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FOIA Number: S

FOIA MARKER

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Record Group/Collection: George H.W. Bush Presidential Records
Collection/Office of Origin: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files

OA/ID Number: 29144
Folder ID Number: 29144-008

Folder Title:
Civil Rights 1990 (1 of 2) [2]

Stack:	Row:	Section:	Shelf:	Position:
G	15	24	7	3

Strike subsection 703(k)(1)(B) and insert at the end of (A) the following:

> provided, however, that where a group of interrelated employment practices produce a single employment decision and the elements of the decision are not capable of separation for analysis, the group of employment practices shall be treated as a single employment practice and may be challenged as such and defended as such.

Legislative history: [Agreement that plaintiff can plead a group of employment practices, and the determination of whether a group of employment practices in fact is not capable of separation for analysis shall be made after discovery.]

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From Bill Kristol to C. Boyden Gray Re: Kennedy-Hawkins Civil Rights Act (1 pp.)	7/2/90	~~P5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (1 of 2) [2]

Open on Expiration of PRA
(Document Follows)
By SP (NLGB) on 10/28/05

Date Closed:	12/17/2004	**OA/ID Number:**	29144-008
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P-3 Release would violate a Federal statute [(a)(3) of the PRA]
P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

f-civil rights

OFFICE OF THE VICE PRESIDENT

WASHINGTON

THE CHIEF of STAFF has seen

July 2, 1990

NOTE TO: BOYDEN GRAY
COUNSEL TO THE PRESIDENT

FROM: BILL KRISTOL WK
CHIEF OF STAFF TO THE VICE PRESIDENT

Here's a strong editorial from The Forward -- the nation's oldest Jewish newspaper -- opposing the Kennedy-Hawkins Civil Rights Act. In light of the President's concern about Jewish groups appearing to support Kennedy-Hawkins, I thought you might want to share this with him.

cc: Governor Sununu
Jim Cicconi
Roger Porter

FORWARD
FOUNDED APRIL 22, 1897

Mr. Abram's Message

For a few moments this week it looked like a dramatic showdown over civil rights would be played out in the Senate. The Democrats were maneuvering to bring the Civil Rights Act of 1990 to a cloture vote an hour before both houses were due to go into a joint session to hear an address by Nelson Mandela. The idea seemed to be that in such a supercharged atmosphere few on the either side of the aisle would have the gumption to be seen as voting to delay a civil rights measure, even if a substantial question of principle — namely, quotas — remained unresolved in the bill. At the last minute, though, the White House and Senate supporters of the measure flinched, agreeing to delay the matter until after the Fourth of July recess. This would be a good time for everyone concerned to flyspeck the proposed law and purge it, once and for all, of any language that might lead to a quota system in hiring or in any other area of American life. The administration has been trying quietly to make this point. It recognizes this bill could result in a tragedy for the civil rights movement. It deserves some help from the Jewish leadership.

That civil rights warrant continued attention from the Congress is a proposition with which we have no quarrel. The long and unfinished struggle to end discrimination against blacks has taught us all how the power of government can be used as a force for good. It is appropriate that legislative approaches and legal tools developed in this fight be sharpened and also be deployed to defend the rights of others. It doesn't matter whether the victims be singled out for their gender, religion or handicap or whether the victims be in the minority, like blacks and

Jews, or the majority, like women. The application of strong laws is needed in all cases. The civil rights struggle, however, has always demanded of its activists a sober restraint, lest they take on the very tendency of their enemies to judge people not as individuals but as groups. For a generation now, the movement's leadership has avoided this temptation. The legislators pushing the 1990 civil rights act — Senator Kennedy and Representative Hawkins — stumbled badly, however, and as the bill was originally drafted the spector of quotas loomed.

This danger was quickly recognized in the Congress as well as the White House, and efforts were begun to purge the bill of these provisions. On May 17, such opponents of quotas as Senator Danforth of Missouri joined Senator Kennedy and such distinguished civil rights leaders as Benjamin Hooks to announce that an accord had been reached. The press release put out on the accord made it sound like everything was sorted out. Then the American ambassador at the UN in Geneva, Morris Abram, a legendary name in the civil rights movement as well as the Jewish world, wrote a letter to the president. The letter wasn't made public, though its contents were reported last week in a page one dispatch from our David Twersky in Washington. In the letter — which we reprint in the adjacent columns — the ambassador charges that the bill institutionalizes the principle of color preference "under the false flag of civil rights." The letter may prove some help to legislators — Orrin Hatch is one — who remain concerned on the quota issue and are prepared to pick up the cause.

The Jewish leadership, whose constituents felt so sharply the evils of past quota systems, has left Mr. Abram to carry this issue alone, though Agudath Israel of America opposes the bill. It may be that today's leaders lack the starch to get on the "wrong side" of a measure bearing the title "civil rights," even if privately some Jewish activists admit that the quota issue does worry them. It may be simply that the lines are not so clear as in the old days. The issues are subtler, for the bill aims to overturn, in effect, a series of Supreme Court decisions that have tried to balance the various burdens of proof of accusers and accused in civil rights litigation. This balance is not an ignoble goal. Discrimination is no minor infraction; it is what lawyer's call a *malum per se*, evil in itself. If you're going to accuse someone of it you ought to face a heavy burden. Yet the proposed law threatens to reverse our system's hallowed presumption of innocence. It may be that the new Jewish leadership in America just lacks the experience that the crusty old Abram has built up over a lifetime fighting for racial equality in the south and north. Mr. Abram draws on this in writing that Mr. Bush has the opportunity "more than any other president in recent years to forge a new and lasting civil rights consensus." It looks increasingly like the President may have to start by vetoing the Civil Rights Act of 1990 and sending it back to Congress so that quotas can be put away for good.

A Flawed Civil Rights Act

Ambassador Abram's letter to President Bush, the subject of an editorial elsewhere on the page today, was sent from Geneva June 7. Mr. Abram declined to release the letter, but it is circulating in Washington. The text:

* * *

The President
The White House
1600 Pennsylvania Avenue
Washington, DC
20500

Dear Mr. President:

If I were still practicing law, I would love the "Civil Rights Act of 1990." While it may enrich some lawyers, it will impoverish the principle of equality of all Americans. All my life, even in the darkest days of segregated Georgia, I fought against the principle of color preference, then known as "white supremacy." This bill institutionalizes that principle under the false flag of civil rights. It is not a civil rights bill but a quota bill because it will acheive precisely what the landmark 1964 Civil Rights Act stood foursquare against.

Proportionality of result, not equality of opportunity, is the touchstone of this flawed legislation:

— it eliminates the longstanding requirement that a plaintiff identify a specific employment practice causing a racial, ethnic, or gender imbalance;

— it holds the employer guilty until proven innocent by forcing him to justify *any* racial, gender, or ethnic statistical imbalance in his workforce;

— it creates a presumption of guilt so difficult to overcome and so costly to fight that employers will simply capitulate and hire by numbers, impairing not only the principle of American equality but, inevitably, American efficiency and productivity;

— it denies individuals their day in court by effectively barring challenges to civil rights consent decrees to which they were not parties.

Abraham Lincoln's great friend Frederick Douglass understood the divisive and destructive influence of propotional representation based on race. "Equality of numbers," he wrote in 1871, "has nothing to do with equality of attainments."

This legislation, despite its flaws, has meritorious portions, including further sanctions on racial and sexual harrassment in the workplace. There is no reason why these advances should be held hostage by the objectionable aspects of the bill — particularly since its race- and gender-conscious elements are easily deleted or modified.

You have the opportunity, perhaps more so than any other president in recent years, to forge a new and lasting civil rights consensus. Every opinion poll confirms that the American people, including blacks, share the goals of equal opportunity and color blindness and will support the vision of Martin Luther King, Jr., who urged that we judge ourselves "not by color of our skin but by the content of our character."

Mr. President, my own participation in the civil rights struggle has shaped my deepest moral and political beliefs. It is because of this that I urge you to refuse your concurrence to this bill as it stands.

Most respectfully,
Morris B. Abram

3, plateau de Frontenex
1206 Geneva

June 7, 1990

The President
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

If I were still practicing law, I would love the "Civil Rights Act of 1990." While it may enrich some lawyers, it will life, even in the darkest days of segregated Georgia, I fought against the principle of color preference, then known as "white supremacy." This bill institutionalizes that principle under the false flag of civil rights. It is not a civil rights bill but a quota bill because it will achieve precisely what the landmark 1964 Civil Rights Act stood foursquare against.

The Abram Letter

You have the opportunity, perhaps more so than any other president in recent years, to forge a new and lasting civil rights consensus. Every opinion poll confirms that the American people, including blacks, share the goals of equal opportunity and color blindness and will support the vision of Martin Luther King, Jr., who urged that we judge ourselves "not by the color of our skin but by the content of our character."

Mr. President, my own participation in the civil rights struggle has shaped my deepest moral and political beliefs. It is because of this that I urge you to refuse your concurrence to this bill as it stands.

Most respectfully,

Morris B. Abram

The term required by business necessity means:

(1) in the case of employment practices primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to successful performance of the job.

(2) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on as such evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

LEGISLATIVE HISTORY

"This language is meant to codify the meaning of business necessity as used in Griggs and other opinions of the Supreme Court."

a measure of job performance

DJS Version:

1. BUSINESS NECESSITY

primarily

(1) The term required by business necessity means (1) in the case of employment practices involving ~~selection~~, the practice or group of practices must bear a demonstrable relationship to successful performance of the job.

[Coleman version: Significant and demonstrable relation]

primarily a measure of job performance

DJS Version:

(2) In the case of employment practices that do not involve ~~selection,~~ the practice or group of practices must bear a demonstrable relationship to a significant business objective of the employer.

[Coleman version: A significant and demonstrable relationship to a nece~~ssary business objective]~~

(3) ~~The defendant~~ may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight if any to such evidence as it deems appropriate. ~~Nothing in this subsection shall be construed to alter the application of the Uniform Guidelines on Employee Selection.~~

judicial notice

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in Griggs and to ~~overrule~~ Ward's Cove. ~~in its entirety.~~"

reflect the state of the law prior to

In deciding whether the standards in sec. 1 & 2 above have been met, the court [illegible] [illegible]

X we
had
"manifest
relationship"
we wanted
need (3)

Final
11:10

[choose one]

[primarily/involving/related to] selection

The term required by business necessity means:

(1) in the case of employment practices ~~primarily intended to measure job performance,~~ the practice or group of practices must bear a significant relationship to successful performance of the job.

involve/relate to / selection

(2) in the case of other employment practices that ~~are~~ do not primarily ~~intended to measure job performance~~, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on as such evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

LEGISLATIVE HISTORY

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in Griggs and other opinions of the Supreme Court before Wards Cove.

2

SENT BY: XEROX Telecopier 7017; 7-15-90 ; 22:24 ; 2022242417→ 2024562397;# 1

..OH-716-2581

7/12/90 LANGUAGE WITHOUT CHANGES

manifest

related

The term required by business necessity means:

primarily measuring selection

(1) in the case of employment practices primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to successful performance of the job.

manifest relationship to the employment in q.

(2) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to a significant business objective of the employer. manifest relationship to the employment in question.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on such evidence as statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in Griggs and other opinions of the Supreme Court."

Strike subsection 703(k)(1)(B) and insert at the end of (A) the following:

> provided, however, that where a group of interrelated employment practices produce a single employment decision and the elements of the decision are not capable of separation for analysis, the group of employment practices shall be treated as a single employment practice and may be challenged as such and defended as such.

Legislative history: [Agreement that plaintiff can plead a group of employment practices, and the determination of whether a group of employment practices in fact is not capable of separation for analysis shall be made after discovery.]

= 2, then say all other in are =

7/12/90 LANGUAGE WITHOUT CHANGES

The term required by business necessity means:

(1) in the case of employment practices primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to successful performance of the job.

(2) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on such evidence as statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in <u>Griggs</u> and other opinions of the Supreme Court."

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Legislative history: [Agreement that plaintiff can plead a group of employment practices, and the determination of whether a group of employment practices in fact is not capable of separation for analysis shall be made after discovery.]

For the distinction in applying condition 1 v condition 2 the principles as applied in Beazer.

7/12/90 LANGUAGE WITHOUT CHANGES

The term required by business necessity means:

(1) in the case of employment practices primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to successful performance of the job.

(2) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on such evidence as statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in Griggs and other opinions of the Supreme Court."

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> provided, however, that where a group of interrelated employment practices produce a single employment decision and the elements of the decision are not capable of separation for analysis, the group of employment practices shall be treated as a single employment practice and may be challenged as such and defended as such.

Legislative history: [Agreement that plaintiff can plead a group of employment practices, and the determination of whether a group of employment practices in fact is not capable of separation for analysis shall be made after discovery.]

1

The term required by business necessity means:

(1) in the case of employment practices primarily intended to measure ~~job performance~~ selection, the practice or group of practices must bear a significant relationship to successful performance of the job or to a significant business objective.

(2) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on as such evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

LEGISLATIVE HISTORY

"This language is meant to codify the meaning of business necessity as used in <u>Griggs</u> and other opinions of the Supreme Court."

The term required by business necessity means:

(1) in the case of employment practices _primarily_ intended to measure job performance, the practice or group of practices must bear a demonstrable relationship to successful performance of the job.

(2) in the case of other employment practices that are not _primarily_ intended to measure job performance, the practice or group of practices must bear a demonstrable relationship to a _significant_ business objective _of the employer_.

In deciding whether the above standards for relationship have been met, the court may rely on as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

LEGISLATIVE HISTORY

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in _Griggs_."

The term required by business necessity means:

(1) in the case of employment practices primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to successful performance of the job.

(2) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on as such evidence ~~as~~ statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

Legislative History: "This langugage is meant to codify the meaning of business necessity as used in Griggs and other opinions of the Supreme Court."

Strike subsection 703(k)(1)(B) and insert at the end of (A) the following:

> provided, however, that if the elements of a decision-making process are not capable of separation for analysis, they may be analyzed as one employment practice, just as where the criteria are distinct and separate each must be identified with particularity.

Legislative History: Agreement that plaintiff can plead the elements of a decision-making process as one employment practice, and the determination of whether the elements in fact are not capable or separation for analysis shall be made after discovery.

{NOTE: This paragraph would be added at the end of the proposed legislative history with the last five words before the citation eliminated, as agreed, from the end of the last paragraph.}

primarily involving selection or intended to measure job perf

<u>7/12/90 LANGUAGE WITHOUT CHANGES</u>

The term required by business necessity means:

(1) in the case of employment practices primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to successful performance of the job.

(2) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on such evidence as statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in <u>Griggs</u> and other opinions of the Supreme Court."

Strike subsection 703(k)(1)(B) and insert at the end of (A) the following:

> <u>provided, however</u>, that where a group of interrelated employment practices produce a single employment decision and the elements of the decision are not capable of separation for analysis, the group of employment practices shall be treated as a single employment practice and may be challenged as such and defended as such.

Legislative history: [Agreement that plaintiff can plead a group of employment practices, and the determination of whether a group of employment practices in fact is not capable of separation for analysis shall be made after discovery.]

7/12/90 LANGUAGE WITH CHANGES

The term required by business necessity means:

(1) in the case of employment practices primarily involving/related to [choose one] selection, the practice or group of practices must bear a significant relationship to successful performance of the job.

(2) in the case of other employment practices not described in subsection (1), the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may receive such evidence as statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as is appropriate.

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in <u>Griggs</u> and to overrule <u>Wards Cove</u>.

Strike subsection 703(k)(1)(B) and insert at the end of (A) the following:

> provided, however, that if the elements of a decision-making process are not capable of separation for analysis, they may be analyzed as one employment practice, just as where the criteria are distinct and separate each must be identified with particularity.

Legislative history: [Agreement that plaintiff can plead a group of employment practices, and the determination of whether a group of employment practices in fact is not capable of separation for analysis shall be made after discovery.]

July 18, 1990

The term required by business necessity means:

(1) in the case of employment practices involving rules relating to drug, methadone, or alcohol use, or not involving employee selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer;

(2) in the case of employment practices not described in paragraph (1), the practice or group of practices must bear a significant relationship to successful performance of the job.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may receive such evidence as statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as is appropriate.

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in Griggs and to overrule Wards Cove.

Strike subsection 703(k)(1)(B) and insert at the end of (A) the following:

> provided, however, that if the elements of a decision-making process are not capable of separation for analysis, they may be analyzed as one employment practice, just as where the criteria are distinct and separate each must be identified with particularity.

Legislative history: [Agreement that plaintiff can plead a group of employment practices, and the determination of whether a group of employment practices in fact is not capable of separation for analysis shall be made after discovery.]

250 cop

7/12/90 LANGUAGE WITH CHANGES

The term required by business necessity means:

(1) in the case of employment practices primarily involving/related to [choose one] selection, the practice or group of practices must bear a significant relationship to successful performance of the job.

(2) in the case of other employment practices not described in subsection (1), the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may receive such evidence as statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as is appropriate.

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in Griggs and to overrule Wards Cove.

Strike subsection 703(k)(1)(B) and insert at the end of (A) the following:

> provided, however, that if the elements of a decision-making process are not capable of separation for analysis, they may be analyzed as one employment practice, [just as where the criteria are distinct and separate each must be identified with particularity.]

OK w/Ken.

Legislative history: [Agreement that plaintiff can plead a group of employment practices, and the determination of whether a group of employment practices in fact is not capable of separation for analysis shall be made after discovery.]

The term required by business necessity means:

(1) in the case of employment practices primarily intended to measure job performance, or assist in applicant selection, the practice or group of practices must bear a significant relationship to successful performance of the job.

(2) in the case of other employment practices ~~that are not~~ primarily intended to ~~measure job performance,~~ assist a business objective, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on such evidence as statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

Legislative History: "This langugage is meant to codify the meaning of business necessity as used in <u>Griggs</u> and other opinions of the Supreme Court."

Strike subsection 703(k)(1)(B) and insert at the end of (A) the following:

> provided, however, that if the elements of a decision-making process are not capable of separation for analysis, they may be analyzed as one employment practice, just as where the criteria are distinct and separate each must be identified with particularity.

Legislative History: Agreement that plaintiff can plead the elements of a decision-making process as one employment practice, and the determination of whether the elements in fact are not capable or separation for analysis shall be made after discovery.

{NOTE: This paragraph would be added at the end of the proposed legislative history with the last five words before the citation eliminated, as agreed, from the end of the paragraph.}

Typed Version on Groups of Practices

Strike subsection 703(k)(1)(B) and insert at the end of (A) the following:

> provided, however, that where a group of interrelated employment practices produce a single employment decision and the elements of the decision are not capable of separation for analysis, the group of employment practices shall be treated as a single employment practice and may be challenged as such and defended as such.

Legislative history: [Agreement that plaintiff can plead a group of employment practices, and the determination of whether a group of employment practices in fact is not capable of separation for analysis shall be made after discovery.]

July 11
DJS Version

1. BUSINESS NECESSITY

(1) The term required by business necessity means (1) in the case of employment practices [primarily involving a measure of job performance (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention or membership in a labor organization),] the practice or group of practices must bear a demonstrable relationship to successful performance of the job.

(2) In the case of other employment practices that do not primarily involve a measure of job performance, the practice or group of practices must bear a demonstrable relationship to a significant business objective of the employer.

