United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 111th CONGRESS, FIRST SESSION

Vol. 155 WASHINGTON, THURSDAY, JANUARY 22, 2009 No. 13

Senate

The Senate met at 9:30 a.m. and was called to order by the Honorable MARK L. PRYOR, a Senator from the State of Arkansas.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Lord, who has given Your servants diversities of gifts, bless all who love and serve humanity. May this time of change help us remember the importance of making Your priorities our own.

Lord, give wisdom and strength to our lawmakers as they seek to build bridges of consensus for the good of our land. Strengthen them with the assurance that the purposes of Your providence will prevail. Light up their small duties and routine chores with the knowledge that glory can reside in the common task. Reward them with Your peace and joy.

Lord, we ask Your rich blessings upon our Senate pages who will be leaving us tomorrow.

We pray in Your powerful Name. Amen.

PLEDGE OF ALLEGIANCE

The Honorable MARK L. PRYOR led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. BYRD).

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, January 22, 2009.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable MARK L. PRYOR, a Senator from the State of Arkansas, to perform the duties of the Chair.

ROBERT C. BYRD,
President pro tempore.

Mr. PRYOR thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. REID. Mr. President, following leader remarks, there will be a period of morning business for up to 1 hour, with Senators permitted to speak for up to 10 minutes each during that period of time. The Republicans will control the first 30 minutes and the majority will control the second 30 minutes.

Following morning business, the Senate will resume consideration of S. 181. There will be 60 minutes for debate equally divided and controlled between Senators MIKULSKI and HUTCHISON. At approximately 11:30 a.m., the Senate will proceed to a rollcall vote in relation to the Hutchison amendment. There have been a number of other amendments laid down. Senator ENZI, it is my understanding, and Senator SPECTER have laid down some amendments. We are going to do our best to dispose of those as quickly as possible today and move on to other things.

We have a number of nominations we have to consider. We have at least one important piece of legislation we must deal with before we get to the economic recovery legislation. So we have a lot to do. We are going to do our best to not have a lot of procedural problems, and I am hopeful we can finish this legislation very quickly today and move on to other matters.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate shall proceed to a period of morning business for up to 1 hour, with Senators permitted to speak for up to 10 minutes each, with the Republicans controlling the first 30 minutes and the majority controlling the final 30 minutes.

The Senator from Arizona is recognized.

LILLY LEDBETTER FAIR PAY ACT OF 2009

Mr. KYL. Mr. President, for nearly half a century, the Equal Pay Act of 1963 and the Civil Rights Act of 1964 have made it clear that discrimination on the basis of sex with regard to compensation paid to women and men for substantially equal work performed in the same establishment is illegal. As do my colleagues on both sides of the aisle, I strongly support both of these antidiscrimination laws.

Unfortunately, some of my colleagues are misleadingly stating in the debate about the legislation pending that it is about pay discrimination. That is not true. The only issue is the length of time of the statute of limitations that will apply in such cases.

In the case Ledbetter v. Goodyear Tire & Rubber Company, the Supreme Court considered the timeliness of the civil rights title VII sex discrimination claim that was based on paycheck disparities between a female plaintiff and her male colleagues. Under title VII, a

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

plaintiff must file suit within 180 days of the alleged unlawful employment practice. In this case, the plaintiff attempted to argue that each paycheck constituted a new violation of title VII and consequently restarted the 180-day clock. The Supreme Court disagreed with that argument and held that:

A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from past discrimination.

In other words, the Court held that the plaintiff's suit had not been filed in a timely manner since the 180-day statute of limitations had long since passed.

In the Ledbetter case, the Supreme Court restated its support for and the rationale behind a statute of limitations, stating they:

Represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

In creating a 180-day statute of limitations period, Congress sought to encourage the prompt processing of all employment discrimination cases.

Now, there are some additional commonsense reasons why virtually every criminal and civil law articulates a timeframe within which the charge or the complaint must be filed. The loss of evidence, which is more likely to occur with the passage of time due to loss of documents, cloudier memories, or even death can have a significant impact on the defendant's ability to mount a fair defense in the case.

The other side has raised an interesting point, because information about an individual's paycheck is frequently a private matter, and the idea is, well, there was no way this plaintiff could have known she had, in fact, been discriminated against. So the argument is that there should be in effect no statute of limitations along the lines of the act today of 180 days but, rather, should be tolled with each succeeding check.

