1. SHORT TITLE.

This Act may be cited as the "Poison Center Support, Enhancement, and Awareness Act of 2008".

#### SEC. 2. FINDINGS.

Congress makes the following findings:

(1) Poison control centers are the primary defense of the United States against injury and deaths from poisoning. Twenty-four hours a day, the general public as well as health care practitioners contact their local poison control centers for help in diagnosing and treating victims of poisoning. In 2007, more than 4,000,000 calls were managed by poison control centers providing ready and direct access for all people of the United States, including many underserved populations in the United States, with vital emergency public health information and response.

(2) Poisoning is the second most common form of unintentional death in the United States. In any given year, there will be between 3,000,000 and 5,000,000 poison exposures. Sixty percent of these exposures will involve children under the age of 6 who are exposed to toxins in their home. Poisoning accounts for 285,000 hospitalizations, 1,200,000 days of acute hospital care, and more than 26,000 fatalities in 2005.

(3) In 2008, the Harvard Injury Control Research Center reported that poisonings from accidents and unknown circumstances more than tripled in rate since 1990. In 2005, the last year for which data are available, 26,858 people died from accidental or unknown poisonings. This represents an increase of 20,000 since 1990 and an increase of 2,400 between 2004 and 2005. Fatalities from poisoning are increasing in the United States in near epidemic proportions. The funding of programs to reverse this trend is needed now more than ever.

(4) In 2004, The Institute of Medicine of the National Academy of Sciences recommended that "Congress should amend the current Poison Control Center Enhancement and Awareness Act Amendments of 2003 to provide sufficient funding to support the proposed Poison Prevention and Control System with its national network of poison centers. Support for the core activities at the current level of service is estimated to require more than \$100 million annually."

(5) Sustaining the funding structure and increasing accessibility to poison control centers will promote the utilization of poison control centers and reduce the inappropriate use of emergency medical services and other more costly health care services. The 2004 Institute of Medicine Report to Congress determined that for every \$1 invested in the Nation's poison control centers \$7 of health care costs are saved. In 2005, direct Federal