(3) In deciding whether the above standards have been met, the Court may rely on as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the Court shall give such weight if any to such evidence as it deems appropriate.

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in Griggs and to reflect the state of law prior to Ward's Cove.

CODIFYING GRIGGS July 10
DJS Version

1. BUSINESS NECESSITY

(1) The term required by business necessity means (1) in the case of employment practices that have as their primary focus the prediction of job performance, the practice or group of practices must bear a demonstrable relationship to successful performance of the jobs.

(2) In the case of employment practices that do not have as their primary focus the prediction of job performance, the practice or group of practices must bear a demonstrable relationship to a meaningful business objective of the respondent.

(3) The kind of evidence needed to prove a "demonstrable" relationship is not limited to any specific type or variety; proof may be made by statistical studies, expert testimony, prior successful experience, judicial notice, or any other form of evidence which a trier of fact would find relevant under the general standard for the admission of evidence embodied in Rule 401 of the Federal Rules of Evidence.

LEGISLATIVE HISTORY

This language is meant to codify the meaning of "business necessity" as it has been explicated in Chief Justice Burger's opinion in Griggs and in subsequent opinions, including Justice Steven's opinion in Beazer and Justice O'Connor's opinion in Watson.

o The attached version is based on the structure and much of the language from the July 11 Jeffords-Danforth-Specter proposal, with modifications indicated below.

o Section (1) is drawn from language in Griggs.

- o "professionally prepared aptitude tests" is in Griggs on pages 427-428

- o "must have a manifest relationship to the employment in question" is in Griggs on page 432

o Section (2) is drawn from Watson, the first Supreme Court case to apply disparate impact theory to "subjective" employment practices.

- o "are based on legitimate business reasons" is in Watson on page 2790

o Section (3) remains exactly as proposed by Danforth-Jeffords-Specter, except

- o "common sense testimony" has been added to the list;

- o "properly" has been added at the end to ensure the availability of appellate review

o The last paragraph has been changed so that it will be legislative history instead of statutory language and so that it reflects the direct reliance on language from Griggs and Watson in sections (1) and (2).

preamble
if desired

GRIGGS ET AL. v. DUKE POWER CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 124. Argued December 14, 1970—Decided March 8, 1971

Negro employees at respondent's generating plant brought this action, pursuant to Title VII of the Civil Rights Act of 1964, challenging respondent's requirement of a high school diploma or passing of intelligence tests as a condition of employment in or transfer to jobs at the plant. These requirements were not directed at or intended to measure ability to learn to perform a particular job or category of jobs. While § 703 (a) of the Act makes it an unlawful employment practice for an employer to limit, segregate, or classify employees to deprive them of employment opportunities or adversely to affect their status because of race, color, religion, sex, or national origin, § 703 (h) authorizes the use of any professionally developed ability test, provided that it is not designed, intended, or used to discriminate. The District Court found that respondent's former policy of racial discrimination had ended, and that Title VII, being prospective only, did not reach the prior inequities. The Court of Appeals reversed in part, rejecting the holding that residual discrimination arising from prior practices was insulated from remedial action, but agreed with the lower court that there was no showing of discriminatory purpose in the adoption of the diploma and test requirements. It held that, absent such discriminatory purpose, use of the requirements was permitted, and rejected the claim that because a disproportionate number of Negroes was rendered ineligible for promotion, transfer, or employment, the requirements were unlawful unless shown to be job related. *Held:*

1. The Act requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race, and, if, as here, an employment practice that operates to exclude Negroes cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent. Pp. 429–433.

2. The Act does not preclude the use of testing or measuring procedures, but it does proscribe giving them controlling force unless they are demonstrably a reasonable measure of job performance. Pp. 433–436.

420 F. 2d 1225, reversed in part.

BURGER, C. J., delivered the opinion of the Court, in which all members joined except BRENNAN, J., who took no part in the consideration or decision of the case.

Jack Greenberg argued the cause for petitioners. With him on the briefs were *James M. Nabrit III, Norman C. Amaker, William L. Robinson, Conrad O. Pearson, Julius LeVonne Chambers*, and *Albert J. Rosenthal.*

George W. Ferguson, Jr., argued the cause for respondent. With him on the brief were *William I. Ward, Jr.*, and *George M. Thorpe.*

Lawrence M. Cohen argued the cause for the Chamber of Commerce of the United States as *amicus curiae* urging affirmance. With him on the brief were *Francis V. Lowden, Jr., Gerard C. Smetana*, and *Milton A. Smith.*

Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold, Assistant Attorney General Leonard, Deputy Solicitor General Wallace, David L. Rose, Stanley Hebert*, and *Russell Specter* for the United States; by *Louis J. Lefkowitz*, Attorney General, *pro se*, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *George D. Zuckerman* and *Dominick J. Tuminaro*, Assistant Attorneys General, for the Attorney General of the State of New York; and by *Bernard Kleiman, Elliot Bredhoff, Michael H. Gottesman*, and *George H. Cohen* for the United Steelworkers of America, AFL–CIO.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.[1]

Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act and this proceeding was brought by a group of incumbent Negro employees against Duke Power Company. All the petitioners are employed at the Company's Dan River Steam Station, a power generating facility located at Draper, North Carolina. At the time this action was instituted, the Company had 95 employees at the Dan River Station, 14 of whom were Negroes; 13 of these are petitioners here.

The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the

[1] The Act provides:

"Sec. 703. (a) It shall be an unlawful employment practice for an employer—

. . . . .

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . . .

"(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. . . ." 78 Stat.

Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant. The plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. Negroes were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four "operating" departments in which only whites were employed.[2] Promotions were normally made within each department on the basis of job seniority. Transferees into a department usually began in the lowest position.

In 1955 the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal Handling to any "inside" department (Operations, Maintenance, or Laboratory). When the Company abandoned its policy of restricting Negroes to the Labor Department in 1965, completion of high school also was made a prerequisite to transfer from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the "operating" departments. Findings on this score are not challenged.

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it became necessary to register satisfactory scores on two professionally prepared apti-

[2] A Negro was first assigned to a job in an operating department in August 1966, five months after charges had been filed with the Equal Employment Opportunity Commission. The employee, a high school graduate who had begun in the Labor [illegible]

tude tests, as well as to have a high school education. Completion of high school alone continued to render employees eligible for transfer to the four desirable departments from which Negroes had been excluded if the incumbent had been employed prior to the time of the new requirement. In September 1965 the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor or Coal Handling to an "inside" job by passing two tests—the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates.[3]

The District Court had found that while the Company previously followed a policy of overt racial discrimination in a period prior to the Act, such conduct had ceased. The District Court also concluded that Title VII was intended to be prospective only and, consequently, the impact of prior inequities was beyond the reach of corrective action authorized by the Act.

The Court of Appeals was confronted with a question of first impression, as are we, concerning the meaning of Title VII. After careful analysis a majority of that court concluded that a subjective test of the employer's intent should govern, particularly in a close case, and that in this case there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. On this basis, the Court of Appeals concluded there was no violation of the Act.

[3] The test standards are thus more stringent than the high school requirement, since they would screen out approximately half of

The Court of Appeals reversed the District Court in part, rejecting the holding that residual discrimination arising from prior employment practices was insulated from remedial action.[4] The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. In so doing, the Court of Appeals rejected the claim that because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job related.[5] We granted the writ on these claims. 399 U. S. 926.

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and re-

[4] The Court of Appeals ruled that Negroes employed in the Labor Department at a time when there was no high school or test requirement for entrance into the higher paying departments could not now be made subject to those requirements, since whites hired contemporaneously into those departments were never subject to them. The Court of Appeals also required that the seniority rights of those Negroes be measured on a plantwide, rather than a departmental, basis. However, the Court of Appeals denied relief to the Negro employees without a high school education or its equivalent who were hired into the Labor Department after institution of the educational requirement.

[5] One member of that court disagreed with this aspect of the decision, maintaining, as do the petitioners in this Court, that Title VII prohibits the use of employment criteria that operate in a racially exclusionary fashion and do not measure skills or abilities necessary to performance of the jobs for which those criteria are

move barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, "whites register far better on the Company's alternative requirements" than Negroes.[6] 420 F. 2d 1225, 1239 n. 6. This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County* v. *United States*, 395 U. S. 285 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any

[6] In North Carolina, 1960 census statistics show that, while 34% of white males had completed high school, only 12% of Negro males had done so. U. S. Bureau of the Census, U. S. Census of Population: 1960, Vol. 1, Characteristics of the Population, pt. 35, Table 47.

Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks. Decision of EEOC, CCH Empl. Prac. Guide, ¶ 17,304.53 (Dec. 2, 1966). See also Decision of EEOC 70-552, CCH Empl. Prac. Guide, ¶ 6139 (Feb. 19, 1970).

person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used.[7] The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need. In the present case the Company has made no such showing.

The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." 420 F. 2d, at 1232. We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.

The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

[7] For example, between July 2, 1965, and November 14, 1966, the percentage of white employees who were promoted but who were not high school graduates was nearly identical to the percentage of nongraduates in the entire white work force.

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

The Company contends that its general intelligence tests are specifically permitted by § 703 (h) of the Act.[8] That section authorizes the use of "any professionally developed ability test" that is not "designed, intended *or used* to discriminate because of race . . . ." (Emphasis added.)

The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703 (h) to permit only the use of job-related tests.[9] The administrative interpretation of the

[8] Section 703 (h) applies only to tests. It has no applicability to the high school diploma requirement.

[9] EEOC Guidelines on Employment Testing Procedures, issued August 24, 1966, provide:

"The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII."

The EEOC position has been elaborated in the new Guidelines on Employee Selection Procedures, 29 CFR § 1607, 35 Fed. Reg. 12333 (Aug. 1, 1970). These guidelines demand that employers using tests have available "data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Id.*, at § 1607.4 (c).

Act by the enforcing agency is entitled to great deference. See, *e. g., United States* v. *City of Chicago*, 400 U. S. 8 (1970); *Udall* v. *Tallman*, 380 U. S. 1 (1965); *Power Reactor Co.* v. *Electricians*, 367 U. S. 396 (1961). Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.

Section 703 (h) was not contained in the House version of the Civil Rights Act but was added in the Senate during extended debate. For a period, debate revolved around claims that the bill as proposed would prohibit all testing and force employers to hire unqualified persons simply because they were part of a group formerly subject to job discrimination.[10] Proponents of Title VII sought throughout the debate to assure the critics that the Act would have no effect on job-related tests. Senators Case of New Jersey and Clark of Pennsylvania, comanagers of the bill on the Senate floor, issued a memorandum explaining that the proposed Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications.* Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." 110 Cong. Rec. 7247.[11] (Emphasis added.) Despite

[10] The congressional discussion was prompted by the decision of a hearing examiner for the Illinois Fair Employment Commission in *Myart* v. *Motorola Co.* (The decision is reprinted at 110 Cong. Rec. 5662.) That case suggested that standardized tests on which whites performed better than Negroes could never be used. The decision was taken to mean that such tests could never be justified even if the needs of the business required them. A number of Senators feared that Title VII might produce a similar result. See remarks of Senators Ervin, 110 Cong. Rec. 5614–5616; Smathers, *id.*, at 5999–6000; Holland, *id.*, at 7012–7013; Hill, *id.*, at 8447; Tower, *id.*, at 9024; Talmadge, *id.*, at 9025–9026; Fulbright, *id.*, at 9599–9600; and Ellender, *id.*, at 9600.

[11] The Court of Appeals majority, in finding no requirement in Title VII that employment tests be job related, relied in part on a

these assurances, Senator Tower of Texas introduced an amendment authorizing "professionally developed ability tests." Proponents of Title VII opposed the amendment because, as written, it would permit an employer to give any test, "whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the guise of compliance with the statute." 110 Cong. Rec. 13504 (remarks of Sen. Case).

The amendment was defeated and two days later Senator Tower offered a substitute amendment which was adopted verbatim and is now the testing provision of § 703 (h). Speaking for the supporters of Title VII, Senator Humphrey, who had vigorously opposed the first amendment, endorsed the substitute amendment, stating: "Senators on both sides of the aisle who were deeply interested in title VII have examined the text of this

quotation from an earlier Clark-Case interpretative memorandum addressed to the question of the constitutionality of Title VII. The Senators said in that memorandum:

"There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance." 110 Cong. Rec. 7213.

However, nothing there stated conflicts with the later memorandum dealing specifically with the debate over employer testing, 110 Cong. Rec. 7247 (quoted from in the text above), in which Senators Clark and Case explained that tests which measure "applicable job qualifications" are permissible under Title VII. In the earlier memorandum Clark and Case assured the Senate that employers were not to be prohibited from using tests that determine *qualifications.* Certainly a reasonable interpretation of what the Senators meant, in light of the subsequent memorandum directed specifically at employer testing, was that nothing in the Act prevents employers from requiring that applicants be fit for the job.

amendment and have found it to be in accord with the intent and purpose of that title." 110 Cong. Rec. 13724. The amendment was then adopted.[12] From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of § 703 (h) to require that employment tests be job related comports with congressional intent.

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

The judgment of the Court of Appeals is, as to that portion of the judgment appealed from, reversed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

[12] Senator Tower's original amendment provided in part that a test would be permissible "if . . . in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved . . . ." 110 Cong. Rec. 13492. This language indicates that Senator Tower's aim was simply to make certain that job-related tests would be permitted. The opposition to the amendment was based on its loose wording which the proponents of Title VII feared would be susceptible of misinterpretation. The final amendment, which was acceptable to all sides, could hardly have required less of a job relation than the first.

GILLETTE v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85. Argued December 9, 1970—Decided March 8, 1971*

Petitioner in No. 85, who was convicted for failure to report for induction, and petitioner in No. 325, who sought discharge from the armed forces upon receipt of orders for Vietnam duty, claim exemption from military service because of their conscientious objection to participation in the Vietnam conflict, as an "unjust" war, pursuant to § 6 (j) of the Military Selective Service Act of 1967. That section provides that no person shall be subject to "service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Petitioners also challenge the constitutionality of § 6 (j) as construed to cover only objectors to all war, as violative of the Free Exercise and Establishment of Religion Clauses of the First Amendment. *Held:*

1. The exemption for those who oppose "participation in war in any form" applies to those who oppose participating in all war and not to those who object to participation in a particular war only, even if the latter objection is religious in character. Pp. 441–448.

2. Section 6 (j) does not violate the Establishment Clause of the First Amendment. Pp. 448–460.

(a) The section on its face does not discriminate on the basis of religious affiliation or belief, and petitioners have not shown the absence of neutral, secular bases for the exemption. Pp. 450–453.

(b) The exemption provision focuses on individual conscientious belief and not on sectarian affiliations. P. 454.

(c) There are valid neutral reasons, with the central emphasis on the maintenance of fairness in the administration of military conscription, for the congressional limitation of the exemption to "war in any form," and therefore § 6 (j) cannot be said to reflect a religious preference. Pp. 454–460.

*Together with No. 325, *Negre* v. *Larsen et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

APPENDIX—Continued

tentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

"You will note that to act knowingly requires that the act be done intentionally. The crimes charged requires proof of specific intent before a defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, or knowingly failed to do an act which the law requires, purposely intending to violate the law.

"Such intent may be determined from all the facts and circumstances surrounding the case. Specific intent must be proved beyond a reasonable doubt before there can be a conviction.

"Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But, you may infer the defendant's intent from the surrounding circumstances.

"You may consider any statement made by the defendant, and all other facts and circumstances in evidence which indicate the state of mind. You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

"As I have said, it is entirely up to you to decide what facts to find from the evidence.

"You will note that the Indictment charges that the offense was committed on or about a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes, beyond a reasonable doubt, that the offense was committed on a date reasonably near the date alleged.

"That is the end of the instructions relating to Counts II and III of the Indictment."

Clara WATSON, Petitioner

v.

FORT WORTH BANK AND TRUST.

No. 86–6139.

Argued Jan. 20, 1988.

Decided June 29, 1988.

Former employee filed Title VII suit against bank, alleging racial discrimination against her and other similarly situated persons. The United States District Court for the Northern District of Texas, Eldon B. Mahon, J., decertified employee class and entered judgment on merits in favor of bank. Employee appealed. The Court of Appeals, Johnson, Circuit Judge, 798 F.2d 791, affirmed in part, vacated in part and remanded on writ of certiorari, the Supreme Court, Justice O'Connor, held that subjective or discretionary employment practices challenged as violating Title VII may, in appropriate cases, be analyzed under disparate impact approach.

Vacated and remanded.

Justice Blackmun concurred in part and concurred in judgment and filed opinion, in which Justices Brennan and Marshall joined.

Justice Stevens concurred in judgment and filed opinion.

Justice Kennedy did not participate in decision.

1. Civil Rights ⇐9.10

In "disparate treatment" case, Title VII plaintiff is required to prove that defendant acted with discriminatory intent or motive. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

2. Civil Rights ⇐44(1)

Prima facie case of disparate treatment is ordinarily established by proof that employer, after having rejected Title VII plaintiff's application for job or promotion, continued to seek applicants with qualifications similar to plaintiff's. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

3. Civil Rights 🔑43

Burden of proving prima facie case of disparate treatment contrary to Title VII is not onerous, and employer may rebut it simply by producing some evidence that it had legitimate, nondiscriminatory reasons for decision. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

4. Civil Rights 🔑44(1)

Once employer succeeds in rebutting Title VII plaintiff's prima facie case of disparate treatment, plaintiff must prove, by preponderance of evidence, that legitimate reasons offered by employer were pretext for discrimination. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

5. Civil Rights 🔑9.10

Necessary premise of disparate impact of claim under Title VII is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C. A. § 2000e et seq.

6. Civil Rights 🔑9.10

Subjective or discretionary employment practices challenged as violating Title VII may, in appropriate case, be analyzed under disparate impact approach. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

7. Civil Rights 🔑43

Employer's policy of leaving promotion decisions to unchecked discretion of lower level supervisors should not itself give rise to any inference in discriminatory conduct contrary to Title VII. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C. A. § 2000e et seq.

8. Civil Rights 🔑9.10

Preferential treatment and use of quotas by public employer subject to Title VII can violate the Constitution. (Per Justice O'Connor, with Chief Justice and two Justices concurring, and four Justices concurring in result.) Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

9. Civil Rights 🔑43

Title VII plaintiff's burden in establishing prima facie case of discrimination under disparate impact analysis goes beyond need to show that there are statistical disparities in employer's work force; plaintiff must identify specific employment practices allegedly responsible for observed statistical disparities and prove causation. (Per Justice O'Connor, with Chief Justice and two Justices concurring, and four Justices concurring in result.) Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C. A. § 2000e et seq.

10. Civil Rights 🔑43

Employer may impeach reliability on statistical data offered by Title VII plaintiff in support of disparate impact claim by showing that data was obtained from smaller incomplete data sets or based on inadequate statistical techniques. (Per Justice O'Connor, with Chief Justice and two Justices concurring, and four Justices concurring in result.) Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S. C.A. § 2000e et seq.

11. Civil Rights 🔑43

Ultimate burden of proving that discrimination against protected group has been caused by specific employment practice remains, at all times, with Title VII plaintiff. (Per Justice O'Connor, with Chief Justice and two Justices concurring, and four Justices concurring in result.) Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

12. Civil Rights 🔑44(1)

Employers are not required, even when defending standardized or objective

test from disparate im
Title VII, to introduc
studies showing that p
dicted actual on-the-job
Justice O'Connor, wit
two Justices concurrin
concurring in result.)
1964, § 701 et seq., a
C.A. § 2000e et seq.