While everybody agrees with the argument, the point is there is already an answer to this and it has been in the common law for hundreds of years. It has been in statutory law, and it has been adopted by courts. It is the doctrine of equitable tolling, which essentially is, when you should have become aware of something, that is when the statute begins to run. When an employee did not know and could not be expected to know about certain facts relating to alleged discrimination, then the Equal Employment Opportunity Commission, the EEOC, and the courts may ''toll'' or freeze the running of the clock as it relates to the filing of the deadlines.

In fact, there is a U.S. Supreme Court case square on point called Cada v. Baxter Health Care Corporation in which the Supreme Court clearly established the doctrine of equitable tolling which in the Court's words:

Permits a plaintiff to avoid the bar of the statute of limitations if, despite all due diligence, he is unable to obtain vital information bearing on the existence of his claim.

That has always been the law.

Senator HUTCHISON has introduced an amendment—an alternative to the bill that is before us—which preserves the balance between an employer's need for certainty with the right of an aggrieved employee to file a valid claim of discrimination. It does this by preserving the existing 180-day filing period for standard claims while offering employees the right to assert claims beyond the filing period in situations where they were unaware of the discrimination or where there were impediments to discovering the discrimination—exactly the allegation in this particular case. In essence, the Hutchison amendment codifies the doctrine of equitable tolling, which is the remedy to the alleged injustice in the Ledbetter holding, and makes sure that such tolling is applied more uniformly.

Unfortunately, the majority legislation goes far beyond the remedy to the particular problem I have just discussed. It arguably provides the greatest expansion of the Civil Rights Act since 1964. It does this in three specific ways. First, it effectively eliminates the statute of limitations, as I said, by imposing this arbitrary paycheck rule which eviscerates the statute of limitations. Second, it expands the class of people who may file a claim by applying the statute to ''affected persons'' without defining what the limitation on affected persons is. So this class expansion would allow not only the aggrieved plaintiff or employee but any spouse, children, or other individuals who might claim to be affected by the discrimination to file a claim. Finally, the expansion would not just apply to sex discrimination but to all protected classes of multiple employment laws covering civil rights, age, disability, and so on. So it is a much broader statute than is being portrayed by some who are simply saying this is about employment discrimination and changing the statute of limitations.

So I wish to stand with all Members of this body who I am sure agree that we need to have laws such as the Civil Rights Act to protect our Nation's citizens. I believe Senator HUTCHISON's amendment strikes the right balance between the needs of employers for certainty and the need of an aggrieved employee to file a valid claim alleging discrimination. I hope my colleagues will be supportive of the Hutchison amendment as a good-faith attempt to combine these two doctrines and in a way that has already been blessed by the U.S. Supreme Court in the Cada decision.

Mr. President, I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Tennessee is recognized.

Mr. ALEXANDER. Mr. President, I congratulate the Senator from Arizona as usual for his very clear explanation of the issues. He is one of the legal scholars in the Senate with a great deal of experience. There is no need for me to go through the details of what he has just explained, so let me think about it and talk about it in a little bit different way.

On Tuesday, a couple million people here and millions all over the world watched an eloquent ceremony from our Nation's Capital, the very moving speech by President Obama, and were reassured by his eloquence in a time of difficulty for our country. Among all of the difficulties we have, of course, the most important seems to be—or is—our economic troubles. The new President promised he would make his first order of business to get this economy moving again, get people working again, and to create new jobs. So it then becomes extremely important to say that is what the new President said, and we agree with him.

I think we agree with that on the Democratic side and on the Republican side. The Democrats are in charge of the Congress, so it is important to see what their priorities are for fulfilling the President's promise to get the economy moving again. Would it be cutting payroll taxes so people have more money in their pockets? Would it be building new roads and bridges to try to create new jobs quickly? Would it be to extend unemployment benefits? Would it be new investments in energy research and development? All of those, one might expect, would be priorities. The President has talked about many of those ideas. But no, it is none of those.

The first priority of the new Democratic Congress, which was already passed by the House and brought to the floor of the Senate without even being considered by a committee, and which we are debating today, is a trial lawyer bailout. Let's give our friends the trial lawyers a big bailout as the first order of business in our effort to help the economy. That is exactly what the Democrats' bill does.