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test from disparate impact challenge under Title VII, to introduce formal validation studies showing that particular criteria predicted actual on-the-job performance. (Per Justice O'Connor, with Chief Justice and two Justices concurring, and four Justices concurring in result.) Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Syllabus *

Petitioner employee, who is black, was rejected in favor of white applicants for four promotions to supervisory positions in respondent bank, which had not developed precise and formal selection criteria for the positions, but instead relied on the subjective judgment of white supervisors who were acquainted with the candidates and with the nature of the jobs. After exhausting her administrative remedies, petitioner filed suit in Federal District Court, alleging, *inter alia*, that respondent's promotion policies had unlawfully discriminated against blacks generally and her personally in violation of Title VII of the Civil Rights Act of 1964. As to petitioner's individual claim, the court held that she had not met her burden of proof under the discriminatory treatment evidentiary standard and, for this and other reasons, dismissed the action. The Court of Appeals affirmed in relevant part, rejecting petitioner's contention that the District Court erred in failing to apply "disparate impact" analysis to her promotion claims. The court held that, under its precedent, a Title VII challenge to a discretionary or subjective promotion system can only be analyzed under the disparate treatment model.

Held: The judgment is vacated, and the case is remanded.

798 F.2d 791 (CA5 1986), vacated and remanded.

Justice O'CONNOR delivered the opinion of the Court with respect to Parts I, II–A, II–B, and III, concluding that disparate impact analysis may be applied to a subjective or discretionary promotion system. Pp. 2783–2787, 2791.

(a) Each of this Court's decisions applying disparate impact analysis—under which facially neutral employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to illegal intentional discrimination—involved standardized tests or criteria, such as written aptitude tests or high school diploma requirements, see, *e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, and the Court has consistently used disparate treatment theory, in which proof of intent to discriminate is required, to review hiring or promotion decisions that were based on the exercise of personal judgment or the application of subjective criteria, see, *e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. Until today, the Court has never addressed the question whether disparate impact analysis may be applied to subjective employment criteria. Pp. 2783–2786.

(b) The reasons supporting the use of disparate impact analysis apply to subjective employment practices. That analysis might effectively be abolished if it were confined to objective, standardized selection practices, since an employer could insulate itself from liability under *Griggs* and its progeny simply by combining such practices with a subjective component, such as a brief interview, in a system that refrained from making the objective tests absolutely determinative, and could thereby remain free to give those tests almost as much weight as it chose without risking a disparate impact challenge. Moreover, disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests, since, in either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indis-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

tinguishable from intentionally discriminatory practices. Simply because no inference of discriminatory intent can be drawn from the customary and reasonable practice in some businesses of leaving promotion decisions to the unchecked discretion of the lower level supervisors most familiar with the jobs and candidates, it does not follow that these supervisors always act without discriminatory intent. Even if it is assumed that discrimination by individual supervisors can be adequately policed through disparate treatment analysis, that analysis would not solve the problem created by subconscious stereotypes and prejudices that lead to conduct prohibited by Title VII. Pp. 2786–2787.

(c) Since neither the District Court nor the Court of Appeals has evaluated the statistical evidence to determine whether petitioner made out a prima facie case of discrimination under disparate impact theory, the case must be remanded. P. 2791.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice WHITE, and Justice SCALIA, concluded in Parts II–C and II–D that:

1. The extension of disparate impact analysis to subjective employment practices could increase the risk that, in order to avoid liability, employers will adopt surreptitious numerical goals and quotas in the belief that, since disparate impact analysis inevitably focuses on statistical evidence, which cannot practically be rebutted by the kind of counter-evidence typically used to defend objective criteria, the threat of ruinous litigation requires steps to ensure that no plaintiff can establish a prima facie case under disparate impact theory. That result would be contrary to Congress' clearly expressed intent in 42 U.S.C. § 2000e–2(j) that no employer shall be required to grant preferential treatment to any protected individual or group because of a numerical imbalance in its work force. Pp. 2787–2788.

2. However, the application of disparate impact theory to subjective employment criteria should not have any chilling effect on legitimate business practices, since the high standards of proof applicable in such cases operate to constrain the theory within its proper bounds, and provide adequate safeguards against the danger that quotas or preferential treatment will be adopted by employers. Pp. 2788–2791.

(a) In establishing a prima facie case when subjective selection criteria are at issue, the plaintiff may have difficulty in satisfying the initial burden of identifying the specific employment practices that are allegedly responsible for any observed statistical disparity, especially where the employer has combined the subjective criteria with more rigid standardized rules or tests. Moreover, the plaintiff's statistical evidence must be sufficiently substantial to prove that the practice in question has caused the exclusion of job or promotion applicants because of their membership in a protected group, and the defendant is free to attack the probative weight of that evidence, to point out fallacies or deficiencies in the plaintiff's data or statistical techniques, and to adduce countervailing evidence of its own. Pp. 2788–2790.

(b) The nature of the "business necessity" or "job relatedness" defense—under which the defendant has a burden of producing evidence after the plaintiff has made out a prima facie case—also constrains the application of the disparate impact theory. Employers are not required, even when defending standardized or objective tests, to introduce formal "validation studies" showing that particular criteria predict actual on-the-job performance. In the context of subjective or discretionary decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a "manifest relationship to the employment in question." Many jobs, for example those involving managerial responsibilities, require personal qualities that are not amenable to standardized testing but are nevertheless job related. In evaluating claims that discretionary practices are insufficiently related to legitimate business purposes, courts are generally less competent than employers to restructure business practices and therefore should not attempt to do so. Pp. 2790–2791.

Justice BLACKMUN, joined by Justice BRENNAN and Justice MARSHALL, agreeing that disparate-impact analysis may be applied to claims of discrimination caused by subjective or discretionary selection processes, concluded that:

1. In the disparate-*impact* context, a plaintiff who successfully establishes a prima facie case shifts the burden of *proof,* not production, to the defendant to establish that the employment practice in question is a business necessity. See, *e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280; *Dothard v. Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786; and *Griggs v. Duke Power Co.,* 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158. The plurality's assertion to the contrary mimics the allocation of burdens this Court has established in the very different context of individual disparate-treatment claims. Unlike a disparate-treatment claim of intentional discrimination, which a prima facie case establishes only by inference, the disparate impact caused by an employment practice is *directly* established by the numerical disparity shown by the prima facie case, and the employer can avoid liability only if it can prove that the discriminatory effect is justified. To be justified as a business *necessity,* a practice must directly relate to a prospective employee's ability to perform the job effectively; *i.e.,* it must be necessary to fulfill legitimate business requirements. Pp. 2792–2795.

2. The plurality's suggestion that the employer will often find it easier to produce evidence of job-relatedness for a subjective factor than for standardized tests may prove misleading, since the employer still has the obligation to *persuade* the court of job-relatedness through the introduction of relevant evidence. Pp. 2795–2797.

(a) The fact that the formal validation techniques endorsed by the Equal Employment Opportunity Commission's (EEOC) Uniform Guidelines on Employee Selection Procedures cannot always be used to prove the job-relatedness of subjective-selection processes does not free an employer from its burden of proof. The link between such processes and job performance may, depending on the type and size of the business and the nature of the particular job, be established by a variety of methods, including the results of studies, expert testimony, and prior successful experience. Although common sense plays a part in the assessment, a reviewing court may not rely on its own, or an employer's sense of what is "normal" as a substitute for a neutral assessment of the evidence. Pp. 2795–2796.

(b) The employer's burden of justifying an employment practice that produces a disparate impact is not lessened simply because the practice relies upon subjective assessments. Establishing a general rule allowing an employer to escape liability simply by articulating vague, inoffensive-sounding subjective criteria would disserve Title VII's goal of eradicating employment discrimination by encouraging employers to abandon attempts to construct neutral selection mechanisms in favor of broad generalities. While subjective criteria will sometimes pose difficult problems for courts charged with assessing job-relatedness, requiring the development of a greater factual record, and, perhaps, the exercise of a greater degree of judgment, that does not dictate that subjective-selection processes generally are to be accepted at face value. Pp. 2796–2797.

Justice STEVENS, agreeing that the racially adverse impact of an employer's practice of simply committing employment decisions to the unchecked discretion of a white supervisory corps is subject to the test of *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, concluded that, since cases involving such practices will include too many variables to be adequately considered in a general context, further discussion of evidentiary standards should be postponed until after the District Court has made appropriate findings concerning petitioner's prima facie evidence of disparate impact and respondent's explanation for its subjective practice. P. 2797.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion of the Court with respect to Parts I, II–A, II–B, and III, in which REHNQUIST, C.J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and SCALIA, JJ., joined, and an opinion with respect to Parts II–C and II–D in which REHNQUIST, C.J., and WHITE and SCALIA, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, in which BRENNAN and MARSHALL, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment. KENNEDY, J., took no part in the consideration or decision of the case.

Art Brender, Fort Worth, Tex., for petitioner.

Bruce W. McGee, Fort Worth, Tex., for respondent.

Justice O'CONNOR delivered the judgment of the Court, the opinion of the Court as to Parts I, II–A, II–B, and III, and an opinion joined by Chief Justice REHNQUIST, Justice WHITE and Justice SCALIA as to Parts II–C and II–D.

This case requires us to decide what evidentiary standards should be applied under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, in determining whether an employer's practice of committing promotion decisions to the subjective discretion of supervisory employees has led to illegal discrimination.

I

Petitioner Clara Watson, who is black, was hired by respondent Fort Worth Bank and Trust (the Bank) as a proof operator in August 1973. In January 1976, Watson was promoted to a position as teller in the Bank's drive-in facility. In February 1980, she sought to become supervisor of the tellers in the main lobby; a white male, however, was selected for this job. Watson then sought a position as supervisor of the drive-in bank, but this position was given to a white female. In February 1981, after Watson had served for about a year as a commercial teller in the Bank's main lobby, and informally as assistant to the supervisor of tellers, the man holding that position was promoted. Watson applied for the vacancy, but the white female who was the supervisor of the drive-in bank was selected instead. Watson then applied for the vacancy created at the drive-in; a white male was selected for that job. The Bank, which has about 80 employees, had not developed precise and formal criteria for evaluating candidates for the positions for which Watson unsuccessfully applied. It relied instead on the subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled. All the supervisors involved in denying Watson the four promotions at issue were white.

Watson filed a discrimination charge with the Equal Employment Opportunity Commission. After exhausting her administrative remedies, she filed this lawsuit in the United States District Court for the Northern District of Texas. She alleged that the Bank had unlawfully discriminated against blacks in hiring, compensation, initial placement, promotions, terminations, and other terms and conditions of employment. On Watson's motion under Federal Rule of Civil Procedure 23, the District Court certified a class consisting of "blacks who applied to or were employed by [respondent] on or after October 21, 1979 or who may submit employment applications to [respondent] in the future." App. 190. The District Court later decertified this broad class because it concluded, in light of the evidence presented at trial, that there was not a common question of law or fact uniting the groups of applicants and employees. After splitting the class along this line, the court found that the class of black employees did not meet the numerosity requirement of Rule 23(a); accordingly, this sub-class was decertified. The court also concluded that Watson was not an adequate representative of the applicant class because her promotion claims were not typical of the claims of the members of that group. Because Watson had proceeded zealously on behalf of the job applicants, however, the court went on to address the merits of their claims. It concluded that Watson had failed to establish a prima facie case of racial discrimination in hiring: the percentage of blacks in the Bank's work force approximated the percentage of blacks in the metropolitan area where the Bank is located. App. 199–202.

The District Court addressed Watson's individual claims under the evidentiary standards that apply in a discriminatory treatment case. See *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). It concluded, on the evidence presented at trial, that Watson had established a prima facie case of employment discrimination, but that the Bank had met its rebuttal burden by presenting legitimate and nondiscriminatory reasons for each of the challenged promotion decisions. The court also concluded that Watson had failed to show that these reasons were pretexts for racial discrimination. Accordingly, the action was dismissed. App. 195–197, 203.

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed in part. 798 F.2d 791 (CA5 1986). The majority concluded that there was no abuse of discretion in the District Court's class decertification decisions. In order to avoid unfair prejudice to members of the class of black job applicants, however, the Court of Appeals vacated the portion of the judgment affecting them and remanded with instructions to dismiss those claims without prejudice. The majority affirmed the District Court's conclusion that Watson had failed to prove her claim of racial discrimination under the standards set out in *McDonnell Douglas* and *Burdine, supra.*[1]

Watson argued that the District Court had erred in failing to apply "disparate impact" analysis to her claims of discrimination in promotion. Relying on Fifth Circuit precedent, the majority of the Court of Appeals panel held that "a Title VII challenge to an allegedly discretionary promotion system is properly analyzed under the disparate treatment model rather than the disparate impact model." 798 F.2d, at 797. Other Courts of Appeals have held that disparate impact analysis may be applied to hiring or promotion systems that involve the use of "discretionary" or "subjective" criteria. See, *e.g., Atonio v. Wards Cove Packing Co.,* 810 F.2d 1477 (CA9 1987) (en banc); *Griffin v. Carlin,* 755 F.2d 1516, 1522–1525 (CA11 1985). Cf. *Segar v. Smith,* 238 U.S.App.D.C. 103, 738 F.2d 1249 (1984), cert. denied, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985). We granted certiorari to resolve the conflict. 483 U.S. ——, 107 S.Ct. 3227, 97 L.Ed.2d 734 (1987).

II

A

Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2, provides:

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with

1. The dissenting judge argued that the District Court had abused its discretion in decertifying the broad class of black employees and applicants. He also argued that Watson had succeeded in proving that the Bank had discriminated against this class, and that the case should be remanded so that appropriate relief could be ordered. 798 F.2d, at 800–815.

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . . .

"(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer ... to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin...."

[1–4] Several of our decisions have dealt with the evidentiary standards that apply when an individual alleges that an employer has treated that particular person less favorably than others because of the plaintiff's race, color, religion, sex, or national origin. In such "disparate treatment" cases, which involve "the most easily understood type of discrimination," *Teamsters v. United States,* 431 U.S. 324, 335, n. 15, 97 S.Ct. 1843, 1854, n. 15, 52 L.Ed.2d 396 (1977), the plaintiff is required to prove that the defendant had a discriminatory intent or motive. In order to facilitate the orderly consideration of relevant evidence, we have devised a series of shifting evidentiary burdens that are "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Texas Department of Community Affairs v. Burdine,* 450 U.S., at 255, n. 8, 101 S.Ct., at 1094, n. 8. Under that scheme, a prima facie case is ordinarily established by proof that the employer, after having rejected the plaintiff's application for a job or promotion, continued to seek applicants with qualifications similar to the plaintiff's. *Id.,* at 253, and n. 6, 101 S.Ct., at 1094, and n. 6. The burden of proving a prima facie case is "not onerous," *id.,* at 253, 101 S.Ct., at 1094, and the employer in turn may rebut it simply by producing some evidence that it had legitimate, nondiscriminatory reasons for the decision. *Id.,* at 254–255, 101 S.Ct., at 1094. If the defendant carries this burden of production, the plaintiff must prove by a preponderance of all the evidence in the case that the legitimate reasons offered by the defendant were a pretext for discrimination. *Id.,* at 253, 255, n. 10, 101 S.Ct., 1093, 1094, n. 10. We have cautioned that these shifting burdens are meant only to aid courts and litigants in arranging the presentation of evidence: "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.,* at 253, 101 S.Ct., at 1093. See also *United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct. 1478, 1481, 75 L.Ed. 2d 403 (1983).

In *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), this Court held that a plaintiff need not necessarily prove intentional discrimination in order to establish that an employer has violated § 703. In certain cases, facially neutral employment practices that have significant adverse effects on protected groups have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent. The factual issues and the character of the evidence are inevitably somewhat different when the plaintiff is exempted from the need to prove intentional discrimination. See *Burdine, supra,* 450 U.S., at 252, n. 5, 101 S.Ct. 1093, n. 5; see also *United States Postal Service Bd. of Governors v. Aikens, supra,* 460 U.S., at 713, n. 1, 103 S.Ct., at 1480, n. 1; *McDonnell Douglas,* 411 U.S., at 802, n. 14, 93 S.Ct., at 1824, n. 14; *Teamsters, supra,* 431 U.S., at 335–336, n. 15, 97 S.Ct., at 2729–2730, n. 15. The evidence in these "disparate impact" cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities.

[5] The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used. See, *e.g.*, *Washington v. Davis*, 426 U.S. 229, 253–254, 96 S.Ct. 2040, 2054, 48 L.Ed.2d 597 (1976) (STEVENS, J., concurring). Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination. Rather, the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.

Perhaps the most obvious examples of such functional equivalence have been found where facially neutral job requirements necessarily operated to perpetuate the effects of intentional discrimination that occurred before Title VII was enacted. In *Griggs* itself, for example, the employer had a history of overt racial discrimination that predated the enactment of the Civil Rights Act of 1964. 401 U.S., at 426–428, 91 S.Ct., at 851–852. Such conduct had apparently ceased thereafter, but the employer continued to follow employment policies that had "a markedly disproportionate" adverse effect on blacks. *Id.*, at 428–429, 91 S.Ct., at 852. Cf. *Teamsters, supra*, 431 U.S., at 349 and n. 32, 97 S.Ct., at 1861 and n. 32. The *Griggs* Court found that these policies, which involved the use of general aptitude tests and a high school diploma requirement, were not demonstrably related to the jobs for which they were used. 401 U.S., at 431–432, 91 S.Ct., at 853–854. Believing that diplomas and tests could become "masters of reality," *id.*, at 433, 91 S.Ct., at 854, which would perpetuate the effects of pre-Act discrimination, the Court concluded that such practices could not be defended simply on the basis of their facial neutrality or on the basis of the employer's lack of discriminatory intent.

This Court has repeatedly reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent. We have not limited this principle to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination. Each of our subsequent decisions, however, like *Griggs* itself, involved standardized employment tests or criteria. See, *e.g.*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (written aptitude tests); *Washington v. Davis, supra*, (written test of verbal skills); *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) (height and weight requirements); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979) (rule against employing drug addicts); *Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982) (written examination). In contrast, we have consistently used conventional disparate-treatment theory, in which proof of intent to discriminate is required, to review hiring and promotion decisions that were based on the exercise of personal judgment or the application of inherently subjective criteria. See, *e.g.*, *McDonnell Douglas Corp. v. Green, supra*, (discretionary decision not to rehire individual who engaged in criminal acts against employer while laid off); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) (hiring decisions based on personal knowledge of candidates and recommendations); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (discretionary decision to fire individual who was said not to get along with co-workers); *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S., at 715, 103 S.Ct., at 1481 (discretionary promotion decision).

Our decisions have not addressed the question whether disparate impact analysis may be applied to cases in which subjective criteria are used to make employment decisions. As noted above, the Courts of Appeals are in conflict on the issue. In order to resolve this conflict, we must determine whether the reasons that support the use of disparate impact analysis apply to subjective employment practices, and whether such analysis can be applied in this new context under workable evidentiary standards.

B

[6] The parties present us with stark and uninviting alternatives. Petitioner contends that subjective selection methods are at least as likely to have discriminatory effects as are the kind of objective tests at issue in *Griggs* and our other disparate impact cases. Furthermore, she argues, if disparate impact analysis is confined to objective tests, employers will be able to substitute subjective criteria having substantially identical effects, and *Griggs* will become a dead letter. Respondent and the United States (appearing as *amicus curiae*) argue that conventional disparate treatment analysis is adequate to accomplish Congress' purpose in enacting Title VII. They also argue that subjective selection practices would be so impossibly difficult to defend under disparate impact analysis that employers would be forced to adopt numerical quotas in order to avoid liability.

We are persuaded that our decisions in *Griggs* and succeeding cases could largely be nullified if disparate impact analysis were applied only to standardized selection practices. However one might distinguish "subjective" from "objective" criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature. Thus, for example, if the employer in *Griggs* had consistently preferred applicants who had a high school diploma and who passed the company's general aptitude test, its selection system could nonetheless have been considered "subjective" if it also included brief interviews with the candidates. So long as an employer refrained from making standardized criteria absolutely determinative, it would remain free to give such tests almost as much weight as it chose without risking a disparate impact challenge. If we announced a rule that allowed employers so easily to insulate themselves from liability under *Griggs*, disparate impact analysis might effectively be abolished.

[7] We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices. It is true, to be sure, that an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct. Especially in relatively small businesses like respondent's, it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs. It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain. In this case, for example, petitioner was apparently told at one point that the teller position was a big responsibility with "a lot of money ... for blacks to have to count." App. 7. Such remarks may not prove discriminatory intent, but they do suggest a lingering form of the problem that Title VII was enacted to combat. If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible inten-

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tional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply. In both circumstances, the employer's practices may be said to "adversely affect [an individual's] status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(2). We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.

C

Having decided that disparate impact analysis may in principle be applied to subjective as well as to objective practices, we turn to the evidentiary standards that should apply in such cases. It is here that the concerns raised by respondent have their greatest force. Respondent contends that a plaintiff may establish a prima facie case of disparate impact through the use of bare statistics, and that the defendant can rebut this statistical showing only by justifying the challenged practice in terms of "business necessity," *Griggs*, 401 U.S., at 431, 91 S.Ct., at 853, or "job relatedness," *Albemarle Paper Co.*, 422 U.S., at 426, 95 S.Ct., at 2375. Standardized tests and criteria, like those at issue in our previous disparate impact cases, can often be justified through formal "validation studies," which seek to determine whether discrete selection criteria predict actual on-the-job performance. See generally *id.*, at 429–436, 95 S.Ct., at 2377–2380. Respondent warns, however, that "validating" subjective selection criteria in this way is impracticable. Some qualities—for example, common sense, good judgment, originality, ambition, loyalty, and tact—cannot be measured accurately through standardized testing techniques. Moreover, success at many jobs in which such qualities are crucial cannot itself be measured directly. Opinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve close cooperation with one's co-workers or complex and subtle tasks like the provision of professional services or personal counseling. Because of these difficulties, we are told, employers will find it impossible to eliminate subjective selection criteria and impossibly expensive to defend such practices in litigation. Respondent insists, and the United States agrees, that employers' only alternative will be to adopt surreptitious quota systems in order to ensure that no plaintiff can establish a statistical prima facie case.

[8] We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. See *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 489, 106 S.Ct. 3019, 3057, 92 L.Ed.2d 344 (1986) (O'CONNOR, J., concurring in part and dissenting in part). It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically provided that employers are *not* required to avoid "disparate impact" as such:

> "Nothing contained in [Title VII] shall be interpreted to require any employer ... to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer ... in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, sec-

tion, or other area." 42 U.S.C. § 2000e–2(j).

Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, see, *e.g., Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), and it has long been recognized that legal rules leaving any class of employers with "little choice" but to adopt such measures would be "far from the intent of Title VII." *Albemarle Paper Co.*, 422 U.S., at 449, 95 S.Ct., at 2390 (BLACKMUN, J., concurring in judgment). Respondent and the United States are thus correct when they argue that extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today.

D

We do not believe that disparate impact theory need have any chilling effect on legitimate business practices. We recognize, however, that today's extension of that theory into the context of subjective selection practices could increase the risk that employers will be given incentives to adopt quotas or to engage in preferential treatment. Because Congress has so clearly and emphatically expressed its intent that Title VII not lead to this result, 42 U.S.C. § 2000e–2(j), we think it imperative to explain in some detail why the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger that Congress recognized. Our previous decisions offer guidance, but today's extension of disparate impact analysis calls for a fresh and somewhat closer examination of the constraints that operate to keep that analysis within its proper bounds.[2]

[9] First, we note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. Although this has been relatively easy to do in challenges to standardized tests, it may sometimes be more difficult when subjective selection criteria are at issue. Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities. Cf. *Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed. 2d 130 (1982).

Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree

2. Both concurrences agree that we should, for the first time, approve the use of disparate impact analysis in evaluating subjective selection practices. Unlike Justice STEVENS, we believe that this step requires us to provide the lower courts with appropriate evidentiary guidelines, as we have previously done for disparate treatment cases. Moreover, we do not believe that each verbal formulation used in prior opinions to describe the evidentiary standards in disparate impact cases is automatically applicable in light of today's decision. Cf. *post*, at 2791 (BLACKMUN, J., concurring in part and concurring in judgment). Congress expressly provided that Title VII not be read to require preferential treatment or numerical quotas. 42 U.S.C. § 2000e–2(j). This congressional mandate requires in our view that a decision to extend the reach of disparate impact theory be accompanied by safeguards against the result that Congress clearly said it did not intend.

sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. Our formulations, which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation. In *Griggs*, for example we examined "requirements [that] operate[d] to disqualify Negroes at a substantially higher rate than white applicants." 401 U.S., at 426, 91 S.Ct., at 851. Similarly, we said in *Albemarle Paper Co.* that plaintiffs are required to show "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." 422 U.S., at 425, 95 S.Ct., at 2375. Later cases have framed the test in similar terms. See, *e.g.*, *Washington v. Davis*, 426 U.S., at 246–247, 96 S.Ct., at 2050–2051 ("hiring and promotion practices disqualifying substantially disproportionate numbers of blacks"); *Dothard*, 433 U.S., at 329, 97 S.Ct., at 2726 (employment standards that "select applicants for hire in a significantly discriminatory pattern"); *Beazer*, 440 U.S., at 584, 99 S.Ct., at 1365 ("statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities"); *Teal*, 457 U.S., at 446, 102 S.Ct., at 2530 ("significantly discriminatory impact").[3]

[10] Nor are courts or defendants obliged to assume that plaintiffs' statistical evidence is reliable. "If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own." *Dothard*, 433 U.S., at 331, 97 S.Ct., at 2727–2728. See also *id.*, at 338–339, 97 S.Ct., at 2727–2728 (REHNQUIST, J., concurring in result and concurring in part) ("If the defendants in a Title VII suit be-

3. Faced with the task of applying these general statements to particular cases, the lower courts have sometimes looked for more specific direction in the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 CFR pt. 1607 (1987). See, *e.g.*, *Bushey v. New York State Civil Service Comm'n*, 733 F.2d 220, 225–226 (CA2 1984), cert. denied, 469 U.S. 1117, 105 S.Ct. 803, 83 L.Ed.2d 795 (1985); *Firefighters Institute v. St. Louis*, 616 F.2d 350, 356–357 (CA8 1980), cert. denied, *sub nom. Saint Louis v. United States*, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981). These Guidelines have adopted an enforcement rule under which adverse impact will not ordinarily be inferred unless the members of a particular race, sex, or ethnic group are selected at a rate that is less than four-fifths of the rate at which the group with the highest rate is selected. 29 CFR § 1607.4(D) (1987). This enforcement standard has been criticized on technical grounds, see, *e.g.*, Boardman & Vining, The Role of Probative Statistics in Employment Discrimination Cases, 46 Law & Contemp.Prob., No. 4, pp. 189, 205–207 (1983); Shoben, Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII, 91 Harv.L.Rev. 793, 805–811 (1978), and it has not provided more than a rule of thumb for the courts, see, *e.g.*, *Clady v. County of Los Angeles*, 770 F.2d 1421, 1428–1429 (CA9 1985), cert. denied, 475 U.S. 1109, 106 S.Ct. 1516, 89 L.Ed.2d 915 (1986).

Courts have also referred to the "standard deviation" analysis sometimes used in jury-selection cases. See, *e.g.*, *Rivera v. Wichita Falls*, 665 F.2d 531, 536, n. 7 (CA5 1982) (citing *Castenada v. Partida*, 430 U.S. 482 (1977)); *Guardians Association of New York City Police Dept. v. Civil Service Comm'n of New York*, 630 F.2d 79, 86, and n. 4 (CA2 1980) (same), cert. denied, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981). We have emphasized the useful role that statistical methods can have in Title VII cases, but we have not suggested that any particular number of "standard deviations" can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination. See *Hazlewood School Dist. v. United States*, 433 U.S. 299, 311, n. 17, 97 S.Ct. 2736, 2743, n. 17, 53 L.Ed.2d 768 (1977).

Nor has a consensus developed around any alternative mathematical standard. Instead, courts appear generally to have judged the "significance" or "substantiality" of numerical disparities on a case-by-case basis. See *Clady*, *supra*, at 1428–1429; B. Schlei & P. Grossman, Employment Discrimination Law 98–99, and n. 77 (2d ed. 1983); *id.* 18–19, and n. 33 (Supp. 1983–1985). At least at this stage of the law's development, we believe that such a case-by-case approach properly reflects our recognition that statistics "come in infinite variety and ... their usefulness depends on all of the surrounding facts and circumstances." *Teamsters v. United States*, 431 U.S. 324, 340, 97 S.Ct. 1843, 1856–1857, 52 L.Ed.2d 396 (1977).

lieve there to be any reason to discredit plaintiffs' statistics that does not appear on their face, the opportunity to challenge them is available to the defendants just as in any other lawsuit. They may endeavor to impeach the reliability of the statistical evidence, they may offer rebutting evidence, or they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded"). Without attempting to catalogue all the weaknesses that may be found in such evidence, we may note that typical examples include small or incomplete data sets and inadequate statistical techniques. See, *e.g., Fudge v. Providence Fire Dept.,* 766 F.2d 650, 656–659 (CA1 1985). Similarly, statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value. See, *e.g., Hazlewood School Dist. v. United States,* 433 U.S. 299, 308, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977) ("proper comparison was between the racial composition of [the employer's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market") (footnote omitted). Other kinds of deficiencies in facially plausible statistical evidence may emerge from the facts of particular cases. See, *e.g., Carroll v. Sears, Roebuck & Co.,* 708 F.2d 183, 189 (CA5 1983) ("The flaw in the plaintiffs' proof was its failure to establish the required causal connection between the challenged employment practice (testing) and discrimination in the work force. Because the test does not have a cut-off and is only one of many factors in decisions to hire or promote, the fact that blacks score lower does not automatically result in disqualification of disproportionate numbers of blacks as in cases involving cutoffs") (citation omitted); *Contreras v. Los Angeles,* 656 F.2d 1267, 1273–1274 (CA9 1981) (probative value of statistics impeached by evidence that plaintiffs failed a written examination at a disproportionately high rate because they did not study seriously for it), cert. denied, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 140 (1982).

[11] A second constraint on the application of disparate impact theory lies in the nature of the "business necessity" or "job relatedness" defense. Although we have said that an employer has "the burden of showing that any given requirement must have a manifest relationship to the employment in question," *Griggs,* 401 U.S., at 432, 91 S.Ct., at 854, such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times. Thus, when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship." *Albemarle Paper Co.,* 422 U.S., at 425, 95 S.Ct., at 2375 (citation omitted; internal quotation marks omitted). Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals. The same factors would also be relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment. Cf. *ibid.*

[12] Our cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal "validation studies" showing that particular criteria predict actual on-the-job performance. In *Beazer,* for example, the Court considered it obvious that "legitimate employment goals of safety and efficiency" permitted the exclusion of methadone users from employment with

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the New York City Transit Authority; the Court indicated that the "manifest relationship" test was satisfied even with respect to non-safety-sensitive jobs because those legitimate goals were "significantly served by" the exclusionary rule at issue in that case even though the rule was not required by those goals. 440 U.S., at 587, n. 31, 99 S.Ct., at 1366, n. 31. Similarly, in *Washington v. Davis,* the Court held that the "job relatedness" requirement was satisfied when the employer demonstrated that a written test was related to success at a police training academy "wholly aside from [the test's] possible relationship to actual performance as a police officer." 426 U.S., at 250, 96 S.Ct., at 2052. See also *id.,* at 256, 96 S.Ct., at 2055 (STEVENS, J., concurring) ("[A]s a matter of law, it is permissible for the police department to use a test for the purpose of predicting ability to master a training program even if the test does not otherwise predict ability to perform on the job").

In the context of subjective or discretionary employment decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a "manifest relationship to the employment in question." It is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing. In evaluating claims that discretionary employment practices are insufficiently related to legitimate business purposes, it must be borne in mind that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Furnco Construction Corp. v. Waters,* 438 U.S., at 578, 98 S.Ct., at 2950. See also *Zahorik v. Cornell University,* 729 F.2d 85, 96 (CA2 1984) ("[The] criteria [used by a university to award tenure], however difficult to apply and however much disagreement they generate in particular cases, are job related.... It would be a most radical interpretation of Title VII for a court to enjoin use of an historically settled process and plainly relevant criteria largely because they lead to decisions which are difficult for a court to review"). In sum, the high standards of proof in disparate impact cases are sufficient in our view to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment.

III

We granted certiorari to determine whether the court below properly held disparate impact analysis inapplicable to a subjective or discretionary promotion system, and we now hold that such analysis may be applied. We express no opinion as to the other rulings of the Court of Appeals.

Neither the District Court nor the Court of Appeals has evaluated the statistical evidence to determine whether petitioner made out a prima facie case of discriminatory promotion practices under disparate impact theory. It may be that the relevant data base is too small to permit any meaningful statistical analysis, but we leave the Court of Appeals to decide in the first instance, on the basis of the record and the principles announced today, whether this case can be resolved without further proceedings in the District Court. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY took no part in the consideration or decision of this case.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, concurring in part and concurring in the judgment.

I agree that disparate-impact analysis may be applied to claims of discrimination caused by subjective or discretionary selection processes, and I therefore join Sections

I, IIA, IIB, and III of the Court's opinion. I am concerned, however, that the plurality mischaracterizes the nature of the burdens this Court has allocated for proving and rebutting disparate-impact claims. In so doing, the plurality projects an application of disparate-impact analysis to subjective employment practices that I find to be inconsistent with the proper evidentiary standards and with the central purpose of Title VII. I therefore cannot join parts C and D of Section II. I write separately to reiterate what I thought our prior cases had made plain about the nature of claims brought within the disparate-impact framework.

I

The plurality's discussion of the allocation of burdens of proof and production that apply in litigating a disparate-impact claim under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, is flatly contradicted by our cases.[1] The plurality, of course, is correct that the initial burden of proof is borne by the plaintiff, who must establish, by some form of numerical showing, that a facially neutral hiring practice "select[s] applicants ... in a significantly discriminatory pattern." *Dothard v. Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 2726–2727, 53 L.Ed.2d 786 (1977).[2] Our cases make clear, however, that, contrary to the plurality's assertion, *ante,* at 2790, a plaintiff who successfully establishes this prima facie case shifts the burden of *proof,* not production, to the defendant to establish that the employment practice in question is a business necessity. See, *e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (employer must "meet the burden of *proving* that its tests are 'job related' "); *Dothard v. Rawlinson,* 433 U.S., at 329, 97 S.Ct., at 2727 (employer must "*prov* [e] that the challenged requirements are job related"); *Griggs v. Duke Power Co.,* 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971) ("Congress has placed on the employer the burden of *showing* that any given requirement must have a manifest relationship to the employment in question") (emphasis added in each).

The plurality's suggested allocation of burdens bears a closer resemblance to the allocation of burdens we established for disparate-treatment claims in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802–804, 93 S.Ct. 1817, 1824–1825, 36 L.Ed.2d 668 (1973), and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 252–256, 101 S.Ct. 1089, 1093–1095, 67 L.Ed.2d 207 (1981), than it does to those the Court has established for disparate-impact claims. Nothing in our cases supports the plurality's declaration that, in the context of a disparate-*impact* challenge, "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Ante,* at 2790. What is most striking about this statement is that it is a near-perfect echo of this Court's declaration in *Burdine* that, in the context of an individual disparate-*treatment* claim, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S., at 253, 101 S.Ct., at 1093. In attempting to mimic the allocation of burdens the Court has established in the very different context of individual disparate-treatment claims, the plurality

1. It bears noting that the question on which we granted certiorari, and the question presented in petitioner's brief, is whether disparate-impact analysis applies to subjective practices, not where the burdens fall, if the analysis applies. The plurality need not have reached its discussion of burden allocation and evidentiary standards to resolve the question presented. I, however, find it necessary to reach this issue in order to respond to remarks made by the plurality.

2. I have no quarrel with the Court's characterization of the plaintiff's burden of establishing that any disparity is significant. See *ante,* at 2788–2790.

turns a blind eye to the crucial distinctions between the two forms of claims.[3]

The offense alleged in a disparate-treatment challenge focuses exclusively on the intent of the employer. See *Teamsters v. United States*, 431 U.S. 324, 335, n. 15, 97 S.Ct. 1843, 1854, n. 15, 52 L.Ed.2d 396 (1977) (in disparate-treatment challenge "[p]roof of discriminatory motive is critical"). Unless it is proved that an employer intended to disfavor the plaintiff because of his membership in a protected class, a disparate-treatment claim fails. A disparate-impact claim, in contrast, focuses on the *effect* of the employment practice. See *id.*, at 336, n. 15, 97 S.Ct., at 1854, n. 15 (disparate-impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another"). Unless an employment practice producing the disparate effect is justified by "business necessity," *ibid.*, it violates Title VII, for "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups." *Griggs v. Duke Power Co.*, 401 U.S., at 432, 91 S.Ct., at 854.

In *McDonnell Douglas* and *Burdine*, this Court formulated a scheme of burden allocation designed "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S., at 255, n. 8, 101 S.Ct., at 1094, n. 8. The plaintiff's initial burden of establishing a prima facie case of disparate treatment is "not onerous," *id.*, at 253, 101 S.Ct., at 1094, and "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949–2950, 57 L.Ed.2d 957 (1978).[4] An employer may rebut this presumption if it asserts that plaintiff's rejection was based on "a legitimate, nondiscriminatory reason" and produces evidence sufficient to "rais[e] a genuine issue of fact as to whether it discriminated against the plaintiff." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S., at 254–255, 101 S.Ct., at 1094. If the employer satisfies "this burden of production," then "the factual inquiry proceeds to a new level of specificity," *id.*, at 255, 101 S.Ct., at 1094–1095, and it is up to the plaintiff to prove that the proffered reason was a pretext for discrimination. *Id.*, at 256, 101 S.Ct., at 1095. This allocation of burdens reflects the Court's unwillingness to *require* a trial court to presume, on the basis of the facts establishing a prima facie case, that an employer intended to discriminate, in the face of evidence suggesting that the plaintiff's rejection might have been justified by some nondiscriminatory reason. The prima facie case is therefore insufficient to shift the burden of *proving* a lack of discriminatory intent to the defendant.

3. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252, n. 5, 101 S.Ct. 1089, 1093, n. 5, 67 L.Ed.2d 207 (1981) (recognizing, in the context of articulating allocation of burdens applicable to disparate-treatment claims, "that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes"); *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 713, n. 1, 103 S.Ct. 1478, 1481, n. 1, 75 L.Ed.2d 403 (1983) ("We have consistently distinguished disparate-treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants").

4. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), the Court explained that a plaintiff could meet his burden of establishing a prima facie case of racial discrimination by showing:

"(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

The prima facie case of disparate impact established by a showing of a significant statistical disparity is notably different. Unlike a claim of intentional discrimination, which the *McDonnell Douglas* factors establish only by inference, the disparate impact caused by an employment practice is *directly* established by the numerical disparity. Once an employment practice is shown to have discriminatory consequences, an employer can escape liability only if it persuades the court that the selection process producing the disparity has " 'a manifest relationship to the employment in question.' " *Connecticut v. Teal,* 457 U.S. 440, 446, 102 S.Ct. 2525, 2530, 73 L.Ed.2d 130 (1982), quoting *Griggs v. Duke Power Co.,* 401 U.S., at 432, 91 S.Ct., at 854. The plaintiff in such a case already has proved that the employment practice has an improper effect; it is up to the employer to prove that the discriminatory effect is justified.

Intertwined with the plurality's suggestion that the defendant's burden of establishing business necessity is merely one of production is the implication that the defendant may satisfy this burden simply by "producing evidence that its employment practices are based on legitimate business reasons." *Ante,* at 2790. Again, the echo from the disparate-treatment cases is unmistakable. In that context, it is enough for an employer "to articulate some legitimate, nondiscriminatory reason" for the allegedly discriminatory act in order to rebut the presumption of intentional discrimination. *McDonnell Douglas,* 411 U.S., at 802, 93 S.Ct., at 1824. But again the plurality misses a key distinction: An employer accused of discriminating intentionally need only dispute that it had any such intent—which it can do by offering *any* legitimate, nondiscriminatory justification. Such a justification is simply not enough to legitimize a practice that has the effect of excluding a protected class from job opportunities at a significantly disproportionate rate. Our cases since *Griggs* make clear that this effect itself runs afoul of Title VII unless it is "necessary to safe and efficient job performance." *Dothard v. Rawlinson,* 433 U.S., at 332, n. 14, 97 S.Ct., at 2728, n. 14. See also *Nashville Gas Co. v. Satty,* 434 U.S. 136, 143, 98 S.Ct. 347, 352, 54 L.Ed.2d 356 (1977) (issue is whether "a company's business necessitates the adoption of particular leave policies"); *Griggs v. Duke Power Co.,* 401 U.S., at 432, 91 S.Ct., at 854 ("any given requirement must have a *manifest* relationship to the employment in question" (emphasis added)).

Precisely what constitutes a business necessity cannot be reduced, of course, to a scientific formula, for it necessarily involves a case-specific judgment which must take into account the nature of the particular business and job in question. The term itself, however, goes a long way toward establishing the limits of the defense: To be justified as a business *necessity* an employment criterion must bear more than an indirect or minimal relationship to job performance. See *Dothard v. Rawlinson,* 433 U.S., at 331–332, 97 S.Ct., at 2727–2728 (absent proof that height and weight requirements directly correlated with amount of strength deemed "essential to good job performance," requirements not justified as business necessity); *Albemarle Paper Co. v. Moody,* 422 U.S., at 431, 95 S.Ct., at 2378, quoting EEOC's Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.4(c) ("The message of these Guidelines is the same as that of the *Griggs* case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job' "). Cf. *Washington v. Davis,* 426 U.S. 229, 247, 96 S.Ct. 2040, 2051, 48 L.Ed.2d 597 (1976) (Title VII litigation "involves a more probing judicial review, and less deference to the seemingly reasonable acts of [employers] than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed"). The criterion must directly relate to a prospective employee's ability to perform the job effectively. And even where an employer proves that a particular selection process is sufficiently job-related, the process in question may still be determined to be unlawful, if the plaintiff persuades the court that other selection processes that have a lesser discriminatory effect could also suitably serve the employer's business needs. *Albemarle Paper Co. v. Moody,* 422 U.S., at 425, 95 S.Ct., at 2375. In sum, under *Griggs* and its progeny, an employer, no matter how well intended, will be liable under Title VII if it relies upon an employment-selection process that disadvantages a protected class, unless that process is shown to be necessary to fulfill legitimate business requirements. The plurality's suggestion that the employer does not bear the burden of making this showing cannot be squared with our prior cases.

II

I am also concerned that, unless elaborated upon, the plurality's projection of how disparate-impact analysis should be applied to subjective-selection processes may prove misleading. The plurality suggests: "In the context of subjective or discretionary employment decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a 'manifest relationship to the employment in question.'" *Ante,* at 2791. This statement warrants further comment in two respects.

A

As explained above, once it has been established that a selection method has a significantly disparate impact on a protected class, it is clearly not enough for an employer merely to *produce* evidence that the method of selection is job-related. It is an employer's obligation to *persuade* the reviewing court of this fact.

While the formal validation techniques endorsed by the EEOC in its Uniform Guidelines may sometimes not be effective in measuring the job-relatedness of subjective-selection processes,[5] a variety of methods are available for establishing the link between these selection processes and job performance, just as they are for objective-selection devices. See 29 CFR § 1607.6(B)(1) and (2) (1987) (where selection procedure with disparate impact cannot be formally validated, employer can "justify continued use of the procedure in accord with Federal law"). Cf. *Washington v. Davis,* 426 U.S., at 247, and n. 13, 96 S.Ct., at 2051, and n. 13 (hiring and promotion practices can be validated in "any one of several ways"). The proper means of establishing business necessity will vary with the type and size of the business in question, as well as the particular job for which the selection process is employed. Courts have recognized that the results of studies, see *Davis v. City of Dallas,* 777 F.2d 205, 218–219 (CA5 1985), cert. denied, 476 U.S. 1116, 106 S.Ct. 1972, 90 L.Ed.2d 656 (1986) (nationwide studies and reports showing job-relatedness of college-degree requirement); the presentation of expert testimony, *id.,* at 219–222, 224–225 (criminal justice scholars' testimony explaining job-relatedness of college-degree requirement and psychologist's testimony explaining job-relatedness of prohibition on recent marijuana use); and prior successful experience, *Zahorik v. Cornell University,* 729 F.2d 85, 96 (CA2 1984) ("generations" of experience reflecting job-relatedness of decentralized decision-making structure based on peer judgments in academic setting), can all be used, under appropriate circumstances, to establish business neces-

5. The American Psychological Association, co-author of Standards for Educational and Psychological Testing (1985), which is relied upon by the EEOC in its Uniform Guidelines, has submitted a brief as *amicus curiae* explaining that subjective-assessment devices are, in fact, amenable to the same "psychometric scrutiny" as more objective screening devices, such as written tests. Brief for APA as *Amicus Curiae* 2. See also Bartholet, Application of Title VII to Jobs in High Places, 95 Harv.L.Rev. 947, 987–988 (1982) (discussing feasibility of validating subjective hiring assessments).

sity.[6] Moreover, an employer that complies with the EEOC's recording requirements, 29 CFR §§ 1607.4 and 1607.15 (1987), and keeps track of the effect of its practices on protected classes, will be better prepared to document the correlation between its employment practices and successful job performance when required to do so by Title VII.

The fact that job-relatedness cannot always be established with mathematical certainty does not free an employer from its burden of proof, but rather requires a trial court to look to different forms of evidence to assess an employer's claim of business necessity. And while common sense surely plays a part in this assessment, a reviewing court may not rely on its own, or an employer's, sense of what is "normal," *ante,* at 2791, as a substitute for a neutral assessment of the evidence presented. Indeed, to the extent an employer's "normal" practices serve to perpetuate a racially disparate status quo, they clearly violate Title VII unless they can be shown to be necessary, in addition to being "normal." See *Griggs v. Duke Power Co.,* 401 U.S., at 430, 91 S.Ct., at 853 ("practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the [discriminatory] status quo").

B

The plurality's prediction that an employer "will often find it easier" *ante,* at 2791, to justify the use of subjective practices as a business necessity is difficult to analyze in the abstract. Nevertheless, it bears noting that this statement cannot be read, consistently with Title VII principles, to lessen the employer's burden of justifying an employment practice that produces a disparate impact simply because the practice relies upon subjective assessments. Indeed, the less defined the particular criteria involved, or the system relied upon to assess these criteria, the more difficult it may be for a reviewing court to assess the connection between the selection process and job performance. Cf. *Albemarle Paper Co. v. Moody,* 422 U.S., at 433, 95 S.Ct., at 2379 (validation mechanism that fails to identify "whether the criteria *actually* considered were sufficiently related to the [employer's] legitimate interest in job-specific ability" cannot establish that test in question was sufficiently job-related). For example, in this case the Bank supervisors were given complete, unguided discretion in evaluating applicants for the promotions in question.[7] If petitioner can successfully establish that respondent's hiring practice disfavored black applicants to a significant extent, the bald assertion that a purely discretionary selection process allowed respondent to discover the best people for the job, without any further evidentiary support, would not be enough to prove job-relatedness.[8]

6. As a corollary, of course, a Title VII plaintiff can attack an employer's offer of proof by presenting contrary evidence, including proof that the employer's hiring methods failed in fact to screen for the qualities identified as central to successful job performance. In this case, for example, petitioner could produce evidence that Kevin Brown, one of the white employees chosen over her for a promotion, allegedly in part because of his greater "supervisory experience," proved to be totally unqualified for the position. App. 113. Six months after Brown was promoted, his performance was evaluated as only "close to being 'competent.'" Record Vol. I, p. 63, (Plaintiff's Exhibit 3). When he resigned soon thereafter, allegedly under pressure, he questioned whether "poor communication ..., inadequate training" or his personality, had rendered him unqualified for the job. *Ibid.*

7. One of the hiring supervisors testified that she was never given any guidelines or instructions on her hiring and promotion decisions. App. 161–162. Another testified that he could not attribute specific weight to any particular factors considered in his promotion decisions because "fifty or a hundred things" might enter into such decisions. *Id.,* at 135.

8. Because the establishment of business necessity is necessarily case-specific, I am unwilling to preclude the possibility that an employer could *ever* establish that a successful selection among applicants required granting the hirer near-absolute discretion. Of course, in such circumstances, the employer would bear the burden of establishing that an absence of specified criteria was necessary for the proper functioning of the business.

Allowing an employer to escape liability simply by articulating vague, inoffensive-sounding subjective criteria would disserve Title VII's goal of eradicating discrimination in employment. It would make no sense to establish a general rule whereby an employer could more easily establish business necessity for an employment practice, which left the assessment of a list of general character qualities to the hirer's discretion, than for a practice consisting of the evaluation of various objective criteria carefully tailored to measure relevant job qualifications. Such a rule would encourage employers to abandon attempts to construct selection mechanisms subject to neutral application for the shelter of vague generalities.[9]

While subjective criteria, like objective criteria, will sometimes pose difficult problems for the court charged with assessing the relationship between selection process and job performance, the fact that some cases will require courts to develop a greater factual record and, perhaps, exercise a greater degree of judgment, does not dictate that subjective-selection processes generally are to be accepted at face value, as long as they strike the reviewing court as "normal and legitimate." *Ante*, at 2791.[10] *Griggs* teaches that employment practices "fair in form, but discriminatory in operation," cannot be tolerated under Title VII. 401 U.S., at 431, 91 S.Ct., at 853. This lesson should not be forgotten simply because the "fair form" is a subjective one.

Justice STEVENS, concurring in the judgment.

The question we granted certiorari to decide, though extremely important, is also extremely narrow. It reads as follows:

> "Is the racially adverse impact of an employer's practice of simply committing employment decisions to the unchecked discretion of a white supervisory corps subject to the test of *Griggs vs. Duke Power Co.*, 401 U.S. 424 [91 S.Ct. 849, 28 L.Ed.2d 158] (1971)?" Pet. for Cert. i.

Essentially for the reasons set forth in Parts II-B and II-C of Justice O'CONNOR's opinion, I agree that this question must be answered in the affirmative. At this stage of the proceeding, however, I believe it unwise to announce a "fresh" interpretation of our prior cases applying disparate impact analysis to objective employment criteria. See *ante*, at 2788. Cases in which a Title VII plaintiff challenges an employer's practice of delegating certain kinds of decisions to the subjective discretion of its executives will include too many variables to be adequately discussed in an opinion that does not focus on a particular factual context. I would therefore postpone any further discussion of the evidentiary standards set forth in our prior cases until after the District Court has made appropriate findings concerning this plaintiff's prima facie evidence of disparate impact and this defendant's explanation for its practice of giving supervisors discretion in making certain promotions.

9. See *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1485 (CA9) (en banc) ("It would subvert the purpose of Title VII to create an incentive to abandon efforts to validate objective criteria in favor of purely discretionary hiring methods"), on return to panel, 827 F.2d 439 (CA9 1987), cert. denied, 485 U.S. ——, 108 S.Ct. 1293, 99 L.Ed.2d 503 (1988), cert. pending, No. 87-1387; *Miles v. M.N.C. Corp.*, 750 F.2d 867, 871 (CA11 1985) (subjective assessments involving white supervisors provide "ready mechanism" for racial discrimination). Cf. Doverspike, Barrett & Alexander, The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness, 9 Law & Psychology Rev. 35, 35 (1985) (noting that "litigious climate has resulted in a decline in the use of tests and an increase in more subjective methods of hiring").

10. Nor can the requirement that a plaintiff in a disparate-impact case specify the employment practice responsible for the statistical disparity be turned around to shield from liability an employer whose selection process is so poorly defined that no specific criterion can be identified with any certainty, let alone be connected to the disparate effect. Cf. *ante*, at 2788 (plaintiff is responsible "for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities").

This is what we believe we agreed to on groups of practices

Jeff's notes from 7/12/90 meeting -- reviewed by Boyden Gray and Dick Thornburgh and shown to all parties -- and no objection raised

the group of employment practices

provided, however, Where a group of interrelated employment ~~or~~ practices produce a single employment decision and ~~[illegible]~~ the elements of the decision are not capable of separation for analysis, ~~they~~ it shall be treated as a single employment practice and may be challenged as such and defended as such.

Legis Hist

- agree that it's a second phase
- not going to be subject to mo/dis—

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WORDS AND PHRASES RELATED TO "BUSINESS NECESSITY" FROM CASE LAW

- <u>Section 4 of Kennedy/Hawkins as it would apply to a single employment practice</u>:

  Section 4. An unlawful employment practice based on disparate impact is established under this section when a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity.

- <u>Definition of "Business Necessity" which would appear in section 3</u>:

  Administration: **"reasonably related to job performance or other legitimate business interest."**

  Kennedy/Hawkins bill: **"bears a substantial and demonstrable relationship to effective job performance."**

- <u>Alternatives from previous cases</u>:

1. has "<u>a manifest relationship to the employment in question</u>." <u>Griggs</u>, 401 U.S. 424, at 432. Cited with approval by the dissent in <u>Wards Cove</u>, 109 S.Ct. 2115, at 2129. Cited with approval by the majority in <u>Albemarle Paper Co. v. Moody</u>, 422 U.S. 405, (1975) at 425. Cited with approval by the dissent in <u>Furnco Construction Co. v. Waters</u>, 438 U.S. 567 (1978) at 583._

2. is "<u>demonstrably a reasonable measure of job performance</u>." <u>Griggs</u>, supra, at 856. Cited with approval by the dissent in <u>Wards Cove</u>, supra, at 2129, fn.8. Cited with approval by the majority in <u>Albemarle Paper</u>, supra, at 426.

3. "a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a <u>valid business purpose</u>." <u>Wards Cove</u>, supra at p. 2129 (emphasis added.) This is a quote from the dissent.

4. "employer must ... demonstrate that 'any given requirement [has] a manifest relationship to the employment in question'" <u>Connecticut v. Teal</u>, 457 U.S. 440 (1982).

Cited by the dissent in Wards Cove, supra, at p. 2130, on the issue of burden of proof.

5. "If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" Albemarle Paper Co. v. Moody, supra at 425, quoting McDonnell Douglas Corp. v. Green, 411, U.S. 792, (1973), at 801._

6. "There is, in short, simply no way to determine whether the criteria *actually* considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact." (emphasis added.) Albemarle Paper Co., supra, at 433.

7. Citing the EEOC guidelines, the Court in Albemarle Paper Co., stated at page 431, "The message of this Guidelines is the same as that of the Griggs case -- that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' 29 CFR 1607.4(c)."

8. "to be justified as a business *necessity*, a practice must directly relate to a prospective employee's ability to perform the job effectively; i.e. it must be necessary to fulfill legitimate business requirements." Blackmun, Brennan, and Marshall, agreeing that disparate-impact analysis may be applied to subjective or discretionary selection processes in Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777 (1988), at 2781.

9. "To be justified as a business *necessity* an employment criterion must bear more than an indirect or minimal relationship to job performance. See Dothard v. Rawlinson, 433 U.S., at 331-332 ... The criterion must directly relate to a prospective employee's ability to perform the job effectively." Watson v. Fortworth, supra at 2791._
Blackmun, Brennan, and Marshall concurring in part.

business interests. For the same reason, any formulation using the term "demonstrably" should include a definition of that term as applied to subjective practices.

4. Other issues not addressed by the letter:

- An issue not addressed in the letter at all is that, as currently written, the once the complaining party has made out a prima facie case, the respondent must demonstrate that the employment practice is "required by business necessity".

  The standard should be that the employment practice is "justified by business necessity". This is one of the changes suggested in the draft prepared by the group in your office and is consistent with the Majority Report on this issue.

- With respect to the issue of naming the particular practice, if under new (iii) the complaining party cannot name a particular practice or practices, the employer should be required to demonstrate business necessity only for those employment practices sufficient to have caused the disparate impact.

  Although the case that Kennedy purports to have in mind under this subparagraph is one in which a set of practices cannot be disaggregated, the employer should not have to justify each practice if he/she can demonstrate that the disparate impact would have occurred anyway because of a subset of the group of practices that is justified by business necessity.

Attached is proposal for a counteroffer to Senator Kennedy reflecting the issues addressed above. It has not been reviewed by anyone outside of this office.

Group of Employment Practices

"(iii) if the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which practice or practices, if any, contributed to the disparate impact, (A) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact, and (B) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact; and if the court finds that the complaining party cannot so identify which practice or practices, if any, contributed to the disparate impact, the complaining party shall be required, as set forth in subsection (k)(1)(B), to demonstrate that a group of employment practices result in the disparate impact, and the respondent shall be required to demonstrate that **some or all of** such [group of] employment practices**, sufficient to have resulted in the disparate impact**, are **justified** [required] by business necessity."

Business Necessity

"Business necessity means, in the case of employment practices involving selection (e.g. hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), [substantially and] demonstrably **a reasonable measure** [related to successful] **of** job performance, or, in the case of employment practices not involving selection, means [substantially and] demonstrably related to a **legitimate** [compelling/overarching/essential objective] **business interest** of the respondent. **For the purposes of a subjective employment practice, "demonstrably" means evidenced by more than the unsupported opinion of the respondent but does not necessarily require the same kind of evidentiary submission as would be required in the case of an objective employment practice.**".