Why does it do that? The bill Senator KYL talked about attempts to regulate a solution that is fair to employees and fair to business about a pay discrimination lawsuit, whether you are a woman or whether you are a man. You need to have a reasonable amount of time for the employee to file the cause of action, the act of discrimination, but you have to have a reasonable amount of time for the employer to know that the chances of that lawsuit being brought are limited. That is a part of every aspect of our law, and we call it the statute of limitations. You cannot sit in your backyard for 20 or 30 years with a cause of action in your pocket and then run up to the courthouse and say: Oops, I should have brought this 30 years ago, but I noticed now all the witnesses are dead, nobody is around to defend this; I am going to bring it now. That is, in effect, what we are talking about today.

We have differences in our responses to the Supreme Court decision about

what the reasonableness of a statute of limitations on a cause of action on pay discrimination might be. On this side of the aisle, Senator HUTCHISON's amendment on which we will be voting on later this morning says: Let's expand the current law and say that an employee should bring the lawsuit, not just within 180 days as the Supreme Court and the law now says, but whenever that employee could have known or reasonably should have known about the lawsuit. So that gives the employee even more fairness than the law exists today.

On the other side of the aisle the solution is: Let's, in effect, abolish the statute of limitations and have never-ending lawsuits.

What would the effect of this be in practical terms? I can speculate what the effect will be. I think it means that employers will have to keep more records. We are not talking about General Motors and General Electric here. They have big staffs who already keep lots of records and big law firms, in effect, that work for their companies. We are talking about the shoe shop owner, the filling station owner, and the small business owner who works 10 or 12 hours a day every day of the week. We are talking about the men and women in America on whom we are relying to create the largest number of jobs to spur the economic recovery that our new President talked about and that we all want.

What are we saying to them? We are saying: Mr. and Mrs. Small Business Person, we want you to keep a lot more records. That means you might have to spend money you are earning to hire an employee to keep records going back interminably so you can defend a lawsuit. We want you to be careful about pay for performance, rewarding one person over another person, because under the law proposed by that side, years later, some son or daughter or relative of that person may say: Somebody wasn't fair to mama or daddy and bring a lawsuit after everybody is gone, particularly whoever knew about whatever this situation was.

So employers and small business people will be discouraged from being more competitive by saying to one employee over another employee that we are going to have pay for performance, which is never easy to do. The legitimate complaints, people who are real victims of real pay discrimination, also are going to be hurt. The Equal Opportunity Employment Commission had 75,000 or so claims and most of them were not meritorious. That means everybody is delayed in terms of the meritorious claims, and this will open the floodgates and slow justice for the real victims.

It will mean, if you are a small businessman in America and this law passes, if Senator HUTCHISON's amendment is not adopted, you better get ready to hire a recordkeeper, you better get ready to pay some settlements to lawyers because, for the interminable future, a lawyer and someone who used to work for you or is a relative of that person may come in and allege pay discrimination, even though it was 25 years ago and they knew it all the time.

What does that mean for you? You better set aside $25,000, $50,000, $200,000 of money that you could use to hire more people or pay a dividend or get the economy moving again to bail out the trial lawyers.

I am disappointed with the proposal on the other side of the aisle. I fully support Senator KAY BAILEY HUTCHISON, who has a proposal that I hope we adopt at 11:30 this morning that is fair to employees and that is fair to small businesses.

I would think the majority would have something better to offer the American people in response to the new President's eloquent suggestion that it is time to get the economy moving again than a bailout for their friends, the trial lawyers.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Utah.

Mr. BENNETT of Utah. Mr. President, I rise to comment with respect to the proposed Lilly Ledbetter legislation, and I bring the perspective of a small employer, for I have presided over firms with as few as half a dozen employees. I have been fortunate enough to see some of those firms grow to larger firms. Indeed, one firm I joined as the fourth employee in the history of that firm ended up listed on the New York Stock Exchange. So I have seen the travails employers go through as they deal with growth situations and creating jobs. The company with which I was involved grew from the original four employees to a staff of 4,000.

One of the challenges that comes with a company that is growing that rapidly and creating that number of jobs is you are always involved with change. You are always involved with uncertainty. It is not the same thing as presiding over a company that has been established for 60 or 70 years and has a degree of stability. Every month is a new adventure, a new challenge, and you are constantly changing your employee base. As new people are hired, the old people sometimes get resentful of the new people and say: We were here at the beginning; why aren't we getting these promotions? And you have to explain to them that the company has changed and we need new talents, we need to bring on board new skills, and, quite frankly, the small group that was with us in the beginning has to be augmented with new people.