GRIGGS ET AL. v. DUKE POWER CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 124. Argued December 14, 1970—Decided March 8, 1971

Negro employees at respondent's generating plant brought this action, pursuant to Title VII of the Civil Rights Act of 1964, challenging respondent's requirement of a high school diploma or passing of intelligence tests as a condition of employment in or transfer to jobs at the plant. These requirements were not directed at or intended to measure ability to learn to perform a particular job or category of jobs. While § 703 (a) of the Act makes it an unlawful employment practice for an employer to limit, segregate, or classify employees to deprive them of employment opportunities or adversely to affect their status because of race, color, religion, sex, or national origin, § 703 (h) authorizes the use of any professionally developed ability test, provided that it is not designed, intended, or used to discriminate. The District Court found that respondent's former policy of racial discrimination had ended, and that Title VII, being prospective only, did not reach the prior inequities. The Court of Appeals reversed in part, rejecting the holding that residual discrimination arising from prior practices was insulated from remedial action, but agreed with the lower court that there was no showing of discriminatory purpose in the adoption of the diploma and test requirements. It held that, absent such discriminatory purpose, use of the requirements was permitted, and rejected the claim that because a disproportionate number of Negroes was rendered ineligible for promotion, transfer, or employment, the requirements were unlawful unless shown to be job related. *Held:*

1. The Act requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race, and, if, as here, an employment practice that operates to exclude Negroes cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent. Pp. 429–433.

2. The Act does not preclude the use of testing or measuring procedures, but it does proscribe giving them controlling force unless they are demonstrably a reasonable measure of job performance. Pp. 433–436.

420 F. 2d 1225, reversed in part.

BURGER, C. J., delivered the opinion of the Court, in which all members joined except BRENNAN, J., who took no part in the consideration or decision of the case.

Jack Greenberg argued the cause for petitioners. With him on the briefs were *James M. Nabrit III*, *Norman C. Amaker*, *William L. Robinson*, *Conrad O. Pearson*, *Julius LeVonne Chambers*, and *Albert J. Rosenthal*.

George W. Ferguson, Jr., argued the cause for respondent. With him on the brief were *William I. Ward, Jr.*, and *George M. Thorpe*.

Lawrence M. Cohen argued the cause for the Chamber of Commerce of the United States as *amicus curiae* urging affirmance. With him on the brief were *Francis V. Lowden, Jr.*, *Gerard C. Smetana*, and *Milton A. Smith*.

Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold*, *Assistant Attorney General Leonard*, *Deputy Solicitor General Wallace*, *David L. Rose*, *Stanley Hebert*, and *Russell Specter* for the United States; by *Louis J. Lefkowitz*, Attorney General, *pro se*, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *George D. Zuckerman* and *Dominick J. Tuminaro*, Assistant Attorneys General, for the Attorney General of the State of New York; and by *Bernard Kleiman*, *Elliot Bredhoff*, *Michael H. Gottesman*, and *George H. Cohen* for the United Steelworkers of America, AFL–CIO.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.[1]

Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act and this proceeding was brought by a group of incumbent Negro employees against Duke Power Company. All the petitioners are employed at the Company's Dan River Steam Station, a power generating facility located at Draper, North Carolina. At the time this action was instituted, the Company had 95 employees at the Dan River Station, 14 of whom were Negroes; 13 of these are petitioners here.

The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the

[1] The Act provides:

"Sec. 703. (a) It shall be an unlawful employment practice for an employer—

. . . . .

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . . .

"(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. . . ." 78 Stat. 255, 42 U. S. C. § 2000e-2.

Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant. The plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. Negroes were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four "operating" departments in which only whites were employed.[2] Promotions were normally made within each department on the basis of job seniority. Transferees into a department usually began in the lowest position.

In 1955 the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal Handling to any "inside" department (Operations, Maintenance, or Laboratory). When the Company abandoned its policy of restricting Negroes to the Labor Department in 1965, completion of high school also was made a prerequisite to transfer from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the "operating" departments. Findings on this score are not challenged.

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it became necessary to register satisfactory scores on two professionally prepared apti-

[2] A Negro was first assigned to a job in an operating department in August 1966, five months after charges had been filed with the Equal Employment Opportunity Commission. The employee, a high school graduate who had begun in the Labor Department in 1953, was promoted to a job in the Coal Handling Department.

tude tests, as well as to have a high school education. Completion of high school alone continued to render employees eligible for transfer to the four desirable departments from which Negroes had been excluded if the incumbent had been employed prior to the time of the new requirement. In September 1965 the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor or Coal Handling to an "inside" job by passing two tests—the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates.[3]

The District Court had found that while the Company previously followed a policy of overt racial discrimination in a period prior to the Act, such conduct had ceased. The District Court also concluded that Title VII was intended to be prospective only and, consequently, the impact of prior inequities was beyond the reach of corrective action authorized by the Act.

The Court of Appeals was confronted with a question of first impression, as are we, concerning the meaning of Title VII. After careful analysis a majority of that court concluded that a subjective test of the employer's intent should govern, particularly in a close case, and that in this case there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. On this basis, the Court of Appeals concluded there was no violation of the Act.

[3] The test standards are thus more stringent than the high school requirement, since they would screen out approximately half of all high school graduates.

The Court of Appeals reversed the District Court in part, rejecting the holding that residual discrimination arising from prior employment practices was insulated from remedial action.[4] The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. In so doing, the Court of Appeals rejected the claim that because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job related.[5] We granted the writ on these claims. 399 U. S. 926.

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and re-

[4] The Court of Appeals ruled that Negroes employed in the Labor Department at a time when there was no high school or test requirement for entrance into the higher paying departments could not now be made subject to those requirements, since whites hired contemporaneously into those departments were never subject to them. The Court of Appeals also required that the seniority rights of those Negroes be measured on a plantwide, rather than a departmental, basis. However, the Court of Appeals denied relief to the Negro employees without a high school education or its equivalent who were hired into the Labor Department after institution of the educational requirement.

[5] One member of that court disagreed with this aspect of the decision, maintaining, as do the petitioners in this Court, that Title VII prohibits the use of employment criteria that operate in a racially exclusionary fashion and do not measure skills or abilities necessary to performance of the jobs for which those criteria are used.

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move barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, "whites register far better on the Company's alternative requirements" than Negroes.[6] 420 F. 2d 1225, 1239 n. 6. This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County* v. *United States*, 395 U. S. 285 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any

[6] In North Carolina, 1960 census statistics show that, while 34% of white males had completed high school, only 12% of Negro males had done so. U. S. Bureau of the Census, U. S. Census of Population: 1960, Vol. 1, Characteristics of the Population, pt. 35, Table 47.

Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks. Decision of EEOC, CCH Empl. Prac. Guide, ¶ 17,304.53 (Dec. 2, 1966). See also Decision of EEOC 70-552, CCH Empl. Prac. Guide, ¶ 6139 (Feb. 19, 1970).

person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used.[7] The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need. In the present case the Company has made no such showing.

The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." 420 F. 2d, at 1232. We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.

The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

[7] For example, between July 2, 1965, and November 14, 1966, the percentage of white employees who were promoted but who were not high school graduates was nearly identical to the percentage of nongraduates in the entire white work force.

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

The Company contends that its general intelligence tests are specifically permitted by § 703 (h) of the Act.[8] That section authorizes the use of "any professionally developed ability test" that is not "designed, intended *or used* to discriminate because of race . . . ." (Emphasis added.)

The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703 (h) to permit only the use of job-related tests.[9] The administrative interpretation of the

[8] Section 703 (h) applies only to tests. It has no applicability to the high school diploma requirement.

[9] EEOC Guidelines on Employment Testing Procedures, issued August 24, 1966, provide:

"The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.'

The EEOC position has been elaborated in the new Guidelines on Employee Selection Procedures, 29 CFR § 1607, 35 Fed. Reg. 12333 (Aug. 1, 1970). These guidelines demand that employers using tests have available "data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' *Id.*, at § 1607.4 (c).

Act by the enforcing agency is entitled to great deference. See, *e. g., United States* v. *City of Chicago*, 400 U. S. 8 (1970); *Udall* v. *Tallman*, 380 U. S. 1 (1965); *Power Reactor Co.* v. *Electricians*, 367 U. S. 396 (1961). Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.

Section 703 (h) was not contained in the House version of the Civil Rights Act but was added in the Senate during extended debate. For a period, debate revolved around claims that the bill as proposed would prohibit all testing and force employers to hire unqualified persons simply because they were part of a group formerly subject to job discrimination.[10] Proponents of Title VII sought throughout the debate to assure the critics that the Act would have no effect on job-related tests. Senators Case of New Jersey and Clark of Pennsylvania, comanagers of the bill on the Senate floor, issued a memorandum explaining that the proposed Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications.* Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." 110 Cong. Rec. 7247.[11] (Emphasis added.) Despite these assurances, Senator Tower of Texas introduced an amendment authorizing "professionally developed ability tests." Proponents of Title VII opposed the amendment because, as written, it would permit an employer to give any test, "whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the guise of compliance with the statute." 110 Cong. Rec. 13504 (remarks of Sen. Case).

The amendment was defeated and two days later Senator Tower offered a substitute amendment which was adopted verbatim and is now the testing provision of § 703 (h). Speaking for the supporters of Title VII, Senator Humphrey, who had vigorously opposed the first amendment, endorsed the substitute amendment, stating: "Senators on both sides of the aisle who were deeply interested in title VII have examined the text of this

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[10] The congressional discussion was prompted by the decision of a hearing examiner for the Illinois Fair Employment Commission in *Myart* v. *Motorola Co.* (The decision is reprinted at 110 Cong. Rec. 5662.) That case suggested that standardized tests on which whites performed better than Negroes could never be used. The decision was taken to mean that such tests could never be justified even if the needs of the business required them. A number of Senators feared that Title VII might produce a similar result. See remarks of Senators Ervin, 110 Cong. Rec. 5614–5616; Smathers, *id.*, at 5999–6000; Holland, *id.*, at 7012–7013; Hill, *id.*, at 8447; Tower, *id.*, at 9024; Talmadge, *id.*, at 9025–9026; Fulbright, *id.*, at 9599–9600; and Ellender, *id.*, at 9600.

[11] The Court of Appeals majority, in finding no requirement in Title VII that employment tests be job related, relied in part on a quotation from an earlier Clark-Case interpretative memorandum addressed to the question of the constitutionality of Title VII. The Senators said in that memorandum:

"There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance." 110 Cong. Rec. 7213.

However, nothing there stated conflicts with the later memorandum dealing specifically with the debate over employer testing, 110 Cong. Rec. 7247 (quoted from in the text above), in which Senators Clark and Case explained that tests which measure "applicable job qualifications" are permissible under Title VII. In the earlier memorandum Clark and Case assured the Senate that employers were not to be prohibited from using tests that determine *qualifications.* Certainly a reasonable interpretation of what the Senators meant, in light of the subsequent memorandum directed specifically at employer testing, was that nothing in the Act prevents employers from requiring that applicants be fit for the job.

amendment and have found it to be in accord with the intent and purpose of that title." 110 Cong. Rec. 13724. The amendment was then adopted.[12] From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of § 703 (h) to require that employment tests be job related comports with congressional intent.

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

The judgment of the Court of Appeals is, as to that portion of the judgment appealed from, reversed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

[12] Senator Tower's original amendment provided in part that a test would be permissible "if . . . in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved . . . ." 110 Cong. Rec. 13492. This language indicates that Senator Tower's aim was simply to make certain that job-related tests would be permitted. The opposition to the amendment was based on its loose wording which the proponents of Title VII feared would be susceptible of misinterpretation. The final amendment, which was acceptable to all sides, could hardly have required less of a job relation than the first.

GILLETTE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85. Argued December 9, 1970—Decided March 8, 1971*

Petitioner in No. 85, who was convicted for failure to report for induction, and petitioner in No. 325, who sought discharge from the armed forces upon receipt of orders for Vietnam duty, claim exemption from military service because of their conscientious objection to participation in the Vietnam conflict, as an "unjust" war, pursuant to § 6 (j) of the Military Selective Service Act of 1967. That section provides that no person shall be subject to "service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Petitioners also challenge the constitutionality of § 6 (j) as construed to cover only objectors to all war, as violative of the Free Exercise and Establishment of Religion Clauses of the First Amendment. *Held:*

1. The exemption for those who oppose "participation in war in any form" applies to those who oppose participating in all war and not to those who object to participation in a particular war only, even if the latter objection is religious in character. Pp. 441–448.

2. Section 6 (j) does not violate the Establishment Clause of the First Amendment. Pp. 448–460.

(a) The section on its face does not discriminate on the basis of religious affiliation or belief, and petitioners have not shown the absence of neutral, secular bases for the exemption. Pp. 450–453.

(b) The exemption provision focuses on individual conscientious belief and not on sectarian affiliations. P. 454.

(c) There are valid neutral reasons, with the central emphasis on the maintenance of fairness in the administration of military conscription, for the congressional limitation of the exemption to "war in any form," and therefore § 6 (j) cannot be said to reflect a religious preference. Pp. 454–460.

*Together with No. 325, *Negre* v. *Larsen et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

7/12/90 LANGUAGE WITHOUT CHANGES

The term required by business necessity means:

(1) in the case of employment practices primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to successful performance of the job.

(2) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on such evidence as statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

There would also be in the statute the following language, "This language is meant to codify the meaning of business necessity as used in Griggs and other opinions of the Supreme Court."

Strike subsection 703(k)(1)(B) and insert at the end of (A) the following:

> provided, however, that where a group of interrelated employment practices produce a single employment decision and the elements of the decision are not capable of separation for analysis, the group of employment practices shall be treated as a single employment practice and may be challenged as such and defended as such.

Legislative history: [Agreement that plaintiff can plead a group of employment practices, and the determination of whether a group of employment practices in fact is not capable of separation for analysis shall be made after discovery.]

The term required by business necessity means:

(1) in the case of employment practices primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to successful performance of the job.

(2) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on as such evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

LEGISLATIVE HISTORY

"This language is meant to codify the meaning of business necessity as used in Griggs and other opinions of the Supreme Court."

The term required by business necessity means:

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In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on such evidence as statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

Legislative History: "This langugage is meant to codify the meaning of business necessity as used in Griggs and other opinions of the Supreme Court."

Strike subsection 703(k)(1)(B) and insert at the end of (A) the following:

> provided, however, that if the elements of a decision-making process are not capable of separation for analysis, they may be analyzed as one employment practice, just as where the criteria are distinct and separate each must be identified with particularity.

Legislative History: Agreement that plaintiff can plead the elements of a decision-making process as one employment practice, and the determination of whether the elements in fact are not capable or separation for analysis shall be made after discovery.

{NOTE: This paragraph would be added at the end of the proposed legislative history with the last five words before the citation eliminated, as agreed, from the end of the last paragraph.}

The term required by business necessity means:

(1) in the case of employment practices primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to successful performance of the job.

(2) in the case of other employment practices that are not primarily intended to measure job performance, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on such evidence as statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

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Legislative History: Agreement that plaintiff can plead the elements of a decision-making process as one employment practice, and the determination of whether the elements in fact are not capable or separation for analysis shall be made after discovery.

{NOTE: This paragraph would be added at the end of the proposed legislative history with the last five words before the citation eliminated, as agreed, from the end of the last paragraph.}

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In deciding whether the above standards for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may rely on such evidence as statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence and the court shall give such weight, if any, to such evidence as it deems appropriate.

Legislative History: "This langugage is meant to codify the meaning of business necessity as used in <u>Griggs</u> and other opinions of the Supreme Court."

Strike subsection 703(k)(1)(B) and insert at the end of (A) the following:

> provided, however, that if the elements of a decision-making process are not capable of separation for analysis, they may be analyzed as one employment practice, just as where the criteria are distinct and separate each must be identified with particularity.

Legislative History: Agreement that plaintiff can plead the elements of a decision-making process as one employment practice, and the determination of whether the elements in fact are not capable or separation for analysis shall be made after discovery.

{NOTE: This paragraph would be added at the end of the proposed legislative history with the last five words before the citation eliminated, as agreed, from the end of the last paragraph.}

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02. Memo	From C. Boyden Gray to John Sununu Re: Senator Kennedy's 6/29 Letter (1 pp.)	7/3/90	~~P5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (1 of 2) [2]

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By SP (NLGB) on 10/28/05

Date Closed:	12/17/2004	**OA/ID Number:**	29144-008
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
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(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE

WASHINGTON

July 3, 1990

MEMORANDUM FOR GOVERNOR JOHN H. SUNUNU
CHIEF OF STAFF TO THE PRESIDENT

FROM: DICK THORNBURGH
ATTORNEY GENERAL

C. BOYDEN GRAY
COUNSEL TO THE PRESIDENT

SUBJECT: Senator Kennedy's June 29 Letter

We have reviewed Senator Kennedy's June 29 letter to you, and the new Wards Cove language that he attached. This language still leaves us with a quota bill. With the bill coming to the Senate floor next week, we must make it clear what the President can and cannot accept. Therefore, we recommend that you send a letter rejecting Kennedy's June 29 proposal and offering a serious, final counterproposal on this issue. We have attached a draft letter and proposal to this effect. We also attach an explanatory memorandum for you to review at your leisure. We apologize for the length, but the dramatic rewrite of the rules of litigation and 20 years of jurisprudence necessarily requires some explanation, however tedious.

cc: Roger Porter

I'm not a lawyer — (thank god for small favors) but I have tried to reflect the concerns and the counsel in [illegible] from AG Pres.

THE WHITE HOUSE

WASHINGTON

July 3, 1990

Dear Ted:

Thank you for your letter of June 29 in which you suggest two proposals for addressing some of the difficulties with the Kennedy-Hawkins Wards Cove provisions. I join you in believing that there should be a way to work out these and other problems with the bill. And I am convinced that the changes we have proposed address valid concerns while in fact strengthening the rights aspect of the bill.

all serious participants have agreed

As we have discussed in the past, getting the right formulations in the Wards Cove section of the bill is critical to producing a piece of legislation that I would feel comfortable advising the President to sign. As the President noted in his Rose Garden speech on May 17, no one would want him to sign a bill the ~~unintended~~ consequences of ~~which~~ would be quotas. Quotas violate the fundamental principles of our civil rights tradition and our democracy. They are simply wrong. As the Administration has previously noted, however, the bill as drafted would produce enormous pressure for employers across the country to adopt quota schemes in hiring and promotion in order to avoid litigation.

Three interrelated provisions of the legislation combine to produce this effect: its elimination of the requirement (heretofore unquestioned by either Congress or the Supreme Court) that plaintiffs identify a particular practice that causes disparate impact; its shifting of the burden of proof to employers to prove that their practices are required by business necessity; and its narrow definition of business necessity. These provisions, while admittedly rather technical, in combination will lead employers to adopt quotas. They allow a plaintiff to claim discrimination merely because of statistical disparities between the racial, ethnic, religious or sexual composition of its work force and the available labor pool. At that point, the employer must prove that all of its employment practices are "substantially and demonstrably related to effective job performance." Rather than attempt to meet this onerous standard, many employers will simply avoid the problem in the first place by making sure that their numbers come out "right."

I have previously expressed the Administration's desire to accommodate as much of your Wards Cove proposal as possible short of having it become a quota bill. We have each indicated a willingness to consider modifications of our original positions. In particular, in order to make sure that we ~~are rooting~~ out even well concealed discrimination, I ~~have said that we would think~~ about whether we could accommodate your desire to shift to ~~employers~~ the burden of proving the justification for employment practices even where no intent to discriminate has been shown. If we were to give serious thought to this most unusual step, however, we would need to be sure that plaintiffs could impose this obligation on employers only after identifying which of an employer's practices are problematic, and we would have to be confident that the burden of justification imposed on the employer is one that can be met in appropriate situations without enormous litigation expense.

We have proposed a package of changes [illegible]

(1)

I understand your June 29 proposal to be an effort to meet these last two points by addressing particular concerns that: 1) the bill shifts to the employer the burden of justifying any number of employment practices that have not been shown to cause "disparate impact"; and 2) it does not permit an employer to justify his or her employment practices by showing that they are related to legitimate, non-discriminatory business interests. Although I am sure that you are seriously attempting to address these concerns, the proposal does not do so adequately. I will briefly sketch the reasons why not, indicating at the same time the degree to which we can accommodate the desires of the bill's proponents.

As to the first point, the Supreme Court has never permitted plaintiffs to proceed in a disparate impact case without identifying the employment practices they are challenging and establishing that each of them causes a disparate impact. I do think, however, that we can accommodate your test/school system concern (despite my disagreement with your view that it is fair to penalize a single employer because of the shortcomings of an entire city's school system).

If, under your example, a plaintiff shows that a test causes a "disparate impact," then we could agree that the employer must justify the test or lose the lawsuit; we do not insist that the plaintiff at that stage investigate possible antecedent causes for his or her poor test results. All we would ask is that the plaintiff do what in your example the plaintiff apparently has done -- prove that the test causes a disparate impact, without requiring the employer to justify all of the company's other hiring practices as well. Indeed, we are willing to go further and recognize a prima facie case where multiple practices each contribute to and together cause the disparate impact.

The language you suggest, however, does not solve the problem. Under your proposal, a plaintiff would not even have to identify the test as the cause of the disparate impact unless the defendant provides the evidence the plaintiff needs to establish a prima facie case. Where the defendant cannot provide such evidence, perhaps because the test does not have a disparate impact, your proposal would force the defendant to prove the "business necessity" of the test and of all the employer's other hiring practices as well. The burden would be enormous, and employers could not be expected to await the uncertain results of expensive litigation. Instead, employers would simply adopt quotas to ensure that their numbers come out "right."

I attach some language we have drafted that avoids this intolerable problem while satisfying the point you have raised. Even beyond that, we are willing to stipulate in legislative history how elements of a decision-making process that are not capable of separation for analysis may be treated by the court as one employment practice. I attach proposed history on this point which I believe is responsive to your reasons for being reluctant to ask plaintiffs to specify which particular employment practices they are challenging. We all should be able to agree that an employer whose "numbers are off" need not justify practices that are not proven to contribute to the disparity; otherwise the pressure for quotas would be overwhelming.

Once a prima facie case has been established, your bill would shift to the employer the burden of proving that the employment practice is required by "business necessity." Assuming for the sake of argument that we were willing to accept this highly onerous and unusual shift in the burden of proof (a matter that I know is of the highest importance to proponents of the bill), we would at the very least have to be assured that employment practices would be judged under a reasonable standard.

We might be willing to go along with imposing on an employer the burden of proving that the practice is "reasonably related to job performance or other legitimate business purpose." If an employment practice is related to job performance -- if it makes the business more efficient or productive than the business otherwise might be, even if not "substantially and demonstrably" so -- the practice should not give rise to liability. Nor should employers be confined to seeking workers who are minimally qualified for the jobs at issue; for many jobs, employers must be free to seek outstanding performers, not just "effective" or "successful" workers.

Similarly, your proposal would modify the bill to recognize that an employer may take into account legitimate business purposes other than job effectiveness, but it does so only in extraordinarily narrow circumstances, as to a very limited set of practices and where the employer's purposes are "essential" (or "compelling" or "overarching"). I do not see why a practice that is otherwise related to legitimate, nondiscriminatory business purposes should not be permitted simply because it improves the operation of the business. Your proposal, I am afraid, would have the unintended consequence of contributing to the adoption of quotas and hampering the competitiveness of our nation's productive force.

I have heard it suggested that the standard you propose is designed to stop judges from making common-sense evaluations of whether a given employment practice is actually justified. I hope this is not the case. I cannot believe that you would argue, for example, that a police department should have to prove through complex litigation that a rule against hiring officers with criminal records could be said to be "substantially and demonstrably related to successful job performance" in the future. Nor should an engineering school, to take a more parochial example, be forbidden from requiring that its faculty have doctoral degrees unless it can prove that this requirement (as opposed to some lesser measure of study) is "substantially" and "demonstrably" related to "successful" job performance. Nor can we understand how a company's anti-smoking policy could be successfully defended under the test you propose.

In closing, I return to your city school system example. In the age that we are now entering, getting a good education will be more important than ever before. I know we agree that our goal as a society should not be to reduce educational standards, but to improve educational opportunities for all. America has prospered because merit and effort are still rewarded. Our failures as a society have generally come when we have elevated irrelevant characteristics over individual accomplishment, and your proposals as drafted would inadvertently cause the very problem they seek to solve.

I believe that when you examine the attached language on the Wards Cove issue, you will see that we can accept much of the Kennedy-Hawkins formulation while avoiding the problems the present version creates. If we can reach agreement on this proposal, we can then move on to the other matters raised in your bill. If not, we may have to agree to disagree on this legislation. Either way, I am sure we will work cooperatively on other matters in the future.

Sincerely,

Senator Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510-2101

Group of Employment Practices

Replace (B) in Kennedy-Hawkins with the following:

"(B) a complaining party demonstrates that a group of employment practices, taken together, causes disparate impact on the basis of race, color, religion, sex, or national origin, and that each employment practice has contributed to the disparate impact, and the respondent fails to demonstrate that such group would not cause disparate impact but for employment practices justified by business necessity."

Business Necessity

The term 'justified by business necessity' means reasonably related to job performance or other legitimate business purpose.

Proposed Legislative History
(Wards Cove -- Particularity)

Under this Act, a plaintiff makes out a prima facie case of disparate impact when he or she (1) identifies a particular employment practice and demonstrates that the practice has caused the exclusion of applicants or employees from jobs or promotions because of their race, color, religion, sex, or national origin, or (2) identifies a combination of two or more employment practices and demonstrates that each of the practices has contributed to the exclusion and that together they have caused the exclusion.

In identifying the particular employment practice alleged to cause the exclusion, the plaintiff is not required to do the impossible in breaking down an employer's practices to the greatest conceivable degree. Courts will be permitted to hold, for example, that vesting complete hiring discretion in an individual guided only by unknown subjective standards constitutes a single particular employment practice susceptible to challenge.

It is therefore the specific intention of the proponents of this Act to reaffirm the sort of analysis employed on this issue in Sledge v. J.P. Stevens & Co., 52 EPD para. 39,537 (E.D.N.C. Nov. 30, 1989). The court alluded to the difficulty of "delving into the workings of an employment decisionmaker's mind" and noted that the defendant's personnel officers reported having no idea of the basis on which they made their employment decisions. The court held that: "the identification by the plaintiffs of the uncontrolled, subjective discretion of defendant's employing officials as the source of the discrimination shown by plaintiff's statistics sufficed to satisfy the causation requirements of Wards Cove." This Act contemplates that the use of such uncontrolled and unexplained discretion is properly treated as one employment practice and need not be divided into by the plaintiff discrete sub-parts.

If the elements of a decision-making process are shown to be not capable of separation for analysis, therefore, they may be analyzed as one employment practice, just as where the criteria are distinct and separate each must be identified with particularity and with its causation established. See letter of Charles Fried to Senator Edward M. Kennedy, March 21, 1990 at 4 and n.2 (Hearing Record at ______________).

In addition, the plaintiff may also make out a prima facie case where multiple practices all contribute to causing the disparate impact at issue. Further, in such a case it is not necessary that a plaintiff quantify the degree to which any particular practice has caused the exclusion so long as each practice cited is proven to contribute to the exclusion and so long as the exclusion is proven to be caused by the combination. At that point, the burden shifts to the defendant to prove that the combination would not cause the exclusion but for practices justified by business necessity.

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Memo	From C. Boyden Gray to John Sununu Re: Senator Kennedy's 6/29 Letter (6 pp.)	7/3/90	~~P5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (1 of 2) [2]

Open on Expiration of PRA
(Document Follows)
By [signature] (NLGB) on 10/28/05

Date Closed:	12/17/2004	**OA/ID Number:**	29144-008
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P-3 Release would violate a Federal statute [(a)(3) of the PRA]
P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE

WASHINGTON

July 3, 1990

MEMORANDUM FOR GOVERNOR JOHN H. SUNUNU
CHIEF OF STAFF TO THE PRESIDENT

FROM: DICK THORNBURGH RL
ATTORNEY GENERAL

C. BOYDEN GRAY CBG
COUNSEL TO THE PRESIDENT

SUBJECT: Senator Kennedy's June 29 Letter

This memorandum details the problems with Senator Kennedy's June 29 proposal, explains the counteroffer we propose you make, and discusses the reasons why we think this defines the general parameters as to how far we can recommend that the Administration go.

As we have discussed, when looked at without the distorting lens of politics, Wards Cove clearly stated sound law and sound policy. Kennedy-Hawkins would overrule three interrelated parts of Wards Cove through the bill's "group of practices" provision, its imposition of the burden of proof on the defendant with respect to "business necessity," and its definition of business necessity. In combination, these provisions work together to drive employers to adopt quotas, as follows.

The "group of practices" provision allows the plaintiff to bring a disparate impact claim by showing that the employer's bottom line numbers deviate statistically from the racial, sexual, ethnic, or religious makeup of the labor pool. This could be sufficient for the plaintiff to charge that this "disparity" is attributable to the entire "group of hiring practices" the employer uses. The burden shifting provision then forces the employer to prove that all of these practices are "required by business necessity," which the definition provision states means "substantially and demonstrably related to effective job performance" (or "successful job performance" if the new language is used). Rather than run that gauntlet, employers will avoid having disparities by making sure their bottom line numbers come out "right."

Our general strategy for a compromise that would not lead to quotas but would contain significant concessions has been along the following lines. We believe that it would be tolerable to impose on the defendant the burden of proving "business necessity" if and only if the plaintiff has to identify the practice that causes the disparity and if what the defendant has to prove in order to make out the business necessity is something reasonable (which turns on the definition of business necessity and the types of evidence he is allowed to use).

Requiring the plaintiff to identify the particular practice that causes the disparity (which the Supreme Court has always found to be required in this kind of case) is critical for two reasons. First, and most obviously, it limits the number of practices that the employer has to defend, and thus helps prevent these cases from becoming unduly burdensome. Second, as the Supreme Court has pointed out, it avoids making employers liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of their workforces." Unless this is addressed properly, quotas will be inevitable.

The definition of business necessity is also extremely important. If the employer is permitted to prove that his employment practices are related to legitimate business purposes, and he can rely on common sense evidence, that is something he can hope to accomplish even bearing the burden of proof. Any tougher standard, however, will make statistical disparities too risky and too expensive to tolerate, and quotas will be the natural alternative. It also is very hard to see why the employer should have to prove more than this, since he ought to be able to use hiring practices related to legitimate business purposes.

Nevertheless, shifting the burden of proof to the defendant on business necessity is still a very significant concession. It allows the plaintiff to indict particular hiring practices simply by showing that they produce disparities, and then forces the defendant to prove their legitimacy. Therefore this concession alone will tend to push employers toward quotas to some extent. Because the burden of proof provision significantly changes the law in the direction Kennedy wants to go, and because it is the point that the civil rights groups have been stressing publicly, we think it is a major concession that Kennedy may ultimately take without getting anything significant on the other two points. But this can only happen if we let him know that this is as far as we will go. And we can only recommend making this major concession as a last resort in order to get an agreement.

<u>Any</u> major concession on either of the other two points, however, will leave the President vulnerable to the charge that he is signing a quota bill. Kennedy's June 29 language almost completely dismisses our position on both.

We rejected the first half of Kennedy's "group of practices" proposal on June 26, and Blattner and the groups walked out. This proposal was only a very marginal improvement over the bill in its original form. The plaintiff can <u>still</u> challenge the entirety of an employer's practices by pointing to a disparity and blaming it on the employer's "group of practices" unless the defendant proves to a court that the plaintiff could have pinpointed the practice on the basis of information provided by the employer himself. This means that in order to avoid being forced to justify his entire group of practices, the employer will have to produce information he had in hand to show that the plaintiff <u>could have</u> specified the particular practice. If he does produce this information, however, the employer has just made out the plaintiff's case under the first prong of this section of the bill, which allows the plaintiff to prevail on the basis of an identified practice that results in disparate impact. Thus, the employer is caught between Scylla and Charybdis.

The new, second half of the June 29 proposal (after the semi-colon) does recognize, although only in a very limited circumstance, the validity of practices serving an employer's legitimate business purposes. However, overall the new language does not improve the bill, and probably makes it worse. Without this addition, if the plaintiff relies on the "group of practices" theory, the employer is at least allowed to exonerate individual practices if he can show that they do not contribute to the disparity or that they are required by business necessity. The new section would also make the employer prove that <u>the entire group</u>, as well as each practice in the group, is required by business necessity. That problem can be corrected by redrafting, but in any event the core difficulty remains: the requirement that a court find that a plaintiff could not identify a practice before the plaintiff can use the "group" theory is an utterly trivial concession, particularly in light of the realities of litigation. This supposed concession will not significantly reduce the pressure on employers to adopt quotas.

The language we have attached for you to propose on this point is not nearly as open to these objections, although it goes farther than many courts have allowed. It would allow a plaintiff to challenge a group of practices if he can affirmatively show that

ch contributed to the disparity, and would allow the employer
defend by showing that a subgroup among them sufficient to
event the impact is justified by business necessity. We made a
milar proposal earlier, but it used less of the Kennedy-
wkins language. We have also attached legislative history that
ould further help Kennedy on this issue by making it clear that
urts have flexibility in defining what constitutes a single
ployment practice. (Our current proposal continues to use the
rd "cause." Terms like "results in," "leads to," or
produces," are non-legal terms that would be acceptable only if
e legislative history made it perfectly clear that they meant
cause." If Kennedy will not agree to the word "cause," he is
t likely to agree to the legislative history we would have to
ave.)

he problems with Kennedy's new proposal on the business
ecessity standard are more easily explained. It is essentially
he same old standard, which we have consistently rejected
ecause we are convinced that requiring employers to prove a
ubstantial relationship between a hiring practice and job
erformance is requiring too much, because requiring that the
elationship be demonstrable will lead courts to demand
cientific-type evidence (as opposed to common sense or
xperience), and because it will not permit consideration of
ther business objectives, such as keeping costs down. Kennedy's
ew proposal addresses only the third of these concerns, and only
y allowing such justifications to be used when they are
'essential" (which is nearly impossible) and only as to a very
limited set of practices which may not even be susceptible to
challenge under current disparate impact law (but the inclusion
of which might now make them challengeable). Thus, Kennedy's new
proposal is either no better than his previous proposal or,
perhaps, significantly worse.

We must add that the range of acceptable options here is quite
limited. New words must clearly allow employers to show any
reasonable fit between the practice and the business objective.
Otherwise, they will create substantial litigation risk while the
courts wrestle with the meaning of the new words, and employers
will adopt quotas to avoid that risk. In addition, Kennedy will
help push the courts in bad directions on any ambiguous new words
through legislative history unless that too is worked out through
ironclad guarantees in advance. The language we suggest to you
meets these requirements, but we note that Blattner and the
groups have thus far said that it is unacceptable.

On the other hand, old words coming from past cases have to come from cases that clearly took a reasonable position on the fit required. Any other words from past cases will be interpreted as requiring more than a reasonable fit requirement, because they will be viewed as a rejection of Wards Cove on this issue as well as on the burden of proof, and because Kennedy will create legislative history saying just that.

The only other possibly tolerable fallback position is to have the legislation address only the burden shifting issue, although this is technically difficult to do without including the phrase "business necessity" (whose inclusion would allow Kennedy to cause significant legislative history mischief). If we can devise a way of doing this, it may ultimately be more acceptable to Kennedy than agreeing to one of our formulas. Specter proposed this option on Thursday although he has apparently backed away from it since then. We would hasten to note, however, that we see dangers in such an approach. Failure to codify the requirements of identifying the offending business practice or practices and failure to define business necessity would leave courts free to roam unrestricted in this area.

We would like to say just a few words about the legislative situation. No Senate Republicans except Danforth and Heinz have joined as cosponsors of Kennedy-Hawkins since its introduction, despite great efforts by Danforth. To the contrary, moderate Republicans like Kassebaum and even Chafee have continued to indicate real skepticism about much of the bill. In addition, a significant number of Southern Democrats also have stayed off the bill despite heavy lobbying by civil rights groups. Dole's staff person reports that Dole believes we have enough leverage to insist on a reasonable bill, both because Kennedy does not have very many cosponsors and because he is running out of legislative days. He also says that if we do not get one, we ought not settle for less. Specter says that Kennedy will not start talking seriously until he gets to the floor and is hit by reality. And Kennedy has been enormously anxious to negotiate, even while refusing to make anything but trivial concessions in these negotiations.

Meanwhile, in the world outside the Beltway, mainstream publications like the Christian Science Monitor, the Chicago Tribune, and even the New Republic have editorialized against this legislation. Democratic pollster Greenberg reports overwhelming opposition to racial preferences even among Democrats, and views this as a huge problem for that party. For all these reasons, we ought to be able to get a reasonable bill.

But as you are well aware, in order to get peace on tolerable terms, we must show that we are willing to fight unless such terms are offered. Unless Kennedy believes the President is serious about rejecting a quota bill, he will continue to insist on one.

cc: Roger Porter

3, plateau de Frontenex
1208 Geneva

June 7, 1990

The President
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

If I were still practicing law, I would love the "Civil Rights Act of 1990." While it may enrich some lawyers, it will impoverish the principle of equality of all Americans. All my life, even in the darkest days of segregated Georgia, I fought against the principle of color preference, then known as "white supremacy." This bill institutionalizes that principle under the false flag of civil rights. It is not a civil rights bill but a quota bill because it will achieve precisely what the landmark 1964 Civil Rights Act stood foursquare against.

Proportionality of result, not equality of opportunity, is the touchstone of this flawed legislation:

- it eliminates the longstanding requirement that a plaintiff identify a specific employment practice causing a racial, ethnic, or gender imbalance;

- it holds the employer guilty until proven innocent by forcing him to justify <u>any</u> racial, gender, or ethnic statistical imbalance in his workforce;

- it creates a presumption of guilt so difficult to overcome and so costly to fight that employers will simply capitulate and hire by the numbers, impairing not only the principle of American equality but, inevitably, American efficiency and productivity;

- it denies individuals their day in court by effectively barring challenges to civil rights consent decrees to which they were not parties.

Abraham Lincoln's great friend Frederick Douglass understood the divisive and destructive influence of proportional representation based on race. "Equality of numbers," he wrote in 1871, "has nothing to do with equality of attainments."

This legislation, despite its flaws, has meritorious portions, including further sanctions on racial and sexual harrassment in the workplace. There is no reason why these advances should be held hostage by the objectionable aspects of the bill -- particularly since its race- and gender-conscious elements are easily deleted or modified.