There are resentments, there are concerns, and occasionally there are discrimination cases filed.

But if we were to take the position of the underlying legislation that says if there was genuine wage discrimination in a circumstance, everyone who was involved in writing a paycheck after that discrimination has committed the discrimination again and has effectively reset the clock for the statute of limitations.

As I consider the impact of this on a business, I realize this, in a way, is the asbestos fight all over again. We saw in the asbestos fight companies that were taken down for actions that occurred outside the company on the part of those who worked in other companies that were acquired decades later. Let's put it specifically.

Let's assume a business had a situation where there was, in fact, wage discrimination that took place. The individual against whom this discrimination was practiced did nothing with respect to it but continued to stay employed and continued to receive the paycheck.

Under the Lilly Ledbetter legislation, the clock would be reset for the statute of limitations. The individual who performed the discrimination, let us say, was discharged. The individual who supervised the situation was unaware that discrimination had occurred. The company in which it happened is later acquired by another company. And then the trial lawyers discover this had been going on years ago. They now sue the eventual company that acquired the first company for a great amount of money, perhaps even a class action suit is filed. You cannot prove what happened because all the people involved have disappeared. They have gone away. They no longer work for the company. They have no memory of what happened. It is decades later.

It doesn't matter. Under this legislation, the statute of limitations that is crafted to deal with a situation where there are no available witnesses anymore somehow magically, by virtue of this bill, keeps getting set again and again going forward.

The Supreme Court got this one right. The attempt on the part of those who want to curry favor with the trial lawyers have got this wrong. What will happen? Will more people who have had wage discrimination receive benefits? There is no guarantee that will happen. Will trial lawyers who are looking for causes of action receive fees? There is a pretty good guarantee that will happen. Will small and medium-size businesses that cannot afford legal fees be faced with enormous settlement charges? I am pretty sure that will happen. Will jobs be destroyed as a result of this, as they were in the asbestos case? I guarantee that will happen.

Here we are, in the worst financial situation any of us can recall, talking about a circumstance that would destroy jobs among small businesses and that would discourage employers who are struggling to create new jobs in medium-size businesses. We are talking about putting out billions of dollars in the name of a stimulus while simultaneously discussing legislation that would destroy jobs and create chaos among those who are trying to survive in this financial circumstance.

This is bad legislation on its face and bad legislation on its merits. But the timing of this proposal is atrocious. To be making these kinds of proposals in this kind of financial circumstance is incomprehensible to me, unless I assume that there are those who say the trial lawyers played an important part in the election; the trial lawyers need to be rewarded for the important part they played in the election; let's have a bill that will line the pockets of the trial lawyers and look the other way in terms of the economic consequences.

I compared this to the asbestos litigation. I was in the Chamber when we dealt with what are called strike suits, where trial lawyers would file lawsuits on behalf of clients who were, in fact, not aggrieved but were simply posing in behalf of a class that the trial lawyer himself had put together.

We passed that legislation. It was vetoed by President Clinton. It was the only Clinton veto that was overridden in this Chamber, as everyone was outraged at the behavior of the trial lawyers who brought these strike suits.

There are those who said: Oh, you still don't get it, you who are picking on the trial lawyers. They do wonderful things. I agree that the ability to file a grievance and have a trial lawyer carry it forward, even in a class-action suit, is a protection the American people need. But these lawyers were going far beyond anything that was good for the American people.

The position was summarized by Bill Lerach, known as the ''king of the trial bar,'' when he said: I have the ideal law practice. I have no clients. He is now in jail because his practices finally caught up with him, as it was finally demonstrated that the people on whose behalf he was suing were, in fact, not real clients. They were paid by him to pose as people who were aggrieved.

We saw those kinds of abuses that came out of that situation. We finally saw his law firm destroyed, and this man, and others like him from the trial bar, went to jail for their activities.

Let's not create another circumstance where there is a temptation to once again take advantage of people who have been legitimately hurt, but by manipulating the law in such a way as to maximize the return to the plaintiff's bar, we see the economy hurt.

The Supreme Court, as I say, got this one right. We should stay with the Supreme Court decision and not try to give special advantage to a special group simply because of their activities in the last election.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Kansas.

Mr. BROWNBACK. Mr. President, I ask unanimous consent to speak as in morning business for up to 10 minutes.

The ACTING PRESIDENT pro tempore. We are in morning business, and currently there is 3 minutes 45 seconds left of Republican time.

Without objection, the Senator may speak for up to 10 minutes.

ROE V. WADE

Mr. BROWNBACK. Mr. President, today is a sad day. We had a wonderful inauguration a couple of days ago, phenomenal crowd, a great celebration, and a peaceful transfer of power took place. It was amazing. I was there on the front steps of the Capitol watching it, participating in it, excited about the first African-American President of the United States; an amazing thing to take place within one generation of Martin Luther King's marches and what he did in this country. My State has been a big part of all of those things and what has taken place. Today is a sad day, though. Today, 36 years ago, the Supreme Court's ruling in Roe v. Wade banned all impediments to having an abortion in the United States and said abortion is a constitutional right that the individual carries in the United States and that it cannot be infringed upon, cannot be limited. It did later limit some of that and gave a few places where the State could act to limit—most recently partial-birth abortions, where the Supreme Court has recently ruled that the State can limit partial-birth abortions. And there were a few minor areas in the Roe decision, but overall it made a constitutional right to abortion. That was 36 years ago.

The reason I say it is a sad day is there have been roughly—and nobody knows for sure—40 million children who are not here today because of that decision. It ratcheted up, escalated up substantially the number of abortions in the United States that took place after that. It moved forward to the point that most estimates are that one in four pregnancies in the United States will end in an abortion and a child dying. And it even gets worse from that point. When you look at children with special needs, such as Down syndrome children, the number is somewhere between 80 to 90 percent do not make it here, as I have stated on this floor previously, as they are aborted and they are killed because of their genetic type. They get a test, the amniocentesis test, which says they have an extra chromosome, and generally because of that extra chromosome they are aborted and they are killed, even though the fact is, if they would get here on the ground, life and the prospects for a Down syndrome child now have never been better. Life expectancy, quality of life issues, if that is your measure, have never been better than they are now. Plus, the families who have a Down syndrome child look at those children as the centerpiece of the family, an amazing person. Yet somewhere between 80 to 90 percent of these amazing people never make it here, and that is because of what happened 36 years ago this day in the Supreme Court of the United States.

That is why there will be hundreds of thousands, primarily young people, marching today in Washington, DC. They will get no mention. There will be very little press, if any, outside of some of the religious press that will be there. But outside of that, they will get virtually no coverage. There will be hundreds of thousands of young people here marching and asking for a change and something different, something that I hope President Barack Obama would embrace. He was empowered on the legs of young people and young enthusiastic minds looking for change, looking for something different. That same young generation is the most pro-life demographic in our country today. That age group that is below the age of 25 is the most pro life. They are looking for something different. They are looking for a sanctity of life. They are looking for us to protect all innocent human life. They are looking for us to work to make all human life better, whether that is a child in the womb or a child in Darfur. Whether it is somebody in prison or somebody in poverty, they want that person's life to be better.

That is a beautiful pro-life statement. It is one that we need to see mirrored. It is one we need to see acted upon. It is one we need to see happen, rather than the repealing of things such as Mexico City language which says we can now use taxpayer dollars to fund groups overseas that work and support and fund abortion. Yet apparently that is what the Obama administration is going to do, it is going to repeal Mexico City language and say that taxpayer dollars can now be used for these purposes that most Americans disagree with. That is not the change people are looking for. Those are chains to the past. Those are things that bind us to a culture that doesn't affirm life, that doesn't see it as sacred and beautiful in all its places and dignity in every human life no matter who it is. Those are ones that say quality of life is your measure, as to whether you should be the recipient of such a gift of life.

It is a sad day. It is a tough day. I hope it is a day that doesn't go on as far as our having many future annual recognitions of the Roe v. Wade decision but, rather that in the future we will be a life-affirming place and that we will say, in a dignified culture every life at every place in every way is beautiful and it is unique and it is amazing and it is something that should be celebrated and it should not be killed. When we move to that, that will be real change. That is the sort of change that people can look at and say, that is what I want my country to be like.

You know, the sadness doesn't stop with the death of the children. We are now seeing more and more studies coming out about the impact on people who have abortions. In August this past year, 100 scientists, medical and mental health professionals, released a joint statement that abortion does indeed hurt women. The Supreme Court of the United States concluded some women do regret their abortions and can suffer severe depression and loss of