You have the opportunity, perhaps more so than any other president in recent years, to forge a new and lasting civil rights consensus. Every opinion poll confirms that the American people, including blacks, share the goals of equal opportunity and color blindness and will support the vision of Martin Luther King, Jr., who urged that we judge ourselves "not by the color of our skin but by the content of our character."

Mr. President, my own participation in the civil rights struggle has shaped my deepest moral and political beliefs. It is because of this that I urge you to refuse your concurrence to this bill as it stands.

Most respectfully,

Morris B. Abram

CODIFYING GRIGGS

1. BUSINESS NECESSITY

(1) The term required by business necessity means (1) in the case of employment practices that have as their primary focus the prediction of job performance, the practice or group of practices must bear a demonstrable relationship to successful performance of the jobs.

(2) In the case of employment practices that do not have as their primary focus the prediction of job performance, the practice or group of practices must bear a demonstrable relationship to a meaningful business objective of the respondent.

(3) The kind of evidence needed to prove a "demonstrable" relationship is not limited to any specific type or variety; proof may be made by statistical studies, expert testimony, prior successful experience, judicial notice, or any other form of evidence which a trier of fact would find relevant under the general standard for the admission of evidence embodied in Rule 401 of the Federal Rules of Evidence.

LEGISLATIVE HISTORY

This language is meant to codify the meaning of "business necessity" as it has been explicated in Chief Justice Burger's opinion in Griggs and in subsequent opinions, including Justice Steven's opinion in Beazer and Justice O'Connor's opinion in Watson.

BUSINESS NECESSITY DEFINITIONS AND THEIR USE BY THE U.S. SUPREME COURT

1. <u>"Manifest relationship to the employment in question."</u>

    Griggs v. Duke Power
    Albemarle Paper v. Moody
    Dothard v. Rawlinson
    NYTA v. Beazer
    Connecticut v. Teal
    Wards Cove (Stevens' dissent)--Cites this Griggs test 3 times.

2. <u>"Demonstrable relationship to successful performance of the jobs for which it was used."</u>
   (Now being considered)

    Griggs v. Duke Power
    Not cited in later cases

3. <u>"Essential to effective job performance."</u>
   (Kennedy-Hawkins as introduced)

    Dothard v. Rawlinson--Used to to describe what "they" [i.e., appellants'] argued.
    Stevens' Wards Cove dissent.

4. <u>"Bears a substantial and demonstrable relationship to effective job performance."</u>
   (Kennedy-Danforth)

    Never cited.

5. <u>"Bears a substantial and demonstrable relationship to a compelling objective of the respondent."</u>
   (Kennedy-Jeffords for nonselection practices)

    Never cited.

6. <u>"Significantly serves a legitimate employment goal."</u>

    NYTA v. Beazer
    Wards Cove majority
    Watson v. Fort Worth Bank & Trust
    ("Based on legitimate business reasons")

business.necessity

us nothing about the class of otherwise-qualified applicants and employees who have participated in methadone maintenance

[440 US 586]

programs for over a year—the only class improperly excluded by TA's policy under the District Court's analysis. The record demonstrates, in fact, that the figure is virtually irrelevant because a substantial portion of the persons included in it are either unqualified for other reasons—such as the illicit use of drugs and alcohol[28]—or have received successful assistance in finding jobs with employers other than TA.[29] Finally, we have absolutely no data on the 14,000 methadone users in the *private* programs, leaving open the possibility that the percentage of blacks and Hispanics in the class of methadone users is not significantly greater than the percentage of those minorities in the general population of New York City.[30]

[440 US 587]

At best, respondents' statistical showing is weak; even if it is capable of establishing a prima facie case of discrimination, it is assuredly rebutted by TA's demonstration that its narcotics rule (and the rule's application to methadone users) is "job related."[31] The District Court's express finding that the rule was not

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28. To demonstrate employability, the District Court referred to a study indicating that 34% to 59% of the methadone users who have been in a maintenance program for a substantial period of time are employed. The evidence was inconclusive with respect to all methadone users. 399 F Supp, at 1047. However, the director of the second largest program in New York City testified that only 33% of the entire methadone-patient population in that program were employable. Tr 345 (Jan. 10, 1975). On the statistics relating to illicit use of drugs and alcohol, see supra, at 575–576, 59 L Ed 2d, at 596–597.

29. **[11b]** Although "a statistical showing of disproportionate impact [need not] always be based on an analysis of the characteristics of actual applicants," Dothard v Rawlinson, 433 US 321, 330, 53 L Ed 2d 786, 97 S Ct 2720, "evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants" undermines the significance of such figures. Teamsters v United States, supra, at 340 n 20, 52 L Ed 2d 396, 97 S Ct 1843.

30. If all of the participants in private clinics are white, for example, then only about 40% of all methadone users would be black or Hispanic—compared to the 36.3% of the total population of New York City that was black or Hispanic as of the 1970 census. Assuming instead that the percentage of those minorities in the private programs duplicates their percentage in the population of New York City, the figures would still only show that 50% of all methadone users are black or Hispanic compared to 36.3% of the population in the metropolitan area. (The 20% figure relied upon by the dissent refers to blacks and Hispanics in the work force, rather than in the total population of the New York City metropolitan area. The reason the total-population figure is the appropriate one is because the 63% figure relied upon by respondents refers to methadone users in the population generally and not just those in the work force.)

31. Respondents recognize, and the findings of the District Court establish, that TA's legitimate employment goals of safety and efficiency require the exclusion of all users of illegal narcotics, barbiturates, and amphetamines, and of a majority of all methadone users. See n 4, supra; supra, at 575–576, and nn 9–10; 577, and n 14, 59 L Ed 2d, at 596–597, 598; n 28, supra. The District Court also held that those goals require the exclusion of all methadone users from the 25% of its positions that are "safety sensitive." See supra, at 578, 59 L Ed 2d, at 598. Finally, the District Court noted that those goals are significantly served by—even if they do not require—TA's rule as it applies to all methadone users including those who are seeking employment in nonsafety-sensitive positions. See nn 33, 37, infra. The record thus demonstrates that TA's rule bears a "manifest relationship to the employment in question." Griggs v Duke Power Co., 401 US 424, 432, 28 L Ed 2d 158, 91 S Ct 849. See Albemarle Paper Co. v Moody, 422 US 405, 425, 45 L Ed 2d 280, 95 S Ct 2362. Whether or not respondents' weak showing was sufficient to establish a prima facie case, it clearly failed to carry respondents' ultimate burden of proving a violation of Title VII.

Civil Rights

Key amendments to fix Wards Cove section:

(1) In the definition (m) of "demonstrates" delete "and persuasion." after "burden of production."

(2) Delete the definition (o) of "required by business necessity."

(3) In the section on proof of disparate impact, change section (k)(1) to read:

"An unlawful employment practice based on disparate impact is established under this section when ~~(A)~~ a complaining party ~~demonstrates~~ proves that an employment practice the complaining party has identified with particularity results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is ~~required-by-business-necessity,-or~~ legitimately related to job performance or other business interests."

(4) Delete sub-section (k)(1)(B) on multiple employment practices.

(5) Delete subsection (k)(2).

(6) Add a two new sections as a Prohibition Against Quotas.

"(1) 42 U.S.C. 2000e-2(j) is amended to insert the words "or permit" after the word "require" throughout.

"(2) The use of quotas, numerical requirements, or set-asides on the basis or race, color, religion, sex or national origin shall be a prohibited employment practice. Any provision of this Chapter which shall be determined to create incentives for or result in a respondent (employer) using such quotas, numerical requirements, or set-asides shall be inoperative."

DRAFT
WARDS
COVE FIX

A BILL

To amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1990".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and

(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.

(b) PURPOSES.—The purposes of this Act are—

(1) to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and

(2) to strengthen existing protections and remedies available under Federal civil rights laws to provide

KEY:

BLACK = COMMITTEE CHANGES MADE TO THE BILL IN HOUSE ED & LABOR

PROPOSED ADMINISTRATION CHANGES

more effective deterrence and adequate compensation for victims of discrimination.

SEC. 3. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new subsections:

"(l) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production ~~and persuasion~~.

"(n) The term 'group of employment practices' means a combination of employment practices that produces one or more decisions with respect to employment, employment referral, or admission to a labor organization, apprenticeship or other training or retraining program. ~~or an overall employment process.~~

~~"(o) The term 'required by business necessity' means essential to effective job performance.~~

"~~(p)~~ (o) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, or those Federal entities subject to the provisions of section 717 (or the heads thereof).".

SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) is amended by adding at the end thereof the following new subsection:

"(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—

"(1) An unlawful employment practice based on disparate impact is established under this ~~sub~~section when—

"(A) a complaining party ~~demonstrates~~ proves that

the complaining party has identified with particularity

an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate ~~by objective evidence~~ that such practice is ~~required by business necessity; or~~ legitimately related to job performance or other business interests,

~~"(B) a complaining party demonstrates that~~ although a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate by objective evidence that such ~~practices are~~ group of employment practices is required by business necessity, except that—

"(i) if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact; and

"(ii) if the respondent demonstrates that a specific employment practice within such ~~group of employment practices does not con-~~

(1) 42 USC 2000e-2(j) is amended to insert the words "or permit" after the word "require" throughout.

(2) Prohibition. The use of quotas, Numerical requirements or set-asides on the basis of race, color, religion, sex or National origin shall be a prohibited employment practice. Any provision of this Chapter which shall be determined to create incentives for or result in a respondent (employer) to use such quotas, Numerical requirements, or set-asides shall be inoperative.

~~tribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.~~

~~"(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.".~~

SEC. 5. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) IN GENERAL.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) (as amended by section 4) is further amended by adding at the end thereof the following new subsection:

"(l) DISCRIMINATORY PRACTICE NEED NOT BE SOLE MOTIVATING FACTOR.—Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though such practice was also motivated by other factors.".

(b) ENFORCEMENT PROVISIONS.—Section 706(g) of such Act (42 U.S.C. 2000e–5(g)) is amended by inserting before the period in the last sentence the following: "or, in a

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THE WHITE HOUSE

WASHINGTON

April 3, 1990

MEMORANDUM FOR JOHN H. SUNUNU
CHIEF OF STAFF

FROM: C. BOYDEN GRAY CBG
COUNSEL TO THE PRESIDENT

SUBJECT: Kennedy-Hawkins Civil Rights Legislation

I understand that you will be meeting with Senator Gorton today to discuss the proposed Kennedy-Hawkins civil rights legislation. The Department of Justice views letter opposing that bill and bearing a "senior advisors" veto threat will go to the Hill this afternoon.

That letter expresses the Administration's support for legislation reversing the results in Patterson (by creating additional remedies for on-the-job racial harassment, ensuring that Section 1981 covers the performance as well as the formation of a contract) and in Lorance (by allowing suits to challenge discriminatory seniority systems not only on adoption, but also upon application to the employee).

Further, the letter summarizes the principal bases of our opposition to Kennedy-Hawkins. That legislation is objectionable because:

- it would pressure employers into adopting hiring quotas by requiring any company whose workforce shows a racial or sexual imbalance to prove that its hiring practices are demanded by "business necessity" as "essential to effective job performance" (thus shifting the burden of proof and establishing an almost impossible standard to meet, while in effect making statistical imbalance itself a Civil Rights Act violation);

- it would deprive people of their day in court (and would infringe constitutional rights) by restricting the ability of employees who were not parties to court-approved settlements to challenge a settlement imposing racial preferences when their own rights prove to be affected;

- it would reverse for civil rights cases the general rule that the plaintiff must show not only some degree of improper motivation on the part of the defendant, but also show harm resulting from that factor; and

- it would upset Title VII's current remedial system by providing compensatory and punitive damages for intentional violations. (This section of the bill does not even purport to address any Supreme Court decision; it alters the carefully balanced determination that Congress made in 1964.)

The Senate Labor Committee is expected to report the Kennedy-Hawkins bill tomorrow on an 11-5 vote, with the 5 Republicans who are not co-sponsors voting in the negative. Kennedy-Hawkins currently has 39 cosponsors in the Senate and 156 cosponsors in the House. These numbers still are smaller than those often associated with "civil rights" legislation. The debate thus far has focused significantly on the quota issue, although Kennedy-Hawkins backers to the dismay of the business community will try to move the debate to remedies (noting that racial discrimination results in compensatory and punitive damages under the Civil War statutes, while relief for discrimination on the basis of sex and other grounds is limited to injunctions and back pay under Title VII).

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
05. Memo	From Roger Porter to John Sununu Re: Civil Rights Meeting w/Senator Kennedy (1 pp.)	6/8/90	~~P5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Civil Rights 1990 (1 of 2) [2]

Open on Expiration of PRA
(Document Follows)
By JP (NLGB) on 10/28/05

Date Closed:	12/17/2004	**OA/ID Number:**	29144-008
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
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THE WHITE HOUSE

WASHINGTON

June 8, 1990

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: ROGER B. PORTER RBP

SUBJECT: Civil Rights Meeting with Senator Kennedy

As we discussed this morning, some brief talking points for your meeting with Senator Kennedy are attached. In the discussion today it is important that:

1. He clearly understand the concept behind our approach to Wards Cove;

2. He not develop an unrealistic set of expectations;

3. You reach agreement on the next steps. Careful legislative drafting will be required. That type of drafting is probably best accomplished by a small group.

4. Although the major issues in the bill are outlined in the talking points, there are several other issues that must be addressed before we can "sign off" on a bill. Several of these are noted at the end of your talking points.

As we discussed, it is important for the followup and development (negotiation) of draft language be well coordinated within the Administration, and that the White House should take responsibility for this working closely with Justice and Labor.

Talking Points

1. Wards Cove

The bill, if unamended, will result in employers "hiring by the numbers" (quotas) to avoid discrimination lawsuits (disparate impact cases). Kennedy disagrees.

Employers should focus on relevant skills and qualifications, rather than the statistical makeup of their workforce.

The Wards Cove debate involves three issues:

(a) What the plaintiff must identify in bringing a lawsuit;

(b) What the employer must show to avoid liability; and

(c) Who bears the burden of demonstrating what.

The Kennedy-Hawkins bill only requires the plaintiff to show that the employer's employment practices produced a statistical imbalance (e.g., the employer has hired too few hispanics, etc.).

We want: 1. The plaintiff to identify a particular practice, or group of practices, that caused the disparate impact because of the race, religion, sex, or national origin of those who are underrepresented.

2. The employer would be required to show that the specific practice in question is justified by "business necessity". We would define business necessity so that the employer can hire the best qualified individual for the job. This standard would be less difficult to meet than the bill's definition of "business necessity" but would be consistent with the Griggs decision -- which is the standard which the draft Report purports to codify.

3. The burden of proof to be on the employee throughout the lawsuit. (Note, however, that if after a plaintiff identifies a specific practice and demonstrates how it caused the imbalance the employer could be asked to explain the "business necessity" for the employment practice under our definition.)

2. Wilks Case/Consent Decrees

Many employment discrimination lawsuits are settled by judicial consent decrees. Parties to the decree want finality. Nonparties want the right to challenge the decree when it affects them, often several years later. The draft bill prohibits suits by persons who had "notice" of the decree. It defines notice very broadly so that many individuals adversely affected by the decree and who should be heard by the court could be precluded from their day in court.

<u>We want</u>: 1. Individuals who are applicants or employees at the time of the decree to be allowed to challenge the decree. (There is agreement on this.)

2. These individuals should receive actual notice and have an opportunity to contest the decree. They should be informed that if they do not respond in a timely manner, they may later be barred from challenging the decree.

3. Individuals without notice not to be deprived of a reasonable opportunity to be heard by the court.

4. The Department of Justice has sent a letter stating they believe two provisions in this subsection of the Kennedy-Hawkins bill are unconstitutional (b and c). These must be deleted.

3. <u>Remedies</u>

This is a difficult issue that should be addressed at the end of any negotiation process -- affording time for the business community to make their case and providing maximum pressure for resolution if they want a bill passed. Whatever is done on remedies in this bill will become the standard for ADA immediately, and probably the Age Discrimination in Employment Act in the near future (an age bill is due on the floor this summer for other reasons).

Under the post-civil war statute (section 1981), blacks and hispanics can recover tort-type remedies for intentional discrimination. Women and other minorities cannot under Title VII. The question is whether, or to what extent, remedies for women, and others, should be expanded to bring them closer to those for blacks.

The bill provides that compensatory and punitive damages can be recovered in cases of intentional employment discrimination, rather than the "make whole" remedies now available under Title VII. (These "make whole" remedies are consistent with the general approach of employment law.) The bill changes will discourage conciliation and lead to lengthier litigation involving juries.

Our priorities are:

(1) New remedies for on-the-job harassment cases;

(2) Avoiding jury trials and compensatory and punitive damages.

__We want__ 1. Women who have suffered on-the-job harassment to recover some form of monetary damages.

2. To avoid transforming a conciliation process, grounded in preserving the employee-employer relationship, into an adversarial one like what exists in our medical malpractice liability system.

4. __Other Remaining Issues__

a. The __Price Waterhouse__ case;

b. Statutes of limitation;

c. Interest on judgments against the government;

d. Rules of statutory construction;

e. Congressional coverage;

f. Retroactivity;

g. waiver of attorneys fees;

h. Exempting the application rule 68 of the Federal Rules of Civil Procedure; and

i. Other issues that may be identified by staff in further discussions.

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06. Notes	Typed notes on Quotas-Wards Cove (1 pp.)	n.d.	~~P5~~	

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QUOTAS - WARDS COVE

There are three basic issues, and we can give on the one they've emphasized the most (burden of proof), if we can get enough on the other two.

1) Practice Specification - The bill does not require the plaintiff to identify which employment practices cause a disparity in numbers, or how they do so. The plaintiff can shift the burden to the employer to defend his entire business merely by alleging disparate numbers.

The plaintiff must be required to identify the practice or practices and explain how they discriminate.

2) The Burden of Proof - The bill shifts to the defendant the burden of ultimate proof on the business justification for his practices -- a burden that covers his entire business to the extent a plaintiff hasn't identified any particular practice.

The burden shift may be acceptable if practices (above) are identified and the standard of business necessity (below) is acceptable.

3) The Standard of Business Necessity or Justification - The bill required proof by the defendant that each practice bears a "substantial and demonstrable" relationship to effective job performance. The report makes clear that "demonstrable" means scientific data (not just job interviews and recommendations), and that the resulting hired workers must not only be better as a result, but "significantly better."

The standard must be relaxed to say "reasonably related to job performance or other legitimate business purpose" -- or something similar that can be met in the real world without resort to teams of lawyers.

* * * *

Their principal argument for overruling Wards Cove is that as the person who knows the most about the need for certain hiring practices, the employer should bear the ultimate burden.

This may be acceptable, so long as (1) he knows what he has to defend (i.e., a specified practice and practice) and why, and 2) he has a workable standard on which to base his defense.

COMPROMISE (ORIGINALLY AGREED, THEN REJECTED)

On page 18, after the semi-colon on line 18, insert "and" and the following:

"(iii) if the the court finds, from records or other information of the respondent reasonably available (through discovery or otherwise), that the complaining party can identify which practice or practices, if any, contributed to the disparate impact, (A) the complaining party shall be required to demonstrate which specific practice or practices contribute to the disparate impact, and (B) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact."

Subst demonst - p 17

if the court can't find . . .

the complaining party must still demonstrate that ~~[illegible]~~ the group of employment practices were the cause of the disparate impact

significant
demonstrable

close

Job performance
job effectiveness
related objectives